

# ARKANSAS CODE OF 1987 ANNOTATED

OFFICIAL EDITION



## COURT RULES — VOLUME 1

Evidence • Civil Procedure • Criminal Procedure • District Court • Uniform Rules for  
Circuit/Chancery Courts • Administrative Orders of Supreme Court





# ARKANSAS CODE OF 1987 ANNOTATED



## COURT RULES

### VOLUME 1

2012 Edition

*Prepared by the Editorial Staff of the Publisher*

Under the Direction and Supervision of the  
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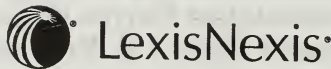
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## Preface

The two-volume set of the Arkansas Code of 1987 Annotated Court Rules contains rules of practice and procedure currently followed by the state and federal courts of Arkansas. Each set of rules is individually indexed. Rules have been edited for internal typographical consistency, but otherwise appear as promulgated by each court.

Original commentary to the Arkansas Rules of Criminal Procedure was drafted by Deputy Attorney General Frank B. Newell and Assistant Attorney General L. Scott Stafford. The 1987 unofficial supplementary commentary to the Rules of Criminal Procedure was prepared by Mr. Frank B. Newell; the conclusions stated are those of Mr. Newell, and the commentary has not been reviewed or approved by any state agency or court.

In some cases, rules, or their related commentaries, reporter's notes, etc., cite provisions of the obsolete Arkansas Statutes Annotated of 1947. These references can be translated easily by using Tables Volume A of the Code, beginning on page 79.

These volumes contain rules received by LexisNexis through July 12, 2012, for the state courts, the federal district courts, and the United States Court of Appeals for the Eighth Circuit.

Annotations are to the following sources:

Arkansas Advance Reports through 2012 Ark. LEXIS 273 (May 31, 2012)  
and 2012 Ark. App. LEXIS 489 (May 30, 2012).

Federal Supplement through June 5, 2012.

Federal Reporter 3d Series through June 5, 2012.

United States Supreme Court Reports through June 5, 2012.

Bankruptcy Reporter through June 5, 2012.

Arkansas Law Notes through the 2008 Edition.

Arkansas Law Review through Volume 61, p. 787.

University of Arkansas at Little Rock Law Review through Volume 30, p. 267.

ALR 6th through Volume 64, p. 655.

ALR Fed. 2d through Volume 46, p. 473.

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## User's Guide

Many of the Arkansas Code's research aids, as well as its organization and other features, are described in the User's Guide, which appears near the beginning of Volume 1 of the Arkansas Code of 1987 Annotated.



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# ARKANSAS RULES OF EVIDENCE

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## ARTICLE I. GENERAL PROVISIONS

### Rule 101. Scope.

These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101.

**Publisher's Notes.** These rules were adopted by the Supreme Court of Arkansas as part of its ruling in *Ricarte v. State*, 290 Ark. 100, 717 S.W.2d 488 (1986) that the Uniform Rules of Evidence as enacted by Acts 1975 (Extended Sess., 1976), No. 1143, were invalid because they were adopted by an unlawful session of the legislature. An accompanying per curiam of October 13, 1986 read: "As explained in today's opinion in *Ricarte v. State*, — Ark. —, — S.W.2d — (Oct. —, 1986) [290 Ark. 100, 717 S.W.2d 488 (1986)], the

court under its statutory and rule-making authority adopts the Uniform Rules of Evidence as they are set forth in Act 1143 of 1975 (Extended Session, 1976). The Rules will be applicable as stated in Rule 1101. Rule 1102 is changed to read: "These rules shall be known as the Arkansas Rules of Evidence and may be cited as A.R.E. Rule —."

Acts 1975 (Extended Sess., 1976), No. 1143, as amended, was reenacted by Acts 1987, No. 876, and is codified as § 16-41-101.

### RESEARCH REFERENCES

**ALR.** Admissibility of evidence of prior accidents or injuries at same place. 15 ALR 6th 1.

**Ark. L. Notes.** Gitelman, Commentary: How the Arkansas Supreme Court Raised the Dead, 1987 Ark. L. Notes 93.

**U. Ark. Little Rock L.J.** Survey of Legislation, Evidence, 14 U. Ark. Little Rock L.J. 793.

Constitutional Law — Child Hearsay Exception in Sexual Abuse Cases — New Arkansas Supreme Court Rule Conflicts with New General Assembly Rule: Which Controls? *Vann v. State*, 309 Ark. 303, 831 S.W.2d 126 (1992), 15 U. Ark. Little Rock L.J. 143.

### CASE NOTES

#### ANALYSIS

Applicability.  
Adoption.

#### Applicability.

The rules of evidence do not apply to revocation hearings. *Russell v. State*, 25 Ark. App. 181, 753 S.W.2d 298 (1988).

Evidentiary rules with respect to privileges apply to prosecutor's subpoenas as the functional equivalent of grand jury proceedings. *Holt v. McCastlain*, 357 Ark. 455, 182 S.W.3d 112 (2004).

Where an accident reconstructionist was hired by an attorney representing a driver who was involved in a car accident, the accident reconstruction report and testimony of

the accident reconstructionist's employee were confidential, privileged communications that could not be subpoenaed. *Holt v. McCastlain*, 357 Ark. 455, 182 S.W.3d 112 (2004).

#### Adoption.

Under its own rule-making power and under existing statutory authority, the Supreme Court adopted the Uniform Rules of Evidence as the law in this state. *Ricarte v. State*, 290 Ark. 100, 717 S.W.2d 488 (1986).

**Cited:** *Scott v. Smith*, 292 Ark. 174, 728 S.W.2d 515 (1987); *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989), criticized *Arkansas Gazette Co. v. Goodwin*, 304 Ark. 204, 801 S.W.2d 284



(1990); *Witherspoon v. State*, 322 Ark. 376, 909 S.W.2d 314 (1995); *Lewis v. Gubanski*, 50 Ark. App. 255, 905 S.W.2d 847 (1995).

## Rule 102. Purpose and construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence, to the end that the truth may be ascertained and proceedings justly determined.

### RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Impeachment of One's Own Witness by Prior Inconsistent Statements Under the Federal and Arkansas

Rules of Evidence, Perroni, 1 U. Ark. Little Rock L.J. 277.

### CASE NOTES

#### ANALYSIS

Inconsistent statements.

Unjustifiable delay.

#### Inconsistent Statements.

When a party has made a statement at trial which is inconsistent with a statement made during settlement negotiations, the inference is that one of the statements is knowingly false; in such a situation, the mandate in this rule to interpret the rules so as to foster the values of "fairness" and "truth" requires the court to hold that prior inconsistent statements made in the course of settlement negotiations should be admitted for impeachment purposes. *Missouri Pac. R.R. v. Arkansas Sheriff's Boys' Ranch*, 280 Ark. 53, 655 S.W.2d 389 (1983).

#### Unjustifiable Delay.

A trial court is authorized to judiciously expedite a trial and to prevent an unjustifi-

able delay. *Spears v. State*, 280 Ark. 577, 660 S.W.2d 913 (1984).

**Cited:** *Reeves v. State*, 263 Ark. 227, 564 S.W.2d 503 (1978), cert. denied 439 U.S. 964, 99 S. Ct. 450, 58 L. Ed. 2d 422 (1978), criticized *Reeves v. Mabry*, 615 F.2d 489 (8th Cir. 1980); *Bullock v. Russell*, 264 Ark. 387, 571 S.W.2d 605 (1978); *King v. Westlake*, 264 Ark. 555, 572 S.W.2d 841 (1978); *Lewis v. Gubanski*, 50 Ark. App. 255, 905 S.W.2d 847 (1995); *Villines v. Tucker*, 324 Ark. 13, 918 S.W.2d 153 (1996); *Lindsey v. State*, 54 Ark. App. 266, 925 S.W.2d 441 (1996); *McWhorter v. McWhorter*, 351 Ark. 622, 97 S.W.3d 408 (2003), cert. denied 540 U.S. 904, 124 S. Ct. 261, 157 L. Ed. 2d 189 (2003).

## Rule 103. Rulings on evidence.

(a) *Effect of Erroneous Ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) *Record of Offer and Ruling.* The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) *Hearing of Jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being

suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) *Errors Affecting Substantial Rights*. Nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court.

### CASE NOTES

#### ANALYSIS

Applicability.  
Discretion of court.  
Duty of appellant.  
Error not prejudicial.  
Errors affecting substantial rights.  
Failure to object.  
Failure to offer proof.  
Grounds for objection.  
Offer of proof.  
Photographs.  
Substance of evidence known to court.  
Timely objection.

#### Applicability.

Rebuttal witnesses' testimony regarding the fact that a criminal defendant carried a knife, although admitted in error, did not affect the substantial rights of defendant. *Landrum v. State*, 320 Ark. 81, 894 S.W.2d 933 (1995).

A proffer of evidence is governed by this rule. *Williams v. State*, 320 Ark. 211, 895 S.W.2d 913 (1995).

Where the trial court ruled as a matter of law that evidence of a controlled substance could not be admitted to prove DWI unless the information alleged intoxication by a controlled substance, no proffer of the evidence the State claimed was erroneously excluded was required to preserve the issue for appeal; subdivision (a)(2) of this rule does not apply to hearings limited to the construction of statutes as a matter of law. *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996).

#### Discretion of Court.

Where the trial court refused to strike the testimony of the defendant development company's president that he gave the plaintiff's husband, since deceased, permission to use the property, which was the subject of a quiet title action, in return for her husband's promise to keep the property clean, the trial court's refusal to strike was not an abuse of discretion since the dead man's statute was repealed, effective July 1, 1976, and the testimony of the president about his conversation with the plaintiff's husband was offered to prove that the statements were made, rather than to prove the truth of the statements. *Mikel v. Development Co.*, 269 Ark. 365, 602 S.W.2d 630 (1980).

The granting or denial of a motion to strike the testimony of a witness after he has left the witness stand is a matter lying within the

sound judicial discretion of the trial judge, whose exercise of that discretion will be set aside on appeal only when there has been an abuse of discretion. *Mikel v. Development Co.*, 269 Ark. 365, 602 S.W.2d 630 (1980).

In an action to recover for personal injuries caused by an exploding tire, the trial court did not abuse its discretion in forbidding plaintiff's attorney, on redirect examination, from eliciting an explanation of an answer given by plaintiff to defendant's attorney concerning why and when plaintiff first hired legal counsel, inasmuch as defendant's attorney on cross-examination had questioned plaintiff's failure to present medical bills. *Morton v. Wiley*, 271 Ark. 319, 609 S.W.2d 322 (1980).

In a medical malpractice action, the court did not abuse its discretion under subsection (a) of this rule in excluding a physician's prior deposition from another case on relevancy grounds; whatever difficulties the physician might have encountered during the physician's early academic career and residency, the fact remained that the physician completed a surgical residency and was board certified in surgery when the physician operated on the patient. *Milner v. Luttrell*, 2011 Ark. App. 297, — S.W.3d —, 2011 Ark. App. LEXIS 315 (Apr. 20, 2011).

#### Duty of Appellant.

It is the appellant's responsibility to demonstrate error. *Powell v. State*, 270 Ark. 236, 605 S.W.2d 2 (1980).

Relying on subsection (d) of this rule, the appeals court in *Addington v. State*, 2 Ark. App. 7, 616 S.W.2d 742 (1981) erroneously considered defendant's argument without an objection below because it affected a substantial right of the party; the procedural rules do not absolve the party at trial from making the appropriate objection as a prerequisite to appellate review. *Friar v. State*, 313 Ark. 253, 854 S.W.2d 318 (1993).

Although the trial court erred in refusing to allow appellant to call a witness during a hearing on appellee's petition for an order of protection against appellant, appellant failed to go forward and make any proffer of what the witness's testimony would have been as required by this rule; thus, the appellate court could not determine if any prejudice existed. *Pablo v. Crowder*, 95 Ark. App. 268, 236 S.W.3d 559 (2006).



### Error Not Prejudicial.

Trial court did not err when it denied a party's request to proffer evidence, but noted that it would allow the proffer at a later time, because the party failed to establish that a delay in the proffer was prejudicial. *Carlew v. Wright*, 356 Ark. 208, 148 S.W.3d 237 (2004).

In a personal injury action filed by a truck passenger and his wife arising from a truck-train collision in which one theory of recovery was that the railroad allowed the crossing to be too overgrown with vegetation for vehicles to approach safely, the trial court's improper admission of evidence of a prior near miss at the railroad crossing, where the vehicle approached the tracks from the north and not the south like the passenger's truck, was not prejudicial because evidence of two other near misses from the south was properly admitted. *Union Pac. R.R. Co. v. Barber*, 356 Ark. 268, 149 S.W.3d 325 (2004), cert. denied 543 U.S. 940, 125 S. Ct. 320, 160 L. Ed. 2d 249 (2004).

### Errors Affecting Substantial Rights.

Where, in sentencing defendant for theft of property, it was alleged that he was subject to an extended term of imprisonment as a habitual offender under § 5-4-501, because of the statements of defendant, following his arrest, to a police officer giving a detailed account of prior felony convictions dating back to 1949, the use of the officer's testimony without evidence being offered as to whether or not defendant was represented by counsel on any of his seven prior convictions which may have made the convictions constitutionally infirm, clearly violated a substantial right of the defendant and constituted error under this rule, thus requiring a new trial. *Addington v. State*, 2 Ark. App. 7, 616 S.W.2d 742 (1981), questioned *Friar v. State*, 313 Ark. 253, 854 S.W.2d 318 (1993). But see *Withers v. State*, 308 Ark. 507, 825 S.W.2d 819 (1992).

Testimony that is merely cumulative cannot be thought to have had a substantial effect on the rights of the defendant. *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986), cert. denied 484 U.S. 872, 108 S. Ct. 202, 98 L. Ed. 2d 153 (1987).

Excluded evidence did not meet the requirement of substantiality. *Daniels v. State*, 293 Ark. 422, 739 S.W.2d 135 (1987); *Phillips v. State*, 293 Ark. 588, 739 S.W.2d 688 (1987).

An appellate court will not reverse for harmless error in the admission of evidence under subsection (a) of this rule. *Freeman v. Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987).

Subsection (d) of this rule is at best limited to evidentiary matters, and in any case does not impose an affirmative duty on the appellate courts to review such matters for the first time on appeal. *Friar v. State*, 313 Ark. 253, 854 S.W.2d 318 (1993).

Testimony that tended to show that defen-

dant had cleaned himself up for court did not substantially affect defendant's rights. *Gunter v. State*, 313 Ark. 504, 857 S.W.2d 156, cert. denied 510 U.S. 948, 114 S. Ct. 391, 126 L. Ed. 2d 339 (1993).

Arkansas did not, by its adoption of subsection (d) of this rule, adopt the plain-error rule, under which plain errors affecting substantial rights may be noticed on appeal although they were not brought to the attention of the trial court. *Lovelady v. State*, 326 Ark. 196, 931 S.W.2d 430 (1996).

### Failure to Object.

Where after deliberating in a murder trial for some time the jury returned and requested to hear parts of the accomplice's testimony over again, and neither the state nor the defense objected to the request, the defendant waived any objection he may have had to this procedure. *Bly v. State*, 267 Ark. 613, 593 S.W.2d 450 (1980).

Where, in a prosecution for capital murder, the trial court admitted as evidence a bullet fragment and an expended cartridge casing that were found by the defendant's aunt in the room where the victim's body was found, the failure of the state to ask the aunt to specifically identify the admitted items was not fatal to proving the chain of custody, since the testimony of the defendant's aunt and that of the police officer to whom she gave the fragment and casing showed that the casing was the same as that found by the defendant's aunt, and since the defendant did not specifically point out the defect in the chain on which the state sought to rely. *Titus v. State*, 268 Ark. 9, 593 S.W.2d 164 (1980).

Where record was completely silent as to nature of defense counsel's objections, appellate court could not find that trial court erred in overruling those objections. *Powell v. State*, 270 Ark. 236, 605 S.W.2d 2 (1980).

The trial court judge properly denied a pretrial motion to suppress marijuana seized by officers under a search warrant, where the defendant asserted as grounds that the seizure was in violation of the fourth and fourteenth amendments to the United States Constitution since an allegation of a violation of the constitution is too vague to amount to a specific objection to the evidence as required by this rule. *Nichols v. State*, 273 Ark. 466, 620 S.W.2d 942 (1981).

Where the ground for an objection is not presented to the trial court, it cannot be raised on appeal. *Davis v. State*, 24 Ark. App. 152, 751 S.W.2d 11 (1988).

Error may not be predicated upon a ruling admitting evidence unless there is a timely, specific objection. *Bohannon v. Underwood*, 300 Ark. 110, 776 S.W.2d 827 (1989).

A constitutional issue will not be addressed on appeal if it was not brought to the trial court's attention for a ruling during trial or at

some point prior to the entry of final judgment. *Stewart v. Winfrey*, 308 Ark. 277, 824 S.W.2d 373 (1992).

Where no objection whatever was made to the testimony of the rebuttal witnesses, the issue was not preserved for appeal. *Shaver v. State*, 37 Ark. App. 124, 826 S.W.2d 300 (1992).

Although a specific ground of objection need not be stated when the error is obvious from the context, that does not mean that no objection need be made. *Thomson v. Littlefield*, 319 Ark. 648, 893 S.W.2d 788 (1995).

Trial court did not err in allowing the assistant Attorney General to testify where the testimony came in without objection and without a motion to strike. *Chegnet Sys. v. Montgomery*, 322 Ark. 742, 911 S.W.2d 956 (1995).

The court would reject the contention that the defendant did not have to make an objection to testimony by a witness that she heard the defendant threaten another person on the basis of the exception to the requirement of an objection to preserve an issue for the court's review under subsection (d) of this rule since the subsection does not impose an affirmative duty. *Alexander v. State*, 335 Ark. 131, 983 S.W.2d 110 (1998).

Subsection (d) of this rule is "negative, not imposing an affirmative duty"; thus, the failure to give an admonition to the jury is not prejudicial error where the instruction or admonition was not requested below. *Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002), cert. denied 537 U.S. 1058, 123 S. Ct. 633, 154 L. Ed 2d 539 (2002).

In a drug trial, defendant's constitutional challenge based on the admission of evidence of subsequent drug offenses during the sentencing phase of the trial was not preserved for appellate review because defendant failed to make a proper, contemporaneous objection at trial. *Crawford v. State*, 362 Ark. 301, 208 S.W.3d 146 (2005).

Upon defendant's conviction for rape and second-degree battery, he argued that the admission of evidence of his prior alleged misconduct involving a minor during the sentencing phase of trial violated his rights under the Confrontation Clause; however, the error was not preserved for review because defendant did not raise an objection at trial. The Wicks exceptions to the preservation rule did not apply under subsection (d) of this rule. *White v. State*, 2012 Ark. 221, — S.W.3d —, 2012 Ark. LEXIS 253 (May 24, 2012).

#### **Failure to Offer Proof.**

In prosecution for theft, where defense counsel made no attempt to pursue questions concerning mistaken identity after court sustained objection to them and did not explain to court the defense of mistaken identity or proffer any evidence for the record to support

an objection to the court's ruling, the court's ruling exclusion of questions concerning mistaken identity could not be considered error. *Boykin v. State*, 270 Ark. 284, 603 S.W.2d 911 (1980).

The trial court did not err in refusing to permit the defendant to cross-examine a police officer with respect to any prior statements that the alleged rape victim may have made where the record showed that the defendant's attorney evidently chose not to pursue the subject, despite his opportunity to do so when the policeman was called on rebuttal and when the victim herself took the witness stand. Also, defendant's counsel neglected to make known to the trial court the substance of the anticipated evidence by proffer under the requirements of subdivision (a)(2) of this rule. *Avery v. State*, 15 Ark. App. 134, 690 S.W.2d 732 (1985).

Where there was no offer of proof as to the factual circumstances involved in the victim's conviction for hindering apprehension, the court was unable to determine whether the conviction should have been admissible. *West v. State*, 27 Ark. App. 49, 766 S.W.2d 22 (1989).

Failure to make an offer of proof precludes review of the issue on appeal under subdivision (a)(2) of this rule. *National Bank of Commerce v. HCA Health Servs.*, 304 Ark. 55, 800 S.W.2d 694 (1990).

Where the trial court excluded the testimony of appellant's witness because appellant's supplemental answers to interrogatories had not been verified, appellant could not, on appeal, take issue with the exclusion where the appellant failed to make a proffer of the witness' testimony at trial. *Abernathy v. Weldon, Williams & Lick, Inc.*, 54 Ark. App. 108, 923 S.W.2d 893 (1996).

Plaintiff's failure to proffer evidence at trial precluded appellate review of trial court decision excluding the evidence. *Duque v. Oshman's Sporting Goods — Servs., Inc.*, 327 Ark. 224, 937 S.W.2d 179 (1997).

The issue of whether the trial court erred in refusing to allow plaintiff to use the police report while cross-examining the investigating officer in relation to testimony other witnesses had given at trial as to the traffic accident was procedurally barred on appeal because plaintiff made no proffer of the evidence that she sought to introduce through cross-examination of the officer. *Martinez v. Wright*, 94 Ark. App. 1, 223 S.W.3d 71 (2006).

Where a mother failed to proffer either the summary or the actual bills that she had received for the minor child's medical care, the appellate court was left with only the mother's testimony on the issue; accordingly, the appellate court deferred to the trial judge's superior position to determine the credibility of witnesses and the weight to be



accorded to their testimony and affirmed the denial of the request for reimbursement of those expenses. *Williams v. Nesbitt*, 95 Ark. App. 79, 234 S.W.3d 343 (2006).

Appellate review of an injured plaintiff's contention that his medical bills were improperly excluded from evidence due to his failure to produce them until the evening before trial was precluded by the plaintiff's failure to make a proffer of the medical records and bills to the trial court as required by subdivision (a)(2) of this rule. *Jennings v. Architectural Prods.*, 2010 Ark. App. 413, — S.W.3d —, 2010 Ark. App. LEXIS 440 (May 12, 2010).

#### **Grounds for Objection.**

A party cannot change the grounds for objection on appeal. *Walker v. State*, 301 Ark. 218, 783 S.W.2d 44 (1990).

Where defendant had no objection to admission of photos of the bullets removed from deceased's body and a closeup shot of his abdomen to show his fatal wound, the specific ground for his objection to a photograph of the deceased's head and torso was not clear. *Gidron v. State*, 316 Ark. 352, 872 S.W.2d 64 (1994).

Murder defendant who had objected at trial under Ark. R. Evid. 613(b) to use of a witness's prior inconsistent statement could not, on appeal, change his grounds for objection to the rule that once a witness admits making a prior inconsistent statement and admits that it was false, the statement becomes inadmissible. *Threadgill v. State*, 74 Ark. App. 301, 47 S.W.3d 304 (2001), *aff'd* 347 Ark. 986, 69 S.W.3d 423 (2002).

In an assault case, defendant preserved a jury selection error relating to the number of peremptory challenges under § 16-33-305 and the Sixth Amendment to the U.S. Constitution because the basis of defendant's motion was clear from the context and the arguments presented; however, no reversal or mistrial was required because defendant failed to raise an objection until after the trial had started, and there was no prejudice because the objectionable jurors did not participate in the verdict. *Smith v. State*, 90 Ark. App. 261, 205 S.W.3d 173 (2005).

#### **Offer of Proof.**

In order for the Supreme Court to find that certain evidence was improperly excluded by the trial court, the party offering such evidence must have made a proffer of the evidence under subdivision (a)(2) of this rule. *Parker v. State*, 268 Ark. 441, 597 S.W.2d 586 (1980).

Normally, the Supreme Court will not consider a point involving the exclusion of evidence when there was no proffer of excluded evidence because the court has no way of knowing the substance of the evidence; however, there is no need for a proffer where the

substance of the offer was apparent from the context within which the questions were asked when the information is unavailable to the cross-examiner. *Henderson v. State*, 279 Ark. 435, 652 S.W.2d 16 (1983).

Trial court erred in sustaining state's objection to question, and the Supreme Court would hold it to be reversible error, even though the defendant had made no proffer of evidence on the point, because the substance of the answer to the question objected to was apparent and because the information was not available to the defense counsel. *Henderson v. State*, 279 Ark. 435, 652 S.W.2d 16 (1983).

Where, in prosecution for rape, the victim was unemployed and unmarried, the manner of support of the victim and her daughter was of no consequence, where an in-chambers proffer showed that the victim was supported by her fiancé. *Johnson v. State*, 290 Ark. 166, 717 S.W.2d 805 (1986).

This rule specifically provides that the trial court may control the form of the proffer and when proffer is to be made; there may be circumstances in which trial court is justified in rejecting a proffer. *Jones v. Jones*, 22 Ark. App. 267, 739 S.W.2d 171 (1987).

It was error to refuse to permit proffer of evidence. *Jones v. Jones*, 22 Ark. App. 267, 739 S.W.2d 171 (1987).

Trial court has very limited discretion to refuse to permit counsel to proffer evidence, but has great discretion in controlling form of proffer and time at which it is to be made. *Sitz v. State*, 23 Ark. App. 126, 743 S.W.2d 18 (1988).

Opportunity to make proffer was not denied. *Sitz v. State*, 23 Ark. App. 126, 743 S.W.2d 18 (1988).

Error may not be predicated upon a ruling that excludes evidence unless the substance of the evidence is proffered. *Ross v. Moore*, 25 Ark. App. 325, 758 S.W.2d 423 (1988).

After the trial court cut short defendant's attempt to cross-examine a witness, defendant's failure to make an offer of proof of what the testimony would have been precludes review of the issue on appeal under subdivision (a)(2) of this rule. *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993).

Subdivision (a)(2) of this rule is not applicable to a hearing that was limited to the construction of a statute as a matter of law. Thus, where trial court did not make any evidentiary rulings, the Supreme Court reached the state's point of appeal. *State v. Gray*, 322 Ark. 301, 908 S.W.2d 642 (1995).

Proffered evidence of the victim's character, by testimony of specific instances of her prior violent conduct toward defendant, was not erroneously excluded where the proffered cross-examination testimony was not admissible under Evid. Rule 405, and beyond the

scope of cross-examination under Evid. Rule 611. *Solomon v. State*, 323 Ark. 178, 913 S.W.2d 288 (1996).

In workers' compensation proceeding, although administrative law judge erred in denying employer the opportunity to proffer certain videotapes, such error was harmless where other records supported the finding, where employer did not obtain a ruling on the issue, and where videotapes were not authenticated. *W.W.C. Bingo v. Zwierzynski*, 53 Ark. App. 288, 921 S.W.2d 954 (1996).

A proffer is required for two reasons: first, so that the trial court may be aware of the nature of the evidence; and second, to enable the appellate court to decide whether the evidence should have been admitted and, if so, whether the error in excluding it may have been harmless. *Lindsey v. State*, 54 Ark. App. 266, 925 S.W.2d 441 (1996).

Counsel's offer of proof as to witness's anticipated testimony held to be sufficient to preserve the issue of the admissibility of that testimony for appeal. *Cox-Hilstrom v. State*, 58 Ark. App. 109, 948 S.W.2d 409 (1997).

Defendant's collateral argument, that cocaine evidence was relevant to show drug use on the part of the state's witness, was not preserved for review, given that defense counsel did not attempt to impeach any witness with this information and when the trial court sustained the state's objection to the question of the witness concerning drugs, defense counsel neither argued that the objection should be overruled nor proffered the testimony that he would have obtained if allowed to pursue another question, and without the proffer, for purposes of subdivision (a)(2) of this rule, the matter was not preserved. *Randle v. State*, 372 Ark. 246, 273 S.W.3d 482 (2008).

Where the patient alleged that a doctor and a medical center's nursing staff were negligent in connection with a fall she sustained while a patient at the medical center, the trial court denied the patient's proffered instruction that would have allowed the jury to consider the testimony of her physician expert on the standard of care for the nursing staff; the physician was never qualified as an expert on nursing. On review, the Supreme Court of Arkansas could not assess whether the circuit judge erred in refusing the proffered instruction because the patient did not proffer what testimony the physician expert would have given. *Nelson v. Stubblefield*, 2009 Ark. 256, 308 S.W.3d 586 (2009).

### Photographs.

In order to preserve an issue involving photographs for appeal, the appellant must make an offer of proof about who took the pictures, when they were taken, why they were taken, where they had been kept, how appellant obtained them, and the substance

of the evidence a witness might have given about the pictures. *Mosley v. State*, 325 Ark. 469, 929 S.W.2d 693 (1996).

### Substance of Evidence Known to Court.

Where a defendant in a battery prosecution attempted to introduce a psychiatrist's opinion testimony that the defendant was not a violent person only for the purpose of mitigation of punishment and not to show a character trait of nonviolence, the court's ruling that the testimony was not admissible was not erroneous under this rule since the substance of the evidence was not sufficiently made known to the trial court and was not apparent from the questions asked of the psychiatrist. *Killman v. State*, 274 Ark. 422, 625 S.W.2d 489 (1981).

In order for an appellate court to hold that testimony regarding an inconsistent statement was improperly excluded under Evid. Rule 613, appellant must have made a proffer of the evidence under this rule; where there was no proffer and the substance of the testimony was not apparent, the appellate court had no way of knowing whether the answer would have revealed an inconsistent statement. *Patterson v. State*, 318 Ark. 358, 885 S.W.2d 667 (1994).

### Timely Objection.

Error cannot be predicated upon a ruling admitting evidence unless a timely objection is made stating the specific ground of objection if the ground is not apparent from the context. *Pace v. State*, 265 Ark. 712, 580 S.W.2d 689 (1979).

For the trial court to have committed reversible error, it must be said that timely and accurate objection was made, so that the trial court was given the opportunity to correct such error. *Gustafson v. State*, 267 Ark. 830, 593 S.W.2d 187 (Ct. App. 1979).

Where in a prosecution for possession of heroin, the defense counsel made a general objection to testimony about a pistol found in the defendant's car, the objection should have been sustained since it should have been apparent to the trial court that the weapon was not relevant to the offense charged and should not have been discussed before the jury. *Philmon v. State*, 267 Ark. 1121, 593 S.W.2d 504 (Ct. App. 1980), questioned *Hall v. State*, 11 Ark. App. 53, 666 S.W.2d 408 (1984).

In action against builder for damages for failure to construct house properly where report of percolation test was introduced into evidence over the general objection of the builder, builder could not now object to the introduction of such report on the grounds that it was hearsay and not a business record in the sense of Evid. Rule 803(6) since neither of these objections was made in the trial court, for error cannot be predicated on a ruling admitting evidence in the absence of a



specific objection, if the specific objection was not apparent from the context. *Enterprise Sales Co. v. Barham*, 270 Ark. 544, 605 S.W.2d 458 (1980).

Where in an eminent domain proceeding brought by the State Highway Commission against the lessees in property from whom the commission had acquired a highway right-of-way, the commission made a timely and specific objection to the testimony of one of the lessee's witnesses concerning the profits made by the lessee from a business conducted on the leasehold property, the failure of the commission to have raised the objection at a pretrial conference did not preclude it from making the objection during the trial, and the profit testimony should not have been admitted. *Arkansas State Hwy. Comm'n v. Lone Star Co.*, 4 Ark. App. 103, 628 S.W.2d 23 (1982).

Error cannot be predicated upon a ruling admitting evidence unless a timely objection is made stating the specific ground of objection if the ground is not clear from the context. *Walt Bennett Ford, Inc. v. Brown*, 283 Ark. 1, 670 S.W.2d 441 (1984).

Where defense attorney stated, before witness was called, that if the state asked the witness about statements made by the victim, the defendant objected on hearsay grounds, but defendant did not object to questions asked of the witness, nor renew or request a final ruling on his previous objection, then defendant did not move to strike the hearsay testimony, and failed to make a timely objection at trial as to the admission of the challenged statement, thus precluding defendant from raising this issue on appeal. *Byrum v. State*, 318 Ark. 87, 884 S.W.2d 248 (1994).

In order to be timely, an objection must be contemporaneous, or nearly so, with the alleged error; to preserve a point for appeal, a proper objection must be asserted at the first opportunity after the matter to which objection has been made occurs. *Smith v. State*, 330 Ark. 50, 953 S.W.2d 870 (1997).

**Cited:** *Duncan v. State*, 263 Ark. 242, 565 S.W.2d 1 (1978); *King v. Westlake*, 264 Ark. 555, 572 S.W.2d 841 (1978); *Shepherd v. State*, 270 Ark. 457, 605 S.W.2d 414 (1980); *Williams v. State*, 270 Ark. 513, 606 S.W.2d 75 (1980); *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), criticized *Jenkins v. State*, 959 S.W.2d 57 (1997); *Morton v. Wiley*, 271 Ark. 319, 609 S.W.2d 322 (1980); *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980); *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981); *Swart v. Town & Country Home Ctr., Inc.*, 2 Ark. App. 211, 619 S.W.2d 680 (1981); *Graham v. State*, 2 Ark. App. 266, 621 S.W.2d 4 (1981); *Chappell Chevrolet, Inc. v. Strickland*, 4 Ark. App. 108, 628 S.W.2d 25 (1982); *Martin v. Martin*, 6 Ark. App. 18, 637 S.W.2d 612 (1982); *Woods v. State*, 278 Ark. 271, 644

S.W.2d 937 (1983); *Hively v. Edwards*, 278 Ark. 435, 646 S.W.2d 688 (1983); *Schaffer v. Tenneco Oil Co.*, 278 Ark. 511, 647 S.W.2d 446 (1983); *Bradley v. State*, 8 Ark. App. 300, 651 S.W.2d 113 (1983); *Brunson v. State*, 9 Ark. App. 106, 653 S.W.2d 157 (1983); *McDermott v. Strauss*, 283 Ark. 444, 678 S.W.2d 334 (1984); *Brimm v. State*, 14 Ark. App. 6, 683 S.W.2d 940 (1985); *Lewis v. State*, 288 Ark. 595, 709 S.W.2d 56 (1986); *East Tex. Motor Freight Lines v. Freeman*, 289 Ark. 539, 713 S.W.2d 456 (1986); *Miller v. Jasinski*, 17 Ark. App. 131, 705 S.W.2d 442 (1986); *Willett v. State*, 18 Ark. App. 125, 712 S.W.2d 925 (1986); *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987); *Barker v. State*, 21 Ark. App. 56, 728 S.W.2d 204 (1987); *Smart v. State*, 297 Ark. 324, 761 S.W.2d 915 (1988); *Honey v. Hickey*, 26 Ark. App. 99, 760 S.W.2d 81 (1988); *Tillman v. State*, 300 Ark. 132, 777 S.W.2d 217 (1989); *Parker v. State*, 300 Ark. 360, 779 S.W.2d 156 (1989), cert. denied 498 U.S. 883, 111 S. Ct. 218, 112 L. Ed. 2d 186 (1990); *Mine Creek Contractors v. Grandstaff*, 300 Ark. 516, 780 S.W.2d 543 (1989); *Hamm v. State*, 26 Ark. App. 217, 764 S.W.2d 456 (1989); *Winters v. State*, 301 Ark. 127, 782 S.W.2d 566 (1990); *Ishie v. Kelley*, 302 Ark. 112, 788 S.W.2d 225 (1990); *Northwestern Nat'l Life Ins. Co. v. Heslip*, 302 Ark. 310, 790 S.W.2d 152 (1990); *Richmond v. State*, 302 Ark. 498, 791 S.W.2d 691 (1990); *Arkansas Valley Elec. Coop. Corp. v. Davis*, 304 Ark. 70, 800 S.W.2d 420 (1990); *Bryant v. State*, 304 Ark. 514, 803 S.W.2d 546 (1991); *Elliott v. Hurst*, 307 Ark. 134, 817 S.W.2d 877 (1991); *Stacy v. Hsi-Chi Lin*, 34 Ark. App. 97, 806 S.W.2d 15 (1991); *King v. Ahrens*, 798 F. Supp. 1371 (W.D. Ark. 1992), aff'd 16 F.3d 265 (8th Cir. Ark. 1994); *Withers v. State*, 308 Ark. 507, 825 S.W.2d 819 (1992); *Hickman v. Trust of Heath, House & Boyles*, 310 Ark. 333, 835 S.W.2d 880 (1992); *McVay v. State*, 312 Ark. 73, 847 S.W.2d 28 (1993); *Garner v. Kees*, 312 Ark. 251, 848 S.W.2d 423 (1993); *Edwards v. State*, 315 Ark. 126, 864 S.W.2d 866 (1993); *Jones v. State*, 321 Ark. 649, 907 S.W.2d 672 (1995); *Carr v. GMC*, 322 Ark. 664, 911 S.W.2d 575 (1995); *Lewis v. Gubanski*, 50 Ark. App. 255, 905 S.W.2d 847 (1995); *Luedemann v. Wade*, 323 Ark. 161, 913 S.W.2d 773 (1996); *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996); *Tauber v. State*, 324 Ark. 47, 919 S.W.2d 196 (1996); *Hill v. State*, 54 Ark. App. 380, 927 S.W.2d 820 (1996); *Green v. State*, 330 Ark. 458, 956 S.W.2d 849 (1997); *Swadley v. Krugler*, 67 Ark. App. 297, 999 S.W.2d 209 (1999); *Epps v. State*, 72 Ark. App. 370, 38 S.W.3d 899 (2001); *Swinford v. State*, 85 Ark. App. 326, 154 S.W.3d 262 (2004); *Jones v. Coker*, 90 Ark. App. 151, 204 S.W.3d 554 (2005); *Duke v. Shinpaugh*, 101 Ark. App. 331, 276 S.W.3d 713 (2008), rehearing denied — Ark. App. —, — S.W.3d —, 2008 Ark. App.

LEXIS 264 (Apr. 2, 2008); Rye v. State, 2009 Ark. App. 839, — S.W.3d —, 2009 Ark. App. LEXIS 1055 (2009); Nelson v. State, 2011 Ark.

429, — S.W.3d —, 2011 Ark. LEXIS 516 (Oct. 13, 2011).

## Rule 104. Preliminary questions.

(a) *Questions of Admissibility Generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy Conditioned on Fact.* Whenever the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or in the court's discretion subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) *Hearing of Jury.* Hearings on the admissibility of confessions in criminal cases shall be conducted out of the hearing of the jury. Hearings on other preliminary matters in all cases, shall be so conducted whenever the interests of justice require or, in criminal cases, whenever an accused is a witness, if he so requests.

(d) *Testimony by Accused.* The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) *Weight and Credibility.* This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

## RESEARCH REFERENCES

**Ark. L. Rev.** Notes, National Standard of Care — A New Dimension of the Locality Rule, 36 Ark. L. Rev. 161.

Arkansas Adopts a Second Admissibility

Test for Novel Scientific Evidence: Do Two Tests Equal One Standard?, 56 Ark. L. Rev. 21.

## CASE NOTES

### ANALYSIS

Admissibility.

Discretion of court.

—Young witnesses.

Proof of chain of custody.

Relevancy conditioned on fact.

Standard of review.

Statements of coconspirators.

### Admissibility.

Whether an undercover agent who made arrangements with the defendant for a heroin sale was incapable of consenting to the taping of the conversation because he needed a “fix” and whether he was able to recognize the defendant’s voice on the telephone were preliminary questions of fact about the admissibility of evidence which must be determined by the trial judge. Foxworth v. State, 263 Ark. 549, 566 S.W.2d 151 (1978).

An officer investigating an accident can give an opinion about the point of impact if

properly qualified. Ferrell v. Southern Farm Bureau Cas. Ins. Co., 291 Ark. 322, 724 S.W.2d 465 (1987).

The judge, not the jury, makes the determination of admissibility of evidence and, once the judge makes that determination, it is a matter of argument of counsel as to the weight to be given that evidence. Jacobs v. State, 294 Ark. 551, 744 S.W.2d 728 (1988).

Evidence held admissible. Winters v. State, 301 Ark. 127, 782 S.W.2d 566 (1990).

### Discretion of Court.

Under this rule, a trial court has discretion in determining the qualifications of a person to be a witness and in further determining the admissibility of evidence, providing the evidence is not inadmissible under some exclusionary rule. White v. Mitchell, 263 Ark. 787, 568 S.W.2d 216 (1978).

In view of first doctor’s vast medical practice and his extensive association with medi-



cal institutions and general practitioners in communities comparable to second doctor, in terms of population, facilities, and the type of medical practice engaged in by the physicians therein, the trial court did not abuse its discretion in holding first doctor's testimony competent. *White v. Mitchell*, 263 Ark. 787, 568 S.W.2d 216 (1978).

The trial court properly decided the question of admissibility of the documentary evidence of prior convictions; the determination of whether the evidence of those convictions was admissible was not a question for the jury. *Wright v. State*, 17 Ark. App. 24, 702 S.W.2d 811 (1986).

The trial judge determines whether evidence is admissible, and on review, the appellate court will reverse the decision only if there is an abuse of discretion under subsection (a) of this rule. *Marx v. State*, 291 Ark. 325, 724 S.W.2d 456 (1987). See *Farmers Bank v. Perry*, 301 Ark. 547, 787 S.W.2d 645 (1990).

#### —Young Witnesses.

The trial court has broad discretion in determining the competency of young witnesses and exercise of that discretion will not be disturbed on appeal absent clear abuse or manifest error. A witness is competent if able to understand the obligation to tell the truth and the consequences of false swearing and if capable of receiving and retaining accurate impressions and communicating a reasonable statement of what has been seen, felt or heard. *Barrett v. State*, 23 Ark. App. 144, 744 S.W.2d 741 (1988).

#### Proof of Chain of Custody.

Where in a prosecution for capital murder, the trial court admitted as evidence a bullet fragment and an expended cartridge casing that were found by the defendant's aunt in the room where the victim's body was found, the failure of the state to ask the aunt to specifically identify the admitted items was not fatal to proving the chain of custody, since the testimony of the defendant's aunt and that of the police officer to whom she gave the fragment and casing showed that the casing was the same as that found by the defendant's aunt, and since the defendant did not specifically point out the defect in the chain on which the state sought to rely. *Titus v. State*, 268 Ark. 9, 593 S.W.2d 164 (1980).

#### Relevancy Conditioned on Fact.

Attempted implication of a witness as the actual murderer properly denied where the facts that the witness may have been abused and may have committed unrelated bad acts created no more than a reckless inference that he murdered the victims. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

#### Standard of Review.

Questions concerning the admissibility of evidence are matters of state law and are subject to review in federal court only when the alleged error infringed upon a specific federal constitutional right or was so grossly prejudicial that it fatally infected the trial and did not afford a litigant the fundamental fairness which is the essence of due process. *Harris v. Norris*, 864 F. Supp. 96 (E.D. Ark. 1994).

#### Statements of Coconspirators.

Statements of alleged coconspirators are inadmissible as hearsay unless they are vicarious admissions; the statements must be connected by other evidence which establishes the conspiracy independent of the statement, and the existence of the conspiracy must be independently proved before the jury is allowed to consider the statements but the trial court has discretion to vary the order of proof. *Patterson v. State*, 267 Ark. 436, 591 S.W.2d 356 (1979), cert. denied 447 U.S. 923, 100 S. Ct. 3014, 65 L. Ed. 2d 1115 (1980).

**Cited:** *Lake v. Lake*, 262 Ark. 852, 562 S.W.2d 68 (1978); *Reeves v. State*, 263 Ark. 227, 564 S.W.2d 503 (1978), cert. denied 439 U.S. 964, 99 S. Ct. 450, 58 L. Ed. 2d 422 (1978), criticized *Reeves v. Mabry*, 615 F.2d 489 (8th Cir. 1980); *Derring v. State*, 273 Ark. 347, 619 S.W.2d 644 (1981); *Carroll v. State*, 276 Ark. 160, 634 S.W.2d 99 (1982); *Barker v. State*, 21 Ark. App. 56, 728 S.W.2d 204 (1987); *Almobarak v. State*, 22 Ark. App. 69, 733 S.W.2d 422 (1987); *McKim v. State*, 25 Ark. App. 176, 753 S.W.2d 295 (1988); *Warrior v. State*, 299 Ark. 337, 772 S.W.2d 592 (1989); *Koroklo v. Koroklo*, 302 Ark. 96, 787 S.W.2d 241 (1990); *Redman v. St. Louis S.W. Ry.*, 316 Ark. 636, 873 S.W.2d 542 (1994); *Lewis v. Gubanski*, 50 Ark. App. 255, 905 S.W.2d 847 (1995); *Esry v. Carden*, 328 Ark. 153, 942 S.W.2d 846 (1997); *Hill v. State Farm Mut. Auto. Ins. Co.*, 56 Ark. App. 67, 937 S.W.2d 684 (1997).

### Rule 105. Limited admissibility.

Whenever evidence which is admissible as to one [1] party or for one [1] purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

## CASE NOTES

## ANALYSIS

Illustrative case.

Impeachment.

Instructions.

Rebutting inference of negligence.

Testimony of coconspirators.

**Illustrative Case.**

The trial court acted correctly, since it did not rule that defense counsel could not ask the witness whether she had made the statement that was attributed to her by the police report, but simply would not allow counsel to reveal what the report stated the witness had said until she had been asked whether she had made that statement. *Lewis v. State*, 41 Ark. App. 89, 848 S.W.2d 955 (1993).

Defendant's Sixth Amendment rights under the Confrontation Clause were violated when the testimony of a deceased company owner was received into evidence through the testimony of a police officer because the statements were testimonial in nature; they went to the core of the State's case on the issue of whether defendant was authorized to use a credit card. Moreover, when considering the testimony solely as an evidentiary matter, it was not admissible for any purpose, and no limiting instruction of any kind would have cured the error in admitting the testimony. *Lee v. State*, 102 Ark. App. 23, 279 S.W.3d 496 (2008).

**Impeachment.**

Although the witness's statement was inadmissible to prove the truth of the matter asserted, it was admissible for the purposes of impeachment. *Harris v. State*, 36 Ark. App. 120, 819 S.W.2d 30 (1991).

**Instructions.**

Where evidence was offered to show that a police officer merely acted on the description of the car given him but the testimony would have been inadmissible hearsay if offered for the truth of the matter asserted the court should have admonished the jury to limit its consideration of this evidence and the court erred in refusing to give the limiting instruction. *Hamm v. State*, 304 Ark. 214, 800 S.W.2d 711 (1990).

Trial judge's limiting instruction properly

restricted challenged evidence to its proper scope. *Crawford v. State*, 309 Ark. 54, 827 S.W.2d 134 (1992).

**Rebutting Inference of Negligence.**

In a personal injury case which involved plaintiff being injured while helping defendant's employee to install a three-hundred-pound gear drive, it was proper for the court to allow the employee to testify that he and only one other man had manually installed gear drives "hundreds of times" previously, since plaintiff's case-in-chief fully developed the fact that hoisting equipment and additional farm hands were available to assist in the placement of the gear drive, so that the testimony was properly admitted under this rule for the single purpose of rebutting the inference that the defendants were negligent in not using additional men or equipment; moreover, such testimony did not allow the defendant to absolve himself of any negligence merely by proving that his conduct at the time of the accident was in conformity with their past practices. *Sanders v. Wheaton*, 273 Ark. 416, 619 S.W.2d 674 (1981).

**Testimony of Coconspirators.**

Arkansas Model Criminal Jury Instruction 201 essentially sets out the best rule in handling the admission of testimony of coconspirators. *Patterson v. State*, 267 Ark. 436, 591 S.W.2d 356 (1979), cert. denied 447 U.S. 923, 100 S. Ct. 3014, 65 L. Ed. 2d 1115 (1980).

Statements of alleged coconspirators are inadmissible as hearsay unless they are vicarious admissions; the statements must be connected by other evidence which establishes the conspiracy independent of the statement, and the existence of the conspiracy must be independently proved before the jury is allowed to consider the statements but the trial court has discretion to vary the order of proof. *Patterson v. State*, 267 Ark. 436, 591 S.W.2d 356 (1979), cert. denied 447 U.S. 923, 100 S. Ct. 3014, 65 L. Ed. 2d 1115 (1980).

**Cited:** *Chisum v. State*, 273 Ark. 1, 616 S.W.2d 728 (1981); *Hackett v. State*, 2 Ark. App. 228, 619 S.W.2d 687 (1981); *Lincoln v. State*, 7 Ark. App. 179, 646 S.W.2d 30 (1983); *Lindsey v. State*, 319 Ark. 132, 890 S.W.2d 584 (1994); *Frazier v. State*, 323 Ark. 350, 915 S.W.2d 691 (1996).

**Rule 106. Remainder of or related writings or recorded statements.**

Whenever a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.



## CASE NOTES

## ANALYSIS

In general.

Admission of prior statement.

**In General.**

This rule is directed toward preventing a misleading impression that may be created by taking a statement out of context; the right to put in the remainder of a statement as part of the opponent's case is subject to the general principles of relevancy. This rule is not designed to make something admissible that should be excluded. *Skiver v. State*, 37 Ark. App. 146, 826 S.W.2d 309 (1992).

In a rape case, although the prohibition on the introduction of polygraph results in § 12-12-704 extended to the willingness or reluctance to be examined as evidence of consciousness of innocence or guilt, the state was not prohibited from introducing a redacted portion of an interview where defendant discussed taking the test; moreover, there was no requirement that the entire statement should have been admitted under Arkansas case law or this rule. *Rollins v. State*, 362 Ark. 279, 208 S.W.3d 215 (2005).

**Admission of Prior Statement.**

Where defense counsel on cross-examination quoted a part of witness's prior statement

and the omitted portion of the statement was not explanatory of the part referred to on cross-examination, it was error to admit the entire statement since not only was the remainder of the prior statement unrelated to the issue of defendant's use of profane language which was raised on cross-examination, but the witness fully explained the reason for omitting profane words in her written statement when she testified. *George v. State*, 270 Ark. 335, 604 S.W.2d 940 (1980).

Trial court did not abuse its discretion by allowing the state to introduce the transcript of police interviews with the victim, which included parts of the statement that were not introduced by the state, because the defense expressly referred to selective portions of the interviews while attempting to show that the investigator coaxed or cajoled the victim into giving incriminating testimony; thus, the entire transcript of the two interviews were properly admitted to refute a charge of improper influence and to provide context. *Hamm v. State*, 365 Ark. 647, 232 S.W.3d 463 (2006).

**Cited:** *Morris v. Torch Club, Inc.*, 295 Ark. 461, 749 S.W.2d 319 (1988).

## ARTICLE II. JUDICIAL NOTICE

**Rule 201. Judicial notice of adjudicative facts.**

(a) *Scope of Rule.* This rule governs only judicial notice of adjudicative facts.

(b) *Kinds of Facts.* A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort [resort] to sources whose accuracy cannot reasonably be questioned.

(c) *When Discretionary.* A court may take judicial notice, whether requested or not.

(d) *When Mandatory.* A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be Heard.* A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of Taking Notice.* Judicial notice may be taken at any stage of the proceeding.

(g) *Instructing Jury.* The court shall instruct the jury to accept as conclusive any fact judicially noticed.

**Publisher's Notes.** The bracketed word "resort" in subdivision (b) was inserted by the publisher.

## CASE NOTES

### ANALYSIS

Adjudicative facts.  
Appeal.  
County seat for venue purposes.  
Discretion of court.  
Governmental regulation.  
Interest rates.  
Judicial notice of evidence.  
Medical reference book.

### Adjudicative Facts.

Statute and regulations held not to constitute "adjudicative facts." *Lively v. State*, 25 Ark. App. 198, 755 S.W.2d 238 (1988).

In a personal injury case, a trial court did not err in failing to take judicial notice of an alleged admission in summary judgment submissions by the premises owner that an accident occurred on the premises on the date in question, because whether the accident occurred there was clearly not an adjudicative fact that fell under the strictures of subsection (b) of this rule. *Jennings v. Architectural Prods.*, 2010 Ark. App. 413, — S.W.3d —, 2010 Ark. App. LEXIS 440 (May 12, 2010).

### Appeal.

This rule does not expressly limit the taking of judicial notice to the trial court; the Supreme Court may take judicial notice of facts which were not presented to the trial court. *Houston v. State*, 293 Ark. 492, 739 S.W.2d 154 (1987).

Where a party challenges the sufficiency of the evidence to support the verdict, the opposing party may not offer additional evidence on appeal by way of judicial notice for the purpose of bolstering the sufficiency of its evidence. *Houston v. State*, 293 Ark. 492, 739 S.W.2d 154 (1987).

### County Seat for Venue Purposes.

Where a trailer containing drugs was described in a search warrant and by testimony of police officers as being south of Mountain Home, Arkansas, it was proper for the trial court to take judicial notice that Mountain Home is the county seat of Baxter County for purposes of establishing venue in the resulting criminal trial in Baxter County, since a fact may be judicially noticed which is generally known within the territorial jurisdiction of the trial court. *Dodson v. State*, 4 Ark. App. 1, 626 S.W.2d 624, cert. denied 457 U.S. 1136, 102 S. Ct. 2966, 73 L. Ed 2d 1355 (1982).

### Discretion of Court.

It would appear that a fifth of Evan Williams Straight Bourbon Whiskey containing

the unbroken federally affixed federal tax seal would fall within this rule, and since defendant did not request an opportunity to test the contents, it cannot be said that the trial court committed error in taking judicial notice that the fifth contained intoxicating liquor. *Hughes v. State*, 264 Ark. 723, 574 S.W.2d 888 (1978).

Given that the circuit court allowed the employee to question witnesses about the OSHA regulations and gave a jury instruction about them, it did not abuse its discretion by refusing to take judicial notice of the OSHA regulations under this rule. *Patterson v. UPS*, 102 Ark. App. 378, 285 S.W.3d 683 (2008).

### Governmental Regulation.

Judicial notice may be taken of the Department of Health regulation, but the proper procedure is for the party relying on such judicial notice to aid the court or administrative law judge by calling attention to the regulation. *St. Paul Ins. Co. v. Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980).

A circuit court is within its bounds in taking judicial notice of a code of regulations duly promulgated under the Arkansas Administrative Procedures Act. *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992).

Even if the trial court already judicially knew the Arkansas Regulations for Alcohol Testing, then it was unnecessary for the court to take judicial notice of them or admit them into evidence; the trial court properly decided that the testimony of the police officers was sufficient to explain the requirements of the Regulations and whether they were complied with. *Mhoon v. State*, 369 Ark. 134, 251 S.W.3d 244 (2007).

### Interest Rates.

Even though there was no evidence presented on the question at trial, the court took judicial notice of the fact that interest rates were very high at that time, and also were high at the time of the Public Service Commission's decision on the rate of interest to be paid on refunds by the telephone company. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

### Judicial Notice of Evidence.

Where the only evidence, in an adverse possession case, of the date actual notice of adverse interest was communicated to defendant was based on judicial notice of a fact not raised at the trial court, the plaintiff failed to make out a prima facie case since such judi-



cial notice of evidence is impermissible. *Pascall v. Smith*, 263 Ark. 428, 569 S.W.2d 89 (1978).

The court could not take judicial notice that the defendant's acts against his niece and brother in North Carolina were felonies in North Carolina so as to affirm a jury's finding of a "prior violent felony" as an aggravating circumstance in the prosecution of the defendant for murder. *Greene v. State*, 335 Ark. 1, 977 S.W.2d 192 (1998).

Trial court never refused to take judicial notice of the Arkansas Board of Acupuncture's rules and regulations because it was never asked to take judicial notice; instead, the alternative medicine practitioner and his school attempted to introduce a document into evidence and the trial court concluded that the copy was not properly admissible. *Southern College of Naturopathy v. State ex rel. Beebe*, 360 Ark. 543, 203 S.W.3d 111 (2005).

Consecutive sentences under § 5-4-403(a) were improper in a case where a trial judge relied upon the record of co-defendants and rejected a jury's recommendation of non-consecutive sentences; the trial court was not allowed to take judicial notice of the court records, as they were not introduced into evidence. *Throneberry v. State*, 102 Ark. App. 17, 279 S.W.3d 489 (2008), review denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 563 (Sept. 4, 2008).

Record of a co-defendant's case cannot be considered at the sentencing phase of a defendant's separate trial if the co-defendant's record has not been introduced into evidence because judicial notice may not be taken of the record in a separate case. *Throneberry v. State*, 102 Ark. App. 17, 279 S.W.3d 489 (2008), review denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 563 (Sept. 4, 2008).

Arkansas Workers' Compensation Commission did not err in failing to take judicial notice of an executed form AR-N because appellants failed to make their record on the

issue at the initial hearing before the administrative law judge. *St. Joseph's Mercy Med. Ctr. v. Redmond*, 2012 Ark. App. 7, — S.W.3d —, 2012 Ark. App. LEXIS 8 (Jan. 4, 2012).

### Medical Reference Book.

The Physician's Desk Reference is a manual found in physicians' offices, pharmacies, and attorneys' offices, and is universally recognized as having reasonably indisputable accuracy. Thus, under this rule, judicial notice of the book might be taken for some purposes at the appellate and trial levels. *West v. Searle & Co.*, 305 Ark. 33, 806 S.W.2d 608 (1991).

Judicial notice of warnings appearing in the Physician's Desk Reference was declined where the plaintiff was never given the opportunity to be heard on the propriety of taking judicial notice, and where the reference book was periodically modified, such that it was not clear that the warnings offered as evidence were of the same date as those to which the defendant physician referred. *West v. Searle & Co.*, 305 Ark. 33, 806 S.W.2d 608 (1991).

It was a definite mistake to find that the administering of melatonin was a basis for determining that the children were dependent-neglected, because the record was devoid of any evidence related to melatonin, i.e., its uses, dosage, side effects, etc., and the trial court had no basis in fact for finding melatonin use to be harmful to children. *Johnson v. Ark. Dep't of Human Servs.*, 2012 Ark. App. 244, — S.W.3d —, 2012 Ark. App. LEXIS 364 (Apr. 11, 2012).

**Cited:** *Ward v. Meyers*, 265 Ark. 448, 578 S.W.2d 570 (1979); *Briggs v. State*, 18 Ark. App. 292, 715 S.W.2d 223 (1986); *Walker v. State*, 304 Ark. 393, 803 S.W.2d 502 (1991), questioned *Bradley v. State*, 306 Ark. 621, 816 S.W.2d 605 (1991); *Kolb v. Morgan*, 313 Ark. 274, 854 S.W.2d 719 (1993); *Hempel v. Bragg*, 313 Ark. 486, 856 S.W.2d 293 (1993); *Beck v. State*, 317 Ark. 154, 876 S.W.2d 561 (1994).

## ARTICLE III. PRESUMPTIONS

### Rule 301. Presumptions in general in civil actions and proceedings.

(a) *Effect.* In all actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

(b) *Inconsistent Presumptions.* If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight neither presumption applies.



## RESEARCH REFERENCES

**Ark. L. Notes.** Gitelman and Watkins, No Requiem for Ricarte: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

Sampson, Burden Shifting in Will Contest Cases: An Examination and a Proposal that the Arkansas Supreme Court Reconcile Arkansas Rules of Evidence Rule 301 with its Undue Influence Case Law, 1996 Ark. L. Notes 87.

**U. Ark. Little Rock L.J.** Survey of Arkansas Law, Evidence, 1 U. Ark. Little Rock L.J. 191.

Legislative Survey, Civil Procedure, 4 U. Ark. Little Rock L.J. 581.

## CASE NOTES

**Designed Concealment.**

Where the provision in an antenuptial agreement is disproportionate to the means of the intended husband, a presumption of designed concealment is raised, which throws the burden upon those claiming in his right to prove that there was full knowledge on the

part of the intended wife of all that materially affected the contract. *Faver v. Faver*, 266 Ark. 262, 583 S.W.2d 44 (1979).

**Cited:** *Kroger Co. v. Standard*, 283 Ark. 44, 670 S.W.2d 803 (1984); *Wal-Mart Stores, Inc. v. Yarbrough*, 284 Ark. 345, 681 S.W.2d 359 (1984).

**Rule 302. Applicability of federal law in civil actions and proceedings.**

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.

## CASE NOTES

**In General.**

Questions concerning the admissibility of evidence are matters of state law and are subject to review in federal court only when the alleged error infringed upon a specific federal constitutional right or was so grossly

prejudicial that it fatally infected the trial and did not afford a litigant the fundamental fairness which is the essence of due process. *Harris v. Norris*, 864 F. Supp. 96 (E.D. Ark. 1994).

**Rule 303. Presumptions in criminal cases.**

(a) *Scope.* Except as otherwise provided by statute, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(b) *Submission to Jury.* The court is not authorized to direct the jury to find a presumed fact against the accused. If a presumed fact establishes guilt or is an element of the offense or negatives a defense, the court may submit the question of guilt or of the existence of the presumed fact to the jury, but only if a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. If the presumed fact has a lesser effect, the question of its existence may be submitted to the jury provided the basic facts are supported by substantial evidence or are otherwise established, unless the court determines that a reasonable juror on the evidence as a whole could not find the existence of the presumed fact.

## CASE NOTES

**Cited:** *Smith v. State*, 264 Ark. 874, 575 S.W.2d 677 (1979).

## ARTICLE IV. RELEVANCY AND ITS LIMITS

**Rule 401. Definition of “relevant evidence”.**

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**Cross References.** Payment of damage claim, admissibility, § 27-53-403.

## RESEARCH REFERENCES

**ALR.** Construction and application of silent witness theory. 116 ALR 5th 373.

Admissibility and use of evidence of nonuse of bicycle helmets. 2 ALR 6th 429.

**Ark. L. Rev.** Recent Developments: Criminal Law — Evidence: What Constitutes Relevant Evidence in Rape Trial When Defense Is Consent, 32 Ark. L. Rev. 826.

Notes, A Restrictive Interpretation of Rule 704 of the Arkansas Uniform Rules of Evidence: *Grambling v. Jennings*, 36 Ark. L. Rev. 178.

Case Note, *Roberts v. State*: A Limitation on the Impeachment of Witnesses by Extrinsic Evidence of Prior Inconsistent Statements, 37 Ark. L. Rev. 688.

Arkansas Adopts a Second Admissibility

Test for Novel Scientific Evidence: Do Two Tests Equal One Standard?, 56 Ark. L. Rev. 21.

Note, *The Arkansas Rape-Shield Statute: Does It Create Another Victim?*, 58 Ark. L. Rev. 949.

**U. Ark. Little Rock L.J.** Impeachment of One’s Own Witness by Prior Inconsistent Statements Under the Federal and Arkansas Rules of Evidence, *Perroni*, 1 U. Ark. Little Rock L.J. 277.

Evidence — Novel Scientific Evidence — DNA Profiling Held Admissible Under the Relevancy Standard. *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991), 15 U. Ark. Little Rock L.J. 71.

## CASE NOTES

## ANALYSIS

In general.

Absent witness.

Admissible evidence.

Child rape victims.

Circumstantial evidence.

Codefendant’s father’s testimony.

Corroboration of accomplice.

Corroboration of confession.

Corroboration of rape victim.

Credibility of witness.

Defendant’s state of mind.

Discretion of court.

Entrapment defense.

Evidence of abortion.

Evidence of dangerous instrumentalities.

Evidence of death.

Evidence of drug use.

Evidence of identity.

Evidence of intent.

Evidence of kinship.

Evidence of rape.

Evidence of rehabilitation.

Evidence of robbery.

Evidence of similar occurrences.

Evidence of violation of regulation.

Evidence of weapons.

Exclusion of irrelevant testimony.

Fingerprint evidence.

Harmless error.

Inadmissible evidence.

Inference of guilt.

Limitation on liability.

Motive.

Negligence.

No prejudicial error.

Opinion testimony.

Photographs.

Pleadings.

Prejudicial error.

Preservation of argument.

Prior activity.

Prior criminal activity.

Prior inconsistent statements.



Prior relationship.  
Punitive damages.  
Relevance argument waived.  
Sexual history of victim.  
Sham transaction.  
Sketch of suspect.  
Testimony by victim's family.  
Testimony establishing relevancy.  
Threats against victim.  
Victim impact evidence.  
Videotapes.  
Weight of probative value.

### **In General.**

In an action to recover for personal injuries, the testimony of an orthopedic specialist that he had been notified by a reviewing committee of the state medical society that his charges were three times the maximum charge of the average orthopedist was relevant to the credibility of the specialist's assertion that his bill for treatment of the plaintiff was reasonable. *Hubbard v. Sharpe*, 261 Ark. 829, 552 S.W.2d 21 (1977).

Evidence is relevant if the item of evidence reasonably shows that a fact is slightly more probable than it would appear without the evidence. *Dooley v. Cecil Edwards Constr. Co.*, 13 Ark. App. 170, 681 S.W.2d 399 (1984).

Under this rule, evidence need only have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993), cert. denied 510 U.S. 1197, 114 S. Ct. 1306, 127 L. Ed. 2d 657 (1994).

Defendant's proffered testimony of false allegations against him showed nothing more than the fact that the victim's sister had lied about defendant in the past and it was not probative of the issue of the victim's veracity or her bias or prejudice against defendant; defendant failed to connect the dots between the proffered evidence and the charges against him such that his theory was speculative at best. *Martin v. State*, 354 Ark. 289, 119 S.W.3d 504 (2003).

Although defendant had been accused but not yet convicted of forgery, evidence that defendant was out on bond when he committed residential burglary and theft of property provided proof of his character and was relevant to the jury's determination of an appropriate punishment; the jury need not have learned of the details of defendant's bond requirements to understand that the fact that defendant was out on bond when he committed the new crimes said something about his character. *Helms v. State*, 92 Ark. App. 79, 211 S.W.3d 53 (2005).

### **Absent Witness.**

Where defendant claimed he was coerced into not reporting the crime because of

threats by the codefendant, but where the evidence of duress did not bear on the issue of defendant's guilt or innocence of the offense charged but, rather, bore only upon why defendant had not reported the crime, and there was no assertion made that defendant was coerced into committing the offense, codefendant's absence as a witness was not prejudicial and at most harmless error. *McGuire v. State*, 265 Ark. 621, 580 S.W.2d 198 (1979).

### **Admissible Evidence.**

Where in a prosecution for possession of marijuana with intent to deliver and delivery, all the bags were seized at the same place and time, defense counsel did not object to the chain of custody, and nothing in the record suggested that anyone substituted something other than marijuana in the untested bags, the fact that only four of the nine bags seized were tested was of no consequence since the trial judge could conclude from the representative sampling and testing that the remaining bags also consisted of marijuana. *Crossno v. State*, 15 Ark. App. 341, 692 S.W.2d 626 (1985).

Evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene. *Oglesby v. State*, 299 Ark. 403, 773 S.W.2d 443 (1989).

Where there was evidence that defendant scaled a chain-link fence adjacent to the building he attempted to enter illegally and was apprehended within that enclosure, the trial judge did not abuse his discretion in admitting items found along the chain-link fence adjacent to the building a few days later, into evidence for the consideration of the jury. *Ward v. State*, 35 Ark. App. 148, 816 S.W.2d 173 (1991).

In prosecution for capital murder and first-degree battery by poison, trial court did not abuse its discretion in admitting the bottle of rat poison. *Weaver v. State*, 324 Ark. 290, 920 S.W.2d 491 (1996).

In a medical malpractice action brought after her husband died from surgery, evidence that a wife was prohibited from introducing was completely relevant and essential to her cause of action, and its "prejudice" was not unfair where she attached copies of a number of documents that contained evidence of her husband's surgeon's mental impairment, abuse of nitrous oxide gas, and use of Prozac at or before the time of the surgery, excerpts from the surgeon's testimony before the medical board, his sealed medical records, and the affidavits of two doctors who both opined that, on the day of the surgery, the surgeon was impaired and that he breached the applicable standard of care. *Turner v. Northwest Ark. Neurosurgery Clinic, P.A.*, 84 Ark. App. 93, 133 S.W.3d 417 (2003).

Where injured truck driver had described

his injuries from a 1999 accident by stating they were insubstantial, but the 2000 demand letter stemming from that accident indicated that he had suffered substantial injuries similar to those he sustained in the 2001 accident, the 2000 demand letter was admissible for impeachment purposes at the damages trial for the 2001 accident; it was also reasonable for the 2004 jury to know the extent of truck driver's claims of injuries from the 1999 accident. *House v. Volunteer Transp., Inc.*, 365 Ark. 11, 223 S.W.3d 798 (2006).

During defendant's trial for committing a terroristic act, the trial court erred in excluding testimony from defendant's mother regarding a computer-generated threat to defendant's life; the testimony was relevant to the issue of self-defense. However, defendant failed to show prejudice by the ruling. *McKeever v. State*, 367 Ark. 374, 240 S.W.3d 583 (2006).

Circuit court properly allowed car manufacturer to introduce Japanese and Canadian reports on sudden acceleration into evidence in mother's defective design action as the evidence was relevant to support manufacturer's claim that it did not act with malice in response to mother's request for punitive damages; the evidence's relevance was not outweighed by the danger of unfair prejudice because the mother had ample opportunity to prepare to defend against the reports, as their admission was a contested issue until and throughout the trial. *Chapman v. Ford Motor Co.*, 368 Ark. 328, 245 S.W.3d 123 (2006).

In a trespass to timber action, a circuit court did not err in allowing the landowner's expert to testify as to the fair market value of all of the timber removed from the property, including that which was removed prior to the date the land was transferred to a trust, even though the landowner could not recover for timber removed prior to that date, because the evidence was relevant to prove defendants' wrongful conduct under this rule for purposes of an award of treble damages under § 18-60-102, of double damages under § 15-32-301, and of punitive damages. *Travis Lumber Co. v. Deichman*, 2009 Ark. 299, 319 S.W.3d 239 (2009).

Counsel was not ineffective for failing to use photographs showing a victim at a party in the days after her rape because the photographs were of questionable relevance; the fact that she did not, in defendant's view, look like a victim some days after the event was irrelevant to the question of whether he raped her. *Prater v. State*, 2012 Ark. 164, — S.W.3d —, 2012 Ark. LEXIS 190 (Apr. 19, 2012).

### **Child Rape Victims.**

How, when and from whom the children who were rape victims acquired their knowledge of sexual matters did not make it more or less likely that the defendant committed

rape, and the trial court did not abuse its discretion in its ruling that the proffered testimony was not relevant or material. *Griswold v. State*, 304 Ark. 168, 801 S.W.2d 270 (1990).

Defendant's rape conviction was proper because the circuit court did not abuse its discretion in finding the testimony of a supervisor with the Crimes Against Children Division of the Arkansas State Police relevant. The victim did not come forward until after years and years of abuse and the supervisor's testimony explained the typical behaviors of abused children that she had witnessed; she explained that it was common for a child victim to not make a disclosure and that there could be several reasons for that behavior. *Chunestudy v. State*, 2012 Ark. 222, — S.W.3d —, 2012 Ark. LEXIS 246 (May 24, 2012).

### **Circumstantial Evidence.**

Where testimony in a prosecution for murder indicated that defendant did not have any paper money with him while at a tavern from which he left with the victim who had been paid and was observed with a sizable amount of paper money in his possession, it was proper to admit into evidence under this rule a blood stained dollar bill found on defendant after his arrest, even though the stain could not be typed, as well as testimony of a serologist to that effect, since that evidence tended to show, as circumstantial evidence, that defendant killed the victim in the course of a robbery. *Linder v. State*, 273 Ark. 470, 620 S.W.2d 944 (1981).

Where in a prosecution for rape and burglary, there was evidence that a ski cap was found several blocks away from the residence of the victim, that the cap was dry while the ground was wet with dew, and that several hairs found in the cap were similar to the defendant's hair, such evidence was relevant and was properly admitted. *Kellensworth v. State*, 275 Ark. 252, 631 S.W.2d 1 (1982).

Where the state's theory was that the murders were cult-related, and there was additional evidence about occult practices, a book about the occult and evidence that the defendant had been seen dressed like a wizard provided a circumstantial link and was therefore relevant. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

It is matters of common knowledge that illicit drug sales are ordinarily cash transactions and that those involved in selling drugs frequently do not conduct such transactions from an ordinary storefront during regular business hours, but instead must be reached at various times and locations; therefore, the trial court could properly conclude that defendant's possession of a significant amount of



cash and a pager was relevant to the question of his intent to deliver the cocaine that he possessed. *Jackson v. State*, 52 Ark. App. 7, 914 S.W.2d 317 (1996).

Where the purpose of evidence is to disclose a motive for killing, anything and everything that might have influenced the commission of the act may, as a rule, be shown; any circumstance that ties a defendant to the crime or raises a possible motive for the crime is independently relevant and admissible as evidence. *Morris v. State*, 358 Ark. 455, 193 S.W.3d 243 (2004).

#### **Codefendant's Father's Testimony.**

In prosecution for possession of marijuana with intent to deliver, trial court correctly permitted codefendant's father to testify that defendant proposed that codefendant admit guilt and defendant would subsequently get him out of jail inasmuch as such testimony supported codefendant's version of the crime, and rebutted defendant's testimony. *Sanders v. State*, 262 Ark. 595, 559 S.W.2d 704 (1977), aff'd 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979).

#### **Corroboration of Accomplice.**

Where the testimony of the witnesses clearly showed that the automobile had not been tampered with and was in essentially the same condition as it was when the defendant sold it several days after the homicide, the trial judge did not abuse his discretion in admitting a portion of a bloodstained seat cover into evidence since it was relevant as having a tendency to corroborate the accomplice's testimony. *Bly v. State*, 267 Ark. 613, 593 S.W.2d 450 (1980).

#### **Corroboration of Confession.**

Although every item of evidence to which defendant objected served to corroborate some aspect of the defendant's confession, the evidence was relevant as it was offered by the State to corroborate other evidence. *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996), cert. denied, 519 U.S. 898, 117 S. Ct. 246, 136 L. Ed. 2d 174 (1996).

#### **Corroboration of Rape Victim.**

In prosecution for rape, the trial court did not err in allowing articles of the defendant's clothing to be introduced into evidence together with testimony that there were human bloodstains on the clothing, where this evidence tended to corroborate the testimony of the rape victim, the police officers, and the medical examiner, and where it also tended to contradict the statement of the defendant that he had been in the car for only a period of time as to allow him to drive three or four blocks. *Brewer v. State*, 269 Ark. 185, 599 S.W.2d 141 (1980).

#### **Credibility of Witness.**

Where a defendant accused of driving while intoxicated alleged that the officer making the arrest treated him abusively, the officer's alleged refusal to administer breathalyzer test after defense attorney's arrival was relevant evidence which the jury should have been allowed to consider as bearing on the officer's credibility. *Hice v. State*, 11 Ark. App. 184, 668 S.W.2d 552 (1984).

Questions to, and answers by, the defendant and a defense witness regarding their beliefs concerning the court's authority over them were relevant to their credibility as the evidence showed that they questioned the authority of the court to hear the case and that their commitment to tell the truth in a court whose authority they questioned might be doubtful. *Fowler v. State*, 339 Ark. 207, 5 S.W.3d 10 (1999), cert. denied 529 U.S. 1055, 120 S. Ct. 1558, 146 L. Ed. 2d 462 (2000).

In a witness bribery case, a trial court erred in excluding evidence that the state's main witness could have been biased due to a quiet title lawsuit two years earlier between the witness's parents and the defendant's parents. *Paschal v. State*, 2012 Ark. 127, — S.W.3d —, 2012 Ark. LEXIS 158 (Mar. 29, 2012).

#### **Defendant's State of Mind.**

The trial court in a first-degree murder case properly excluded the opinion of the arresting officer that the defendant was "scared to death" at the time of his arrest, despite the fact that Rule 701 permits even lay witnesses to describe whether a defendant was angry, nervous or scared, since the defendant's state of mind after the shooting has no relevance under this rule and Rule 402, tending to make the existence of a consequential fact more or less probable than it would be without the evidence, and since the excluded testimony was merely repetitious to that presented by the defendant himself as to his actions after the shooting. *Graham v. State*, 2 Ark. App. 266, 621 S.W.2d 4 (1981).

Defendant's attempt to induce the victim to drop the charges with an offer of restitution, as evidence of defendant's knowledge of his own guilt, was probative evidence not outweighed by the danger of its unfair prejudice. *Wallace v. State*, 55 Ark. App. 114, 932 S.W.2d 345 (1996).

In a prosecution for capital felony murder, evidence the defendant was receiving Social Security checks for a mental disability was inadmissible to show lack of mental capacity, absent a showing that the standard for determining entitlement to such aid was the same as the statutory description of lack of capacity to engage in criminal misconduct. *Bowden v. State*, 328 Ark. 15, 940 S.W.2d 494 (1997).

Evidence of a defendant's mental condition, even if it does not show mental disease or



defect sufficient to constitute a defense, is relevant on the issue of the culpable mental state. *Sharp v. State*, 90 Ark. App. 81, 204 S.W.3d 68 (2005).

Trial court did not err during defendant's trial for aggravated robbery in granting the state's motion in limine restricting evidence of a subsequent murder in support of defendant's affirmative defense of duress because even if evidence of the murder was relevant, and therefore potentially admissible, Ark. R. Evid. 405(b) would have kept it out because the specific instance of conduct was not relevant to the defense; a murder by another person that occurred three hours after the robberies could not have affected defendant's state of mind during the preceding robberies. *Bell v. State*, 2010 Ark. App. 814, — S.W.3d —, 2010 Ark. App. LEXIS 864 (Dec. 8, 2010).

#### **Discretion of Court.**

The Supreme Court will not reverse a ruling on relevancy unless it finds an abuse of the trial court's discretion in the matter. *Hamblin v. State*, 268 Ark. 497, 597 S.W.2d 589 (1980).

A ruling on relevancy is discretionary with the trial court and its decision will not be reversed unless an abuse of the trial court's discretion in the matter is found. *Kellensworth v. State*, 278 Ark. 261, 644 S.W.2d 933 (1983); *James v. State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984); *Dooley v. Cecil Edwards Constr. Co.*, 13 Ark. App. 170, 681 S.W.2d 399 (1984); *Shelter Mut. Ins. Co. v. Tucker*, 295 Ark. 260, 748 S.W.2d 136 (1988); *Demarest v. State*, 25 Ark. App. 203, 755 S.W.2d 577 (1988); *James v. James*, 29 Ark. App. 226, 780 S.W.2d 346 (1989); *Skiver v. State*, 37 Ark. App. 146, 826 S.W.2d 309 (1992).

A trial court's decision regarding relevancy is entitled to great weight and will be reversed only if the court abused its discretion. *Dixon v. State*, 311 Ark. 613, 846 S.W.2d 170 (1993).

In a capital murder prosecution arising from the shooting of a police officer, the court did not abuse its discretion in refusing to allow expert testimony that childhood abuse of the defendant led to a state of mind in which the defendant acted impulsively in response to a perceived attack, given evidence that the defendant was crouched beside a stolen vehicle he had been driving while facing an officer when he turned and shot another officer who was about to apprehend him. *Ford v. State*, 334 Ark. 385, 976 S.W.2d 915 (1998).

Trial court did not abuse its discretion in excluding the proffered testimony of a witness who purportedly would have corroborated defendant's assertion that officers beat him beside the road where that witness could not testify to having seen any such physical con-

tact and could not positively identify either the officers or defendant. *Miles v. State*, 348 Ark. 544, 75 S.W.3d 677 (2002).

#### **Entrapment Defense.**

Information, amended information and arrest warrants allegedly filed and issued prior to the existence of any conspiracy on the part of defendants were relevant to the issue of entrapment, and it was an abuse of discretion for the trial judge to refuse to admit them. *Sweat v. State*, 5 Ark. App. 284, 635 S.W.2d 296 (1982), cert. denied, 469 U.S. 1172, 105 S. Ct. 933, 83 L. Ed. 2d 944 (1985).

Where there was evidence to suggest that the initial inducement to commit the offense charged (possession of marijuana with intent to deliver) came from police officers, and taped conversations which the officers had with third party indicated that the officers used him as a "go-between" with the defendants, as some of the statements made during the taped conversations were material to the defendants' claims of entrapment, it was error for the trial judge to refuse to allow the video tapes and audio recordings into evidence, even though much of the material on the tapes was irrelevant. *Sweat v. State*, 5 Ark. App. 284, 635 S.W.2d 296 (1982), cert. denied, 469 U.S. 1172, 105 S. Ct. 933, 83 L. Ed. 2d 944 (1985).

Evidence having any tendency to make the existence of entrapment more probable is admissible. *Young v. State*, 308 Ark. 647, 826 S.W.2d 814 (1992).

#### **Evidence of Abortion.**

Evidence of witness' abortions excluded where neither the pregnancy nor the abortions were relevant to any issue in the case, because they did not go to the credibility, believability, truthfulness, or veracity of the witness under this rule or Evid. Rules 608 and 609; and, in addition, even if relevant, the prejudicial impact would outweigh any probative value under Evid. Rule 403 because of the controversial nature of abortion. *Billett v. State*, 317 Ark. 346, 877 S.W.2d 913 (1994).

#### **Evidence of Dangerous Instrumentalities.**

The instrumentality used to inflict fear is patently relevant to crimes of rape, kidnapping and aggravated robbery, all of which include an element of force for perpetration. *Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119 (1992).

Knife found at crime site was relevant to corroborate the testimony of the victim concerning stabbings, and no prejudice resulted to the defendant. *Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119 (1992).

On trial for solicitation to commit first-degree murder, evidence of the instrumentality to be used in the murder was entirely relevant, since it clearly evidenced the pur-

pose of the solicitation as well as the means that defendant promoted to perpetrate foul play. As such, a simulated bomb and a videotape depicting its detonation qualified as proof of a material fact under this rule. *Loy v. State*, 310 Ark. 33, 832 S.W.2d 499 (1992).

Defendant's convictions for capital murder and committing a terroristic act were appropriate because evidence of ammunition taken from his former home was relevant and admissible since the shell casings at the scene of the drive-by shooting were the exact types found at defendant's former home and that related to his and his alleged accomplices' knowledge of those types of ammunition, their access thereto, and to their guilt. *Banks v. State*, 2010 Ark. 108, 366 S.W.3d 341 (2010).

### **Evidence of Death.**

Under this rule, a vivid and detailed explanation of the death of a fetus was neither relevant nor properly admissible. *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584 (1987).

In a murder case, the court did not err by allowing the state to question the medical examiner about strangulation as a cause of death where the issue was critical to the state's case and defendant suffered no unfair prejudice; defendant confessed to his son that he got his wife in a choke hold and did not let her go, the jury was not misled by testimony, and the medical examiner's opinion on the cause of death was highly probative. *Wyles v. State*, 357 Ark. 530, 182 S.W.3d 142 (2004).

### **Evidence of Drug Use.**

In defendant's manslaughter case stemming from a head-on collision that occurred as a result of defendant's reckless driving, the trial court did not err in permitting the state to introduce into evidence pipes with cocaine residue that were found in defendant's vehicle because the drug paraphernalia was relevant to the state's theory of the case that defendant was driving while under the influence of drugs and because the evidence made it more probable that defendant had ingested cocaine at some point prior to the accident. *Rollins v. State*, 2009 Ark. 484, 347 S.W.3d 20 (2009).

### **Evidence of Identity.**

The discovery of the rape victim's charm bracelet in a room which had been occupied by the defendant after the crime had a tendency to make his identity as the perpetrator more probable than it would have been without that evidence; therefore, the charm bracelet was relevant and admissible. *Kellensworth v. State*, 278 Ark. 261, 644 S.W.2d 933 (1983).

### **Evidence of Intent.**

Documents written by the defendant describing aggravated robbery scenarios were relevant to the crime since whether defendant intended to commit aggravated robbery was a

material issue. *Cook v. State*, 345 Ark. 264, 45 S.W.3d 820 (2001).

In defendant's stalking case, the court properly admitted testimony regarding the shredding of the victim's patio furniture and the "keying" of her truck because there was evidence that defendant had engaged in a number of harassing tactics throughout the course of the case, and the evidence of damage to her personal property, which began after the victim and defendant separated, had a tendency to show that he was engaging in conduct in order to harass her. *Lowry v. State*, 90 Ark. App. 333, 205 S.W.3d 830 (2005).

Defendant's convictions for capital murder and kidnapping were appropriate because the police officers' testimony linking defendant to a maroon vehicle did not violate Ark. R. Evid. 404(b) since it was not offered for the purpose of showing that he was a bad character, nor was it offered to show a pattern of behavior; rather, it was offered to demonstrate defendant's identity as the driver of a vehicle that was seen near both crime scenes. The evidence was relevant and not too remote in time from the commission of the crimes. *Gilcrease v. State*, 2009 Ark. 298, 318 S.W.3d 70 (2009).

### **Evidence of Kinship.**

Where one of the issues presented to the court was whether a particular person was the heir at law of a particular decedent, and one witness testified decedent had told her she had had an illegitimate son named after one of their cousins, a birth certificate for such an illegitimate son with that name is relevant as tending to make this fact more probable within this rule. *Sims v. First Nat'l Bank*, 264 Ark. 378, 571 S.W.2d 600 (1978).

### **Evidence of Rape.**

Where the similarity between the microscopic particle found on the sheets and those found on defendant's clothing when he was arrested had a tendency to make his identity as the rapist more probable than it would have been without that evidence, the evidence was therefore relevant. *Parker v. State*, 266 Ark. 13, 582 S.W.2d 34 (1979).

The trial court in a rape prosecution properly excluded, on the basis of relevancy, testimony offered by the defendant's sister that she had observed the victim masturbating approximately two weeks prior to the alleged rape, where there was no evidence presented which indicated that the victim's injuries were caused by masturbation and where the examining physician testified unequivocally that the injuries occurred at most, three to four days prior to the alleged rape. *Pruitt v. State*, 8 Ark. App. 350, 652 S.W.2d 51 (1983).

During defendant's trial for the rape of his nine-year-old stepdaughter, the trial court correctly applied the pedophile exception to Ark. R. Evid. 404(b) when admitting testi-



mony from another young woman, who testified that she had been molested by digital penetration by defendant when she was a child, because the similarities were significant and probative on the issue of defendant's deviate sexual impulses; the probative value of the evidence was not substantially outweighed by any danger of unfair prejudice. *Eubanks v. State*, 2009 Ark. 170, 303 S.W.3d 450 (2009).

#### **Evidence of Rehabilitation.**

The trial court did not err in excluding evidence of the defendant's rehabilitation through counseling subsequent to crimes of carnal abuse and sexual abuse since such evidence did not extenuate or reduce the degree of moral culpability but was merely offered to show that defendant was unlikely to commit such crimes again. *James v. State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984).

#### **Evidence of Robbery.**

Evidence that the victim had been robbed of \$68.00 and that defendant was found shortly thereafter with \$52.52 on him was relevant and admissible. *Logan v. State*, 264 Ark. 920, 576 S.W.2d 203 (1979).

Items which were seized pursuant to a search warrant and then identified by victim as those things which were in his automobile when it was stolen were relevant and admissible in prosecution for robbery and theft where there was testimony connecting defendant with items and vehicles. *Phillips v. State*, 271 Ark. 96, 607 S.W.2d 664 (1980).

Trial court did not err in admitting testimony about the victim's subsequent death a month after the robbery because the evidence of the victim's death was clearly relevant to prove death or serious physical injury as an element of the offense of aggravated robbery, § 5-12-103(2). *Medlock v. State*, 79 Ark. App. 447, 89 S.W.3d 357 (2002).

In a capital murder case, testimony of witness who overheard a conversation about the location of a planned robbery was relevant and not unduly prejudicial because it placed defendant at the scene of a later double homicide. *Harris v. State*, 366 Ark. 190, 234 S.W.3d 273 (2006).

#### **Evidence of Similar Occurrences.**

Evidence of similar occurrences is admissible only when it is demonstrated that the events arose out of the same or substantially similar circumstances; and the burden rests on the party offering such evidence to prove that the necessary similarity of conditions exists. *Houston Gen. Ins. Co. v. Arkansas La. Gas Co.*, 267 Ark. 544, 592 S.W.2d 445 (1980).

Where the defendant gas company offered no evidence that the conditions surrounding other fires, including one fire ascertained as being caused by arson, were similar to the fire involved in this case, the trial court erred in

permitting the local fire chief to testify on behalf of the defendant company concerning his investigation as to the cause of several other explosions and fires which had occurred in the vicinity a few months before and after the explosion and fire causing the damages here, since that testimony as presented was not relevant to the cause of this particular fire. *Houston Gen. Ins. Co. v. Arkansas La. Gas Co.*, 267 Ark. 544, 592 S.W.2d 445 (1980).

The trial court in a personal injury action arising from an automobile collision did not abuse its discretion in excluding the proffered testimony of the investigating officer, regarding similar automobile accidents in the near vicinity within the general time frame, which was offered to show that weather conditions contributed to the accident. *Williams v. Gates*, 275 Ark. 381, 630 S.W.2d 34 (1982).

In a contract action brought by a general contractor and a subcontractor to recover the value of work performed in Arkansas, testimony about the existence of a lawsuit in Oklahoma between the same parties for construction work performed there was relevant since it suggested a reason why defendants would refuse to pay the contractors for work performed in Arkansas. Being relevant and not unfairly prejudicial, this evidence was admissible. *Doolley v. Cecil Edwards Constr. Co.*, 13 Ark. App. 170, 681 S.W.2d 399 (1984).

Before evidence of subsequent incidents may be received into evidence, a proper foundation demonstrating the probative relevancy of this information must be presented. *Turner v. Lamitina*, 297 Ark. 361, 761 S.W.2d 929 (1988).

In a sexual assault case, introduction of evidence that defendant had stopped another church member and persuaded that victim to go to an isolated area where unwanted sexual advances were made was relevant to show modus operandi and lack of consent by the second victim and, as such, did not violate Ark. R. Evid. 403. *Davis v. State*, 362 Ark. 34, 207 S.W.3d 474 (2005).

Where the employee allegedly sustained a left-knee injury while working at a restaurant, the employer contested her workers' compensation claim, arguing that it had no notice of the injury. The Arkansas Workers' Compensation Commission did not err by allowing the employee to cross-examine the restaurant owner about other instances where he denied receiving notice about an alleged work injury; evidence of similar occurrences was admissible under this rule. *Steak House v. Weigel*, 101 Ark. App. 81, 270 S.W.3d 365 (2007).

#### **Evidence of Violation of Regulation.**

Absence of a state-mandated lifeline was relevant under this rule as: (1) the violation of a government regulation was evidence of negligence; (2) the purposes of a lifeline were to

demarcate the shallow and deep ends of the pool and to provide a swimmer with something to grasp onto, which were relevant to proximate cause; and (3) the substantial probative value of the violation was not substantially outweighed by the danger of unfair prejudice under Ark. R. Evid. 403. *Bishop v. Tariq, Inc.*, 2011 Ark. App. 445, — S.W.3d —, 2011 Ark. App. LEXIS 477 (June 22, 2011).

#### **Evidence of Weapons.**

In a capital murder trial, the court erred by admitting evidence of the .22 caliber rifle seized from defendant's house where the rifle was not the murder weapon and admission of evidence of the rifle did not support the state's theory that defendant disposed of the actual murder weapon; however, evidence of .22 caliber ammunition was relevant to prove that defendant possessed the means to kill the victim. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003).

Even if Ark. R. Evid. 404(b) did apply, evidence that defendant possessed a .380 caliber handgun was certainly relevant in light of the fact that a .380 caliber shell hull was recovered at the scene of the crime and the trial court did not err in admitting the testimony. *White v. State*, 2009 Ark. 374, 326 S.W.3d 421 (2009).

Codefendant's gun possession charge was not relevant under this rule as defendant did not assert at the trial level, and did not assert on appeal, that the codefendant actually shot two victims; the defense was a general denial that defendant had anything to do with the crime, and whether the codefendant later possessed a gun, unrelated to the crimes defendant was accused of perpetrating, had little, if any, value considering defendant's blanket denial of participation in the crime. *Jackson v. State*, — Ark. —, — S.W.3d —, 2011 Ark. LEXIS 19 (Jan. 20, 2011).

#### **Exclusion of Irrelevant Testimony.**

Trial court did not err in excluding any mention of a doctor who had been involved as a consultant and legal assistant on a patient's malpractice case because the fact that the doctor participated in consulting with two of the patient's experts had no relevance nor had the fact that he had been convicted of drug possession, causing him to lose his medical license. *McCoy v. Montgomery*, 370 Ark. 333, 259 S.W.3d 430 (2007).

Although if any part of a malpractice settlement received by a father was paid for loss of consortium to his new wife, it would have been error for a circuit court to base a child-support award on the entire settlement, the circuit court did not err in excluding the proffered evidence regarding the settlement because the proffered evidence did not have any tendency to prove that any portion of the settlement was issued for that element of

damages. *Fusher v. Fusher*, 103 Ark. App. 158, 287 S.W.3d 624 (2008).

#### **Fingerprint Evidence.**

Where trial court refused to allow defendant to introduce evidence which was admittedly hearsay because the FBI fingerprint expert was not available to testify that defendant's fingerprints had not been found at the scene of a robbery, while those of his accomplice were allowed into evidence, the trial court was correct in so admitting the accomplice's fingerprints, since, in light of defendant's testimony that he and accomplice had served time together in a penitentiary and had seen each other frequently after their release, the fact that the accomplice's fingerprints were found at the robbery scene was relevant under this rule. *Loane v. State*, 271 Ark. 797, 611 S.W.2d 190 (1981).

#### **Harmless error.**

In a case involving terroristic acts under § 5-13-310(a)(1), the exclusion of a computer-generated threat to bolster a self-defense claim under § 5-2-606 was error since the evidence was relevant; however, the error was harmless since evidence of other threats could have been elicited. *McKeever v. State*, 367 Ark. 374, 240 S.W.3d 583 (2006).

Although the gay-themed books were improperly admitted into evidence, any error was harmless in light of the wealth of other evidence of defendant's homosexual lifestyle; further, pornographic videos and photographs were properly admitted where two victims were in the photographs and they corroborated other victims' testimony. *Simmons v. State*, 95 Ark. App. 114, 234 S.W.3d 321 (2006).

Trial court's error in admitting evidence of a neighbor as to incidents when defendant's three children were left unsupervised, if any, was harmless given the overwhelming evidence of defendant's guilt in allowing the abuse of her child by her boyfriend. *Sullivan v. State*, 2011 Ark. App. 576, — S.W.3d —, 2011 Ark. App. LEXIS 620 (Sept. 28, 2011).

#### **Inadmissible Evidence.**

Evidence of acts of individuals while watching films not at issue at the trial could not be considered relevant evidence in the determination of whether movies and the magazine obtained from defendant's store were obscene material. *Oglesby v. State*, 299 Ark. 403, 773 S.W.2d 443 (1989).

Proffered publications properly excluded. *Bice v. Hartford Accident & Indem. Co.*, 300 Ark. 122, 777 S.W.2d 213 (1989).

Circuit court did not err in excluding the finding of the Arkansas State Board of Chiropractic Examiners that the physical therapist was practicing chiropractic medicine without a license because the board did not find that his practice of chiropractic medicine was neg-



ligent or below the standard of care; the court found that the fact that the therapist had committed a statutory violation would have been unfairly prejudicial. *Fryar v. Touchstone Physical Therapy, Inc.*, 365 Ark. 295, 229 S.W.3d 7 (2006).

Trial court did not err in sustaining state's objection that the terms of the civil dispute regarding a loan and the collateral for the loan were irrelevant and in refusing to permit defendant to question the victim concerning the property that had been collateral for the loan because, even if the victim had lied regarding the terms of the loan, that would be no defense to the crimes for which he was convicted, which included kidnapping, terroristic threatening, and aggravated assault. *Tarpley v. State*, 97 Ark. App. 122, 245 S.W.3d 192 (2006).

During defendant's trial for the rape of a nine-year-old girl, who tested positive for chlamydia, the trial court did not err in not allowing defendant to ask the victim's mother, who had a sexual relationship with defendant, if she had tested positive for chlamydia; the question of whether the mother had a positive diagnosis for chlamydia had no relevance to any issue at trial. *Kelley v. State*, 375 Ark. 483, 292 S.W.3d 297 (2009).

Defendant's conviction for murder in the second degree was proper because there was no error in the circuit court's refusal to allow a letter into evidence that denied a handgun permit to the victim. The exhibit had been generated more than 10 years prior to the trial, making it too remote in time to be relevant and the appellate court found that there was no abuse of discretion in refusing to admit the disputed letter. *Johnson v. State*, 2010 Ark. App. 153, — S.W.3d —, 2010 Ark. App. LEXIS 167 (2010).

In a manslaughter case, the court properly excluded evidence of the victim's alleged violent propensities because defendant admitted that he fired his gun without knowing who was riding toward him; therefore, because he did not know who he was shooting, he could not have considered the victim's background and state of mind before firing his weapon. Accordingly, such evidence would only have served to prejudice the victim. *Sipe v. State*, 2012 Ark. App. 261, — S.W.3d —, 2012 Ark. App. LEXIS 388 (Apr. 18, 2012).

### **Inference of Guilt.**

When a defendant voluntarily offers an untrue exculpatory statement or explanation, it may be considered as circumstantial evidence of not only one's belief that his case is weak, but also of guilt itself. *Flowers v. State*, 30 Ark. App. 204, 785 S.W.2d 242 (1990).

Proof that defendant continued to cover up the circumstances of victim's death, by lying to the police about her last encounter with him, served directly to rebut defendant's plea

of self-defense and was evidence from which the jury might infer a consciousness of guilt on her part, and trial court did not abuse its discretion in admitting this evidence. *Flowers v. State*, 30 Ark. App. 204, 785 S.W.2d 242 (1990).

Defendant's convictions for capital murder and committing a terroristic act were appropriate pursuant to Ark. R. Evid. 404(b) because evidence of another drive-by shooting that defendant allegedly ordered while incarcerated was admissible since it reflected his consciousness of guilt and was independently relevant. Attempts to tamper with or silence witnesses to thwart prosecution for the charged offense was evidence of consciousness of guilt and constituted relevant evidence. *Banks v. State*, 2010 Ark. 108, 366 S.W.3d 341 (2010).

### **Limitation on Liability.**

An insurer, which had adopted an underwriting policy limiting the coverage on a single item of men's jewelry to the sum of \$2,500, was entitled to place that information before the jury for the jury's consideration along with all of the other competent evidence, in an action to recover on a homeowner's policy for theft of a ring. *Northwestern Nat'l Ins. Co. v. Stanley*, 268 Ark. 1058, 598 S.W.2d 439 (1980).

### **Motive.**

Testimony concerning defendant's relationship to militaristic organization, the involvement with weapons, and the methods of operation was held relevant to show motive, etc., in larger plan to obtain money for organization in trial for robbery and murder of pawnbroker. *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986), cert. denied 484 U.S. 872, 108 S. Ct. 202, 98 L. Ed. 2d 153 (1987).

In a criminal prosecution for first-degree murder, the trial court did not abuse its discretion in allowing tattoo evidence at trial; the tattoo, which read "Death Before Dishonor," was probative of defendant's motive in the shooting the victim following an altercation. *Morris v. State*, 358 Ark. 455, 193 S.W.3d 243 (2004).

Defendant's conviction for capital murder was proper because when the purpose of evidence was to show motive, anything and everything that might have influenced the commission of the might could be shown. Because part of the state's theory of the case was that defendant killed the victim because she was pregnant with his child, the circuit court did not abuse its discretion in admitting the evidence of her pregnancy. *Anderson v. State*, 2011 Ark. 461, — S.W.3d —, 2011 Ark. LEXIS 548 (Nov. 3, 2011).

### **Negligence.**

In an action arising from an incident in which a piece of plexiglass flew off of the

defendant's truck's camper shell and stuck the plaintiff's vehicle, information sought by the plaintiff about the defendant's prior traffic violations or problems with insurance were in no way relevant to the issue of whether he was negligent. *Barker v. Clark*, 343 Ark. 8, 33 S.W.3d 476 (2000).

### No Prejudicial Error.

Admission of testimony about pills did not make the act of possession of marijuana with intent to sell more probable or less probable than it would have been without the testimony, and thus was not prejudicial error. *Leonard v. State*, 265 Ark. 937, 582 S.W.2d 15 (1979).

In capital murder trial testimony that witness had sold a .22-caliber revolver to defendant's wife and another one to the deceased, should have been admitted pursuant to this rule; however, the error was not prejudicial where the same evidence was introduced by other witnesses and was properly before the jury for its consideration. *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983).

Admission of irrelevant evidence did not warrant reversal where prejudicial effect was minimal and evidence of guilt overwhelming. *Scherrer v. State*, 294 Ark. 227, 742 S.W.2d 877 (1988).

### Opinion Testimony.

An eyewitness' opinion testimony as to whether a shooting was accidental or intentional was not objectionable as being irrelevant or a waste of time in a murder prosecution. *Mathis v. State*, 267 Ark. 904, 591 S.W.2d 679 (Ct. App. 1979), overruled *Rogers v. State*, 10 Ark. App. 19, 660 S.W.2d 949 (1983), questioned *State v. Murphy*, 315 Ark. 68, 864 S.W.2d 842 (1993), questioned *Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001).

### Photographs.

A photograph is not inadmissible merely because it is cumulative, and the defendant cannot admit the facts portrayed and thereby prevent the state from putting on its proof. *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986); *Bradford v. State*, 306 Ark. 590, 815 S.W.2d 947 (1991).

The fact that photographs are inflammatory is not alone sufficient reason to exclude them; inflammatory pictures are admissible, in the discretion of the trial judge, if they tend to shed light on any issue, to enable a witness to better describe the objects portrayed or the jury to better understand the testimony, or to corroborate testimony. *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986); *Bradford v. State*, 306 Ark. 590, 815 S.W.2d 947 (1991).

Trial court did not abuse its discretion where it ruled a picture of defendant, charged with possession with intent to distribute, with stacks of money in the room, where he con-

ducted at least one drug transaction, was relevant. *Qualls v. State*, 306 Ark. 283, 812 S.W.2d 681 (1991).

Photographs which depicted trees growing near power lines a year after the incident in question and in a different site, and which did not depict trees that were blown into power lines after a storm, as was the case in the power outage at issue, did not fairly and correctly depict the situation at issue, and were not probative of the issue of whether the power company failed to clean up a situation after a storm, therefore the trial court erred in accepting the pictures into evidence. *Rich Mt. Elec. Coop. v. Revels*, 311 Ark. 1, 841 S.W.2d 151 (1992).

Under Evid. Rule 407, pictures which could not be admitted as evidence of negligence might be admitted for the purpose of impeachment; however, a trial court may prohibit their use for impeachment if it deems the evidence irrelevant under this rule, or prejudicial under Evid. Rule 403. *Carton v. Missouri Pac. R.R.*, 315 Ark. 5, 865 S.W.2d 635 (1993).

Photographs showing the murder victim and her wounds were relevant evidence. *Weger v. State*, 315 Ark. 555, 869 S.W.2d 688 (1994).

In a prosecution alleging that defendant sexually assaulted his seven year old daughter, forced the daughter to have intercourse with her brother, who was also under 14, and made the brother have intercourse with the brother's mother, who was defendant's wife, trial court did not abuse its discretion in allowing the state to introduce photographs of the family home showing the general condition of the home, including the fact that defendant kept photographs of nude women in plain view, as the evidence was relevant and its probative value was not outweighed by the risk of prejudice to the defendant. *Clem v. State*, 351 Ark. 112, 90 S.W.3d 428 (2002).

In a wrongful death suit, an administratrix for the decedent's estate challenged the admission of 113 photographs by a farm tractor's driver and the tractor owner because the administratrix alleged that the photographs did not properly depict the circumstances at the time of decedent's death. The trial court committed reversible error in admitting the photographs because a foundation for the photographs was not properly laid. *McMickle v. Griffin*, 369 Ark. 318, 254 S.W.3d 729 (2007).

Defendant's conviction for murder in the second degree was proper because admission of photographs taken at the crime scene of various items located in the front passenger seat of the victim's vehicle was proper since the evidence suggested that the crime scene was in a remote location that was secured by officers shortly after the victim's 911 call was



made; the testimony presented was sufficient to support a finding that the matter in question was what its proponent claimed. The officer who took the photographs testified that he saw the items in the front passenger seat and that he did not touch them before photographing them; moreover, even if the photographs were improperly admitted, no prejudice occurred because they were merely cumulative evidence. *Johnson v. State*, 2010 Ark. App. 153, — S.W.3d —, 2010 Ark. App. LEXIS 167 (2010).

### **Pleadings.**

Complaints, normally phrased in the most partisan language, are in no conceivable sense evidentiary; this is particularly true in a personal injury case, and one in which punitive damages are sought. *Razorback Cab of Ft. Smith, Inc. v. Lingo*, 304 Ark. 323, 802 S.W.2d 444 (1991).

### **Prejudicial Error.**

Trial court erred in a medical malpractice action in granting a motion in limine during appellants' opening statement to exclude the decedent's postdischarge medical evidence because by excluding the evidence, which was relevant, the trial court allowed appellants to, at the last minute, be stripped of an entire defense that had been clearly developed throughout the litigation. *Bedell v. Williams*, 2012 Ark. 75, — S.W.3d —, 2012 Ark. LEXIS 89 (Feb. 23, 2012).

### **Preservation of Argument.**

Although defendant argued that the trial court erred in excluding evidence that the victim had cocaine in his system at the time of the murder, the court agreed with the state that the matter was not preserved for review; nowhere in the record did it show that defendant presented the trial court with the theory that the cocaine in the victim's system was relevant because his death was caused by money he owed a drug dealer. *Randle v. State*, 372 Ark. 246, 273 S.W.3d 482 (2008).

### **Prior Activity.**

It was error to allow plaintiff to introduce photographs showing that defendant had, prior to the accident, barricaded a bridge similar to the one from which the plaintiff fell. *Aluminum Co. of Am. v. Guthrie*, 296 Ark. 269, 753 S.W.2d 538 (1988).

Court of appeals deferred to chancellor's decision that testimony that parent had sexually abused another child was irrelevant in custody proceeding, because neither a proper link had been made connecting the allegation to the case at hand nor had a proper investigation been made into the allegations, which were denied by the parent. *Rector v. Rector*, 58 Ark. App. 132, 947 S.W.2d 389 (1997).

In an action for negligence by the owner of an office building and a tenant against a

security company arising from a fire in the building, a lay witness was properly permitted to testify regarding the owner's alleged failure to comply with applicable building codes during a remodeling since evidence regarding fire-safety measures was relevant to the issue of the owner's own liability. *Nationsbank, N.A. v. Murray Guard, Inc.*, 343 Ark. 437, 36 S.W.3d 291 (2001).

In a prosecution for terroristic threatening arising from an incident in which the defendant ordered her son to let two pit bull dogs loose on police officers, it was error, though harmless, for the court to allow a police officer to testify regarding a prior visit to the defendant's home at which several pit bull dogs were engaged in a fight since (1) there was no evidence either that the defendant was present at or knew about the prior incident or that the same officers were involved, and (2) the state of mind of the officer was irrelevant to the charged crime. *Lewis v. State*, 73 Ark. App. 417, 44 S.W.3d 759 (2001).

In a breach of contract case, the court properly allowed insurer to introduce evidence of homeowner's prior late payments and lapses of her homeowner's policies as it showed that homeowner made only one timely payment on her homeowner's policy between November 2000 and November 2001, allowed the policy to lapse twice before the final lapse in November 2001, and had a long history of late payments on her automobile policy; the evidence was admissible to show homeowner's intent to not make the November 2001 payment on time and to show that a mistake did not occur, and the evidence was not unfairly prejudicial. *Jones v. Coker*, 90 Ark. App. 151, 204 S.W.3d 554 (2005).

During defendant's trial for permitting the abuse of her minor child, the court did not err in allowing defendant's neighbor to testify because the testimony was probative of the material issue of defendant's failure to take action to prevent abuse to her children; it also corroborated other testimony that defendant left her three children unattended for a couple of days while she and her boyfriend went to Texas. *Sullivan v. State*, 2012 Ark. 74, — S.W.3d —, 2012 Ark. LEXIS 93 (Feb. 23, 2012).

### **Prior Criminal Activity.**

Since the introduction of an informant's past criminal activity, which did not involve defendant, simply did not shed any light on the intent of defendant, the testimony was irrelevant. *Leonard v. State*, 265 Ark. 937, 582 S.W.2d 15 (1979).

During the penalty phase of defendant's trial for driving while intoxicated in violation of § 5-65-103 and refusal to submit to a chemical test in violation of § 5-65-205, the trial court did not err by admitting evidence of his prior convictions for refusal to submit to a



chemical test; for purposes of this rule, the evidence was relevant to his sentencing as either character evidence or aggravating circumstances. *Williams v. State*, 2009 Ark. App. 554, — S.W.3d —, 2009 Ark. App. LEXIS 699 (2009).

Defendant's maximum sentence of 20 years confinement after he was convicted of sexual assault in the second degree was improper because the trial court erred in permitting 35-year-old, uncharged-misconduct evidence to be admitted during the sentencing phase of the trial. *Brown v. State*, 2010 Ark. App. 154, — S.W.3d —, 2010 Ark. App. LEXIS 159 (Feb. 17, 2010).

#### **Prior Inconsistent Statements.**

In a prosecution for rape, burglary and theft, evidence of victim's prior inconsistent statement concerning identification of defendant, which statement included the phrase "so many niggers look alike," was not irrelevant nor was its probative value substantially outweighed by the danger of unfair prejudice; accordingly, the trial court erred in refusing to allow cross-examination of victim concerning the statement and such error was not harmless where defendant received the maximum sentence on all three charges. *Miller v. State*, 269 Ark. 409, 601 S.W.2d 845 (1980).

#### **Prior Relationship.**

Inasmuch as the proffered evidence of the prior relationship of the parties as described by the prosecutrix tended to make the defendant's defense of consent more probable in view of the invitation from the prosecutrix and her mode of dress at the time she let him into her abode, the trial court erred in excluding the testimony. *Brown v. State*, 264 Ark. 944, 581 S.W.2d 549 (1979).

#### **Punitive Damages.**

In a negligence case, a trial court erred by granting a motion in limine and excluding evidence of prior driving while intoxicated offenses because they were relevant under this rule to the determination of whether punitive damages under § 16-55-206 were warranted. *Yeakley v. Doss*, 370 Ark. 122, 257 S.W.3d 895 (2007).

#### **Relevance Argument Waived.**

Defendant's collateral argument, that cocaine evidence was relevant to show drug use on the part of the state's witness, was not preserved for review, given that defense counsel did not attempt to impeach any witness with this information and when the trial court sustained the state's objection to the question of the witness concerning drugs, defense counsel neither argued that the objection should be overruled nor proffered the testimony that he would have obtained if allowed to pursue another question, and without the proffer, for purposes of Ark. R. Evid.

103(a)(2), the matter was not preserved. *Randle v. State*, 372 Ark. 246, 273 S.W.3d 482 (2008).

#### **Sexual History of Victim.**

Although the rape shield statute, § 16-42-101, is inapplicable to juvenile delinquency proceedings, the trial court may otherwise correctly find that the prior sexual history of a victim is entirely irrelevant to the crime with which a juvenile is charged. *M. M. v. State*, 350 Ark. 328, 88 S.W.3d 406 (2002).

#### **Sham Transaction.**

In an eminent domain proceeding the State was entitled to produce any evidence that it might have to show the transaction between a landowner and a vendor was a sick or sham transaction. *Arkansas State Hwy. Comm'n v. First Pyramid Life Ins. Co. of Am.*, 265 Ark. 417, 579 S.W.2d 587 (1979).

#### **Sketch of Suspect.**

Admission of sketch of a man made by police based on description of eyewitness to theft of property from home which showed man wearing two-tone shirt was admissible under this rule and Rule 402, since defendant was wearing similar shirt when photographed after his arrest and the sketch makes it more probable that defendant was properly identified as having committed the offense; thus, it was relevant. *Morrow v. State*, 271 Ark. 806, 610 S.W.2d 878, cert. denied 454 U.S. 819, 102 S. Ct. 99, 70 L. Ed. 2 89 (1981).

#### **Testimony by Victim's Family.**

In a prosecution for capital felony murder and aggravated robbery, the admission of testimony by the victim's widow and children concerning the decedent's routine in the store which was robbed was not reversible error, inasmuch as the evidence presented by the members of the victim's family was either for the purpose of showing a proper element of the offense or to show the habit and routine of the victim. *Brewer v. State*, 271 Ark. 254, 608 S.W.2d 363 (1980).

#### **Testimony Establishing Relevancy.**

Where a police officer, who had established his familiarity with the subject matter, explained the use of each article of paraphernalia as it was introduced into evidence, such testimony concerning the items enabled the trial court to view the paraphernalia as relevant within the terms of this rule. *State v. Anderson*, 286 Ark. 58, 688 S.W.2d 947 (1985), overruled on other grounds, *Jackson v. State*, 291 Ark. 98, 722 S.W.2d 831 (1987).

Trial court did not abuse its discretion in allowing the Arkansas Department of Human Services' (DHS) attorney to ask the mother on direct examination if the case was the first time she had been involved with DHS; it was relevant because DHS had alleged in the

termination petition that further services to the family would be unlikely to result in reunification and the mother's receipt of services from DHS for many years was relevant. *Vasquez v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 575, 337 S.W.3d 552 (2009).

### Threats Against Victim.

When the evidence against a defendant accused of murder is circumstantial, threats to kill made by other parties are relevant to prove motive on the part of someone other than the accused. *Smith v. State*, 33 Ark. App. 37, 801 S.W.2d 655 (1990).

Defendant's alleged statement to rape victim the day after the rape, that if she reported the rape and accused him he would be tried for murder rather than rape, was relevant; evidence of post-crime conduct has been held relevant and admissible in a variety of contexts under Arkansas law. *Morris v. State*, 53 Ark. App. 183, 920 S.W.2d 508 (1996).

### Victim Impact Evidence.

Testimony of the chairman of a non-profit group's board about the group's response to a flooding disaster, the resulting funerals, and the chairman's personal relationships with the bereaved was relevant victim-impact evidence under Ark. R. Evid. 402 and § 16-97-103 at defendant's sentencing hearing as although the group was able to meet the disaster victims' needs, the testimony illustrated the difficulties the group experienced due to defendant's theft; the evidence was not unduly prejudicial. *Brown v. State*, 2011 Ark. App. 608, — S.W.3d —, 2011 Ark. App. LEXIS 647 (Oct. 12, 2011).

### Videotapes.

A videotape is admissible if it is relevant, helpful to the jury, and not prejudicial; these are generally the same requirements for the admission of photographs. *Hickson v. State*, 312 Ark. 171, 847 S.W.2d 691 (1993).

### Weight of Probative Value.

Where, in a personal injury action brought against a retail store and the purchaser of a handgun from said store, the plaintiff alleged that the store negligently sold the handgun to the defendant who used it to shoot the plaintiff, the trial court erred in admitting into evidence the defendant's deposition which indicated he had been treated by a psychiatrist more than 13 years prior to the shooting incident upon which this cause of action was based, since there was simply no connecting evidence between the prior psychiatric treatment and the present condition of the defendant and therefore, although the evidence may have been relevant, its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or was misleading to the jury. *Cullum & Boren-McCain Mall, Inc. v. Peacock*, 267 Ark. 479,

592 S.W.2d 442 (1980).

To be relevant, it is not required that evidence prove the entire case or even all of a single issue; it requires only proof that has "any tendency" to make any fact that is of consequence to the determination of the action more or less probable. *Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 894 S.W.2d 897 (1995).

In a wrongful death action brought by the administrator of the deceased patient's estate against a nursing center and its parent company, although relevant documentary evidence showing the nursing center's understaffing problem was prejudicial to the nursing center and the company, that prejudice did not outweigh the strong probative value of the evidence. *Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003), cert. denied, 540 U.S. 1012, 124 S. Ct. 532, 157 L. Ed. 424 (2003), cert. denied, 540 U.S. 1004, 124 S. Ct. 535, 157 L. Ed. 2d 409 (2003).

**Cited:** *Lowe v. State*, 264 Ark. 205, 570 S.W.2d 253 (1978); *McCorkle v. State*, 270 Ark. 679, 607 S.W.2d 655 (1980); *Harshaw v. State*, 275 Ark. 481, 631 S.W.2d 300 (1982); *Keck v. American Emp. Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (1983); *Pickens v. State*, 279 Ark. 457, 652 S.W.2d 626 (1983); *Miller v. State*, 280 Ark. 551, 660 S.W.2d 163 (1983); *Toney v. Haskins*, 7 Ark. App. 98, 644 S.W.2d 622 (1983); *Love v. State*, 281 Ark. 379, 664 S.W.2d 457 (1984); *Transit Homes, Inc. v. Bellamy*, 282 Ark. 453, 671 S.W.2d 153 (1984), overruled *Peters v. Pierce*, 314 Ark. 8, 858 S.W.2d 680 (1993); *Koelzer v. Bagley*, 13 Ark. App. 48, 680 S.W.2d 111 (1984); *Anderson v. State*, 13 Ark. App. 68, 679 S.W.2d 806 (1984), aff'd 286 Ark. 58, 688 S.W.2d 947 (1985); *Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985), cert. denied 475 U.S. 1036, 106 S. Ct. 1245, 89 L. Ed. 2d 354 (1986); *Shelton v. State*, 287 Ark. 322, 699 S.W.2d 728 (1985); *Brimm v. State*, 14 Ark. App. 6, 683 S.W.2d 940 (1985); *Howard v. State*, 291 Ark. 633, 727 S.W.2d 830 (1987); *Ronning v. State*, 295 Ark. 228, 748 S.W.2d 633 (1988), cert. denied 489 U.S. 1020, 109 S. Ct. 1141, 103 L. Ed. 2d 201 (1989); *McKenzie v. Tom Gibson Ford, Inc.*, 295 Ark. 326, 749 S.W.2d 653 (1988); *Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988); *Bennett v. State*, 297 Ark. 115, 759 S.W.2d 799 (1988), cert. denied, 498 U.S. 851, 111 S. Ct. 144, 112 L. Ed. 2d 110 (1990); *First Nat'l Bank v. Hess*, 23 Ark. App. 129, 743 S.W.2d 825 (1988); *Walt Bennett Ford, Inc. v. Keck*, 298 Ark. 424, 768 S.W.2d 28 (1989); *Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989); *Irvin v. State*, 28 Ark. App. 6, 771 S.W.2d 26 (1989); *Ransopher v. Chapman*, 302 Ark. 480, 791 S.W.2d 686 (1990); *Pilcher v. State*, 303 Ark. 335, 796 S.W.2d 845 (1990); *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991); *Muskogee Bridge Co. v. Stansell*, 311 Ark. 113, 842 S.W.2d 15 (1992); *Verdict v. State*, 315 Ark.



436, 868 S.W.2d 443 (1993); *Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994), criticized *Jones v. State*, 329 Ark. 62, 947 S.W.2d 339 (1997); *Johnson v. State*, 318 Ark. 425, 886 S.W.2d 584 (1994); *Armstrong v. State*, 45 Ark. App. 72, 871 S.W.2d 420 (1994); *Columbia Mut. Cas. Ins. Co. v. Ingraham*, 47 Ark. App. 23, 883 S.W.2d 868 (1994), rev'd, dismissed 320 Ark. 408, 896 S.W.2d 903 (1995); *Thompson v. Perkins*, 322 Ark. 720, 911 S.W.2d 582 (1995); *Moore v. State*, 323 Ark. 529, 915 S.W.2d 284 (1996); *Hill v. State*, 325 Ark. 419, 931 S.W.2d 64 (1996); *Brown v. State*, 54 Ark. App. 44, 924 S.W.2d 251 (1996); *Newman v. State*, 327 Ark. 339, 939 S.W.2d 811 (1997); *Hicks v. State*, 327 Ark. 652, 941

S.W.2d 387 (1997); *Rankin v. State*, 57 Ark. App. 125, 942 S.W.2d 867 (1997); *Cobb v. State*, 340 Ark. 240, 12 S.W.3d 195 (2000); *Dye v. State*, 70 Ark. App. 329, 17 S.W.3d 505 (2000); *Columbia Nat'l Ins. Co. v. Freeman*, 347 Ark. 423, 64 S.W.3d 720 (2002); *Ridling v. State*, 348 Ark. 213, 72 S.W.3d 466 (2002); *Barnes v. Everett*, 351 Ark. 479, 95 S.W.3d 740 (2003); *McCoy v. State*, 354 Ark. 322, 123 S.W.3d 901 (2003); *Fitting v. State*, 94 Ark. App. 283, 229 S.W.3d 568 (2006); *Williams v. State*, 374 Ark. 282, 287 S.W.3d 559 (2008); *Williams v. Liberty Bank of Ark.*, 2011 Ark. App. 220, — S.W.3d —, 2011 Ark. App. LEXIS 232 (Mar. 16, 2011).

## Rule 402. Relevant evidence generally admissible — Irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by statute or by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible.

### RESEARCH REFERENCES

**ALR.** Admissibility of computer-generated animation. 111 ALR 5th 529.

Admissibility and use of evidence of nonuse of bicycle helmets. 2 ALR 6th 429.

**Ark. L. Rev.** Case Note, *Roberts v. State: A Limitation on the Impeachment of Witnesses by Extrinsic Evidence of Prior Inconsistent Statements*, 37 Ark. L. Rev. 688.

Arkansas Adopts a Second Admissibility Test for Novel Scientific Evidence: Do Two Tests Equal One Standard?, 56 Ark. L. Rev. 21.

**U. Ark. Little Rock L.J.** Impeachment of One's Own Witness by Prior Inconsistent Statements Under the Federal and Arkansas Rules of Evidence, Perroni, 1 U. Ark. Little Rock L.J. 277.

Watkins, *The Journalist's Privilege in Arkansas*, 7 U. Ark. Little Rock L.J. 473.

Evidence — Novel Scientific Evidence — DNA Profiling Held Admissible Under the Relevancy Standard. *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991), 15 U. Ark. Little Rock L.J. 71.

### CASE NOTES

#### ANALYSIS

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#### Bias of Witness.

Evidence that a civil suit had been filed by an assault and battery victim against the defendant as a result of the fracas had a bearing on the extent of the bias of the wit-



ness and was admissible in the criminal prosecution of the defendant for aggravated assault and battery. *Hawksley v. State*, 276 Ark. 504, 637 S.W.2d 573 (1982).

In a witness bribery case, a trial court erred in excluding evidence that the state's main witness could have been biased due to a quiet title lawsuit two years earlier between the witness's parents and the defendant's parents. *Paschal v. State*, 2012 Ark. 127, — S.W.3d —, 2012 Ark. LEXIS 158 (Mar. 29, 2012).

### **Blood Tests.**

The trial court erred in allowing into evidence two blood tests which did not exclude defendant as being the father, for the purpose of showing that he was the father. *Winston v. Robinson*, 270 Ark. 996, 606 S.W.2d 757 (1980).

### **Child Rape Victims.**

How, when and from whom the children who were rape victims acquired their knowledge of sexual matters did not make it more or less likely that the defendant committed rape, and the trial court did not abuse its discretion in its ruling that the proffered testimony was not relevant or material. *Griswold v. State*, 304 Ark. 168, 801 S.W.2d 270 (1990).

Defendant's rape conviction was proper because the circuit court did not abuse its discretion in finding the testimony of a supervisor with the Crimes Against Children Division of the Arkansas State Police relevant. The victim did not come forward until after years and years of abuse and the supervisor's testimony explained the typical behaviors of abused children that she had witnessed; she explained that it was common for a child victim to not make a disclosure and that there could be several reasons for that behavior. *Chunestudy v. State*, 2012 Ark. 222, — S.W.3d —, 2012 Ark. LEXIS 246 (May 24, 2012).

### **Child Support.**

In a case involving child support, a father's claim that evidence of his failure to pay support in another unrelated case was not admissible under Ark. R. Evid. 404(b) was not heard on appellate review because he advanced a different argument before the trial court relating to relevancy; on appeal he conceded that the evidence in question was relevant. *Norman v. Cooper*, 101 Ark. App. 446, 278 S.W.3d 569 (2008).

### **Corroboration of Accomplice.**

Where the testimony of the witnesses clearly showed that the automobile had not been tampered with and was in essentially the same condition as it was when the defendant sold it several days after the homicide, the trial judge did not abuse his discretion in

admitting a portion of a bloodstained seat cover into evidence since it was relevant as having a tendency to corroborate the accomplice's testimony. *Bly v. State*, 267 Ark. 613, 593 S.W.2d 450 (1980).

### **Corroboration of Rape Victim.**

In prosecution for rape the trial court did not err in allowing articles of the defendant's clothing to be introduced into evidence together with testimony that there were human bloodstains on the clothing, where this evidence tended to corroborate the testimony of the rape victim, the police officers, and the medical examiner, and where it also tended to contradict the statement of the defendant that he had been in the car for only a period of time as to allow him to drive three or four blocks. *Brewer v. State*, 269 Ark. 185, 599 S.W.2d 141 (1980).

Testimony of family service worker and victim regarding sexual acts with the victim was relevant to prove the charge of rape, and its probative value substantially outweighed its prejudicial effect. *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996).

### **Credibility of Witnesses.**

In a prosecution for murder, an expert witness was properly precluded from testifying about inconsistencies in the defendant's statement to police officers where the defendant testified on his own behalf and the state cross-examined him concerning such inconsistencies. *Hinkston v. State*, 340 Ark. 530, 10 S.W.3d 906 (2000).

In defendant's murder trial, the key witness who was at the scene of the shooting allegedly battered a woman in retaliation against the her for not relaying the information the key witness wanted the woman to impart to the police, but that key witness was not charged with any offense; those matters were relevant, reflecting upon the key witness's interest, motives in testifying, and bias, and the trial court committed reversible error in restricting cross-examination on the subject. *Ghoston v. State*, 84 Ark. App. 387, 141 S.W.3d 907 (2004).

### **Defendant's State of Mind.**

The trial court in a first-degree murder case properly excluded the opinion of the arresting officer that the defendant was "scared to death" at the time of his arrest, despite the fact that Rule 701 permits even lay witnesses to describe whether a defendant was angry, nervous or scared, since the defendant's state of mind after the shooting has no relevance under Rule 401 and this rule, tending to make the existence of a consequential fact more or less probable than it would be without the evidence, and since the excluded testimony was merely repetitious to that presented by the defendant himself as to his actions after the shooting. *Graham v. State*, 2 Ark. App.

266, 621 S.W.2d 4 (1981).

Trial judge did not abuse her discretion in refusing to admit an earlier document by decedent in a will contest as the document was not relevant to the decedent's mental state when the documents at issue were executed eight years later. *Farr v. Henson*, 79 Ark. App. 114, 84 S.W.3d 871 (2002).

Trial court did not err during defendant's trial for aggravated robbery in granting the state's motion in limine restricting evidence of a subsequent murder in support of defendant's affirmative defense of duress because even if evidence of the murder was relevant, and therefore potentially admissible, Ark. R. Evid. 405(b) would have kept it out because the specific instance of conduct was not relevant to the defense; a murder by another person that occurred three hours after the robberies could not have affected defendant's state of mind during the preceding robberies. *Bell v. State*, 2010 Ark. App. 814, — S.W.3d —, 2010 Ark. App. LEXIS 864 (Dec. 8, 2010).

#### **Evidence of Dangerous Instrumentalities.**

Defendant's convictions for capital murder and committing a terroristic act were appropriate because evidence of ammunition taken from his former home was relevant and admissible since the shell casings at the scene of the drive-by shooting were the exact types found at defendant's former home and that related to his and his alleged accomplices' knowledge of those types of ammunition, their access thereto, and to their guilt. *Banks v. State*, 2010 Ark. 108, 366 S.W.3d 341 (2010).

#### **Evidence of Robbery.**

Items which were seized pursuant to a search warrant and then identified by victim as those things which were in his automobile when it was stolen were relevant and admissible in prosecution for robbery and theft where there was testimony connecting defendant with items and vehicles. *Phillips v. State*, 271 Ark. 96, 607 S.W.2d 664 (1980).

#### **Evidence of Similar Occurrences.**

The trial court in a personal injury action arising from an automobile collision did not abuse its discretion in excluding the proffered testimony of the investigating officer, regarding similar automobile accidents in the near vicinity within the general time frame, which was offered to show that weather conditions contributed to the accident. *Williams v. Gates*, 275 Ark. 381, 630 S.W.2d 34 (1982).

In personal injury action where the plaintiff alleged that she tripped over the defendant's shopping cart, two customer accident reports from other stores owned by the defendant were not relevant, where the only similarity shown between the accidents in the two reports and the plaintiff's accident was that a

cart was involved in some way. *Fraser v. Harp's Food Stores, Inc.*, 290 Ark. 186, 718 S.W.2d 92 (1986).

The relevance of proffered testimony of a drug task force coordinator concerning when and against whom the task force decided to file charges was marginal at best, and thus the trial court did not abuse its discretion in limiting cross-examination by excluding such testimony. *Newman v. State*, 327 Ark. 339, 939 S.W.2d 811 (1997).

#### **Evidence of Weapons.**

In a capital murder trial, the court erred by admitting evidence of the .22 caliber rifle seized from defendant's house where the rifle was not the murder weapon and admission of evidence of the rifle did not support the state's theory that defendant disposed of the actual murder weapon; however, evidence of .22 caliber ammunition was relevant to prove that defendant possessed the means to kill the victim. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003).

#### **Exclusion of Irrelevant Testimony.**

Where a stopped car had been struck at an intersection, and there was no evidence that its driver contributed to the accident in any way, testimony concerning alcohol in the struck vehicle was irrelevant and correctly excluded. *Lowe v. State*, 264 Ark. 205, 570 S.W.2d 253 (1978).

Where in a prosecution for possession of heroin, the defense counsel made a general objection to testimony about a pistol found in the defendant's car, the objection should have been sustained since it should have been apparent to the trial court that the weapon was not relevant to the offense charged and should not have been discussed before the jury. *Philmon v. State*, 267 Ark. 1121, 593 S.W.2d 504 (Ct. App. 1980), questioned *Hall v. State*, 11 Ark. App. 53, 666 S.W.2d 408 (1984).

The question of whether the option purchase price was nominal turned on whether the lessor had retained an appreciable residual at the expiration of the lease, and testimony analyzing the hard costs of operation over the remaining economic life of the chattel, should the lessee choose to exercise the option to purchase, was not relevant evidence that the option purchase price was nominal, and properly excluded under this rule and Rule 403. *Sutton v. Ryder Truck Rental, Inc.*, 305 Ark. 231, 807 S.W.2d 905 (1991).

Trial court had already dismissed the patient's theory of vicarious liability, as well as any claims of liability on the part of the nurse; therefore, any questions concerning the doctors' supervision of the nurse was irrelevant, and the trial court did not abuse its discretion in excluding any testimony on this issue. *Stephens v. Petrino*, 350 Ark. 268, 86 S.W.3d 836 (2002).



Trial court properly rejected evidence offered by a phone company regarding what it would have cost to rent replacement lines while lines damaged by a contractor, who dug in an area without providing notice to the phone company as required by § 14-271-112 of the Underground Facilities Damage Prevention Act, were repaired; evidence was irrelevant because loss of use damages were recoverable in an action for damage to personal property only in cases involving motor vehicles. *Southwestern Bell Tel. Co. v. Harris Co.*, 353 Ark. 487, 109 S.W.3d 637 (2003).

Where defendant filed an answer that generally denied the allegations of plaintiff's complaint, including that defendant was negligent in regard to the traffic accident, the fact that she did not file a counterclaim was not an assertion of fact and she could not be impeached on that point; further, the reason that defendant did not file a counterclaim was not relevant to the issues. *Martinez v. Wright*, 94 Ark. App. 1, 223 S.W.3d 71 (2006).

Trial court did not err in excluding any mention of a doctor who had been involved as a consultant and legal assistant on a patient's malpractice case because the fact that the doctor participated in consulting with two of the patient's experts had no relevance nor had the fact that he had been convicted of drug possession, causing him to lose his medical license. *McCoy v. Montgomery*, 370 Ark. 333, 259 S.W.3d 430 (2007).

During defendant's trial for the rape of a nine-year-old girl, who tested positive for chlamydia, the trial court did not err in not allowing defendant to ask the victim's mother, who had a sexual relationship with defendant, if she had tested positive for chlamydia; the question of whether the mother had a positive diagnosis for chlamydia had no relevance to any issue at trial. *Kelley v. State*, 375 Ark. 483, 292 S.W.3d 297 (2009).

Trial court did not err by sustained the state's objection to defense counsel's questions to the victim's ex-wife about whether she believed that the victim had been having an affair with defendant's wife because they were relevant to the defense, as questions of the ex-wife's state of mind, or whether defendant's beliefs were accurate, were of no consequence to his defense. *James v. State*, 2010 Ark. 486, — S.W.3d —, 2010 Ark. LEXIS 583 (Dec. 9, 2010).

In a manslaughter case, the court properly excluded evidence of the victim's alleged violent propensities because defendant admitted that he fired his gun without knowing who was riding toward him; therefore, because he did not know who he was shooting, he could not have considered the victim's background and state of mind before firing his weapon. Accordingly, such evidence would only have served to prejudice the victim. *Sipe v. State*,

2012 Ark. App. 261, — S.W.3d —, 2012 Ark. App. LEXIS 388 (Apr. 18, 2012).

#### **Harmless Error.**

Where defendant admitted to killing the victim, and it was established by sufficient evidence that he acted with premeditation and deliberation, whatever harm may have resulted from testimony about the victim's interest in music was harmless because the evidence of guilt was overwhelming and the error was slight. *Cobb v. State*, 340 Ark. 240, 12 S.W.3d 195 (2000).

In a case involving terroristic acts under § 5-13-310(a)(1), the exclusion of a computer-generated threat to bolster a self-defense claim under § 5-2-606 was error since the evidence was relevant; however, the error was harmless since evidence of other threats could have been elicited. *McKeever v. State*, 367 Ark. 374, 240 S.W.3d 583 (2006).

During defendant's trial for committing a terroristic act, the trial court erred in excluding testimony from defendant's mother regarding a computer-generated threat to defendant's life; the testimony was relevant to the issue of self-defense. However, defendant failed to show prejudice by the ruling. *McKeever v. State*, 367 Ark. 374, 240 S.W.3d 583 (2006).

#### **Inquiry into Parole.**

The general rule in criminal cases is that parole procedures are not proper areas of either comment or inquiry where the purpose is to influence the sentence. *Gustafson v. State*, 267 Ark. 830, 593 S.W.2d 187 (Ct. App. 1979).

#### **Insanity.**

In a prosecution for murder in which the defendant conceded at trial that he was not asserting the insanity defense, any testimony that an expert witness could have given about the defendant's inability to conform his conduct to the requirements of the law because of mental disease or defect was not relevant and therefore, was properly excluded. *Hinkston v. State*, 340 Ark. 530, 10 S.W.3d 906 (2000).

#### **Intoximeter Test.**

Where in civil action for property damage and personal injury resulting from vehicular collision, one issue was party's sobriety, the results of an intoximeter test administered immediately after the incident was plainly relevant to the issue and therefore admissible under this rule, since there is nothing in the rules or statutes to prohibit it. *Watson v. Frierson*, 272 Ark. 316, 613 S.W.2d 824 (1981).

#### **Limited Purpose.**

Where in an action by insureds against their insurer for damages to the roof of their home allegedly caused by a hailstorm, the



trial court did not abuse its discretion in admitting into evidence photographs of hail damage to a similar roof on another house, where the judge admitted the photographs for the limited purpose of aiding the jury in understanding the oral testimony of an insurance adjuster, testifying for the insurer, as to his opinion and his explanation as to what he looked for in hail damage and what he found in the insureds' roof. *Morrison v. Firemen's Ins. Co.*, 4 Ark. App. 351, 631 S.W.2d 310 (1982).

#### **Luminol Test.**

The mere presence of human blood found by luminol testing, without factors which relate that evidence to the crime, is not admissible. *Palmer v. State*, 315 Ark. 696, 870 S.W.2d 385 (1994).

When positive luminol tests cannot be confirmed by other evidence, the luminol test results become irrelevant and their admission into evidence confuses the jury. *Young v. State*, 316 Ark. 225, 871 S.W.2d 373 (1994); *Houston v. State*, 321 Ark. 598, 906 S.W.2d 286 (1995).

#### **Medical Records.**

Writ of certiorari was proper, because the court erred in denying the husband's motion to quash several subpoenas concerning his medical records, when the husband was not a party to the underlying custody dispute, the husband did nothing to bring his medical condition into issue, and the husband's mental health was examined through other admissible evidence; a nonparty's medical records could not be subpoenaed under the circumstances presented in the instant case. *McKenzie v. Pierce*, 2012 Ark. 190, — S.W.3d —, 2012 Ark. LEXIS 212 (May 3, 2012).

#### **Negative Test Results.**

The results of test which fail to link a defendant to a crime are admissible pursuant to this rule. *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983).

#### **Opinion Testimony.**

An undercover narcotics officer can be found competent to state his opinion regarding the substance he purchased, and where officer, acting in an undercover capacity, and through prior experience, thought he was buying hashish, and in fact thought it was in sufficient quantity to have an effect on six to eight persons, he was properly allowed to testify to the nature of the transaction in a prosecution for delivery of marijuana. *Euton v. State*, 270 Ark. 121, 603 S.W.2d 468 (Ct. App. 1980).

#### **Photographs.**

Defendant's conviction for murder in the second degree was proper because admission of photographs taken at the crime scene of

various items located in the front passenger seat of the victim's vehicle was proper since the evidence suggested that the crime scene was in a remote location that was secured by officers shortly after the victim's 911 call was made; the testimony presented was sufficient to support a finding that the matter in question was what its proponent claimed. The officer who took the photographs testified that he saw the items in the front passenger seat and that he did not touch them before photographing them; moreover, even if the photographs were improperly admitted, no prejudice occurred because they were merely cumulative evidence. *Johnson v. State*, 2010 Ark. App. 153, — S.W.3d —, 2010 Ark. App. LEXIS 167 (2010).

#### **Prejudicial Error.**

Trial court erred in a medical malpractice action in granting a motion in limine during appellants' opening statement to exclude as inadmissible the decedent's postdischarge medical evidence because by excluding the evidence, which was relevant, the trial court allowed appellants to, at the last minute, be stripped of an entire defense that had been clearly developed throughout the litigation. *Bedell v. Williams*, 2012 Ark. 75, — S.W.3d —, 2012 Ark. LEXIS 89 (Feb. 23, 2012).

#### **Preservation for Review.**

Defendant's contention that the trial court erred by allowing the portion of his custodial statement to be played for the jury in which he referenced another person calling him a child molester and trying to get his children taken away was not preserved for appellate review because the only reference to *Ark. R. Evid.* 404(b) was in defendant's pretrial motion for the state to disclose such evidence prior to trial; defense counsel never made a specific objection that the child molester reference was improper character evidence under *Rule* 404(b) and the trial court never ruled on the basis of *Rule* 404(b). In addition, defendant never made a specific relevancy objection under this rule but only urged that the portion of the statement including the comment had nothing to do with the case and no evidentiary purpose. *Leach v. State*, 2012 Ark. 179, — S.W.3d —, 2012 Ark. LEXIS 200 (Apr. 26, 2012).

#### **Probative Value.**

The court's exclusion of references in defendant's confession to "sanity" or "insanity" held proper where defendant was not claiming mental disease or defect. *Willett v. State*, 322 Ark. 613, 911 S.W.2d 937 (1995), questioned *Robbins v. State*, 356 Ark. 225, 149 S.W.3d 871 (2004), criticized *Jones v. State*, 329 Ark. 62, 947 S.W.2d 339 (1997).

Where a .45 caliber bullet and three .45 caliber shell casings were recovered from the scene, and an identical cartridge was recov-

ered from defendant's car, the evidence showed that it was more probable than not that defendant had access to a .45 caliber weapon at the time of the homicide. *Bohanan v. State*, 324 Ark. 158, 919 S.W.2d 198 (1996).

In a prosecution alleging that defendant sexually assaulted his seven year old daughter, forced the daughter to have intercourse with her brother, who was also under 14, and made the brother have intercourse with the brother's mother, who was defendant's wife, trial court did not abuse its discretion in allowing the state to introduce photographs of the family home showing the general condition of the home, including the fact that defendant kept photographs of nude women in plain view, as the evidence was relevant and its probative value was not outweighed by the risk of prejudice to the defendant. *Clem v. State*, 351 Ark. 112, 90 S.W.3d 428 (2002).

Victim stated that she had viewed pornography with defendant at his home, and the items seized corroborated her testimony; photographs of the partially clad victim in suggestive poses were found in close proximity to pornographic magazines, and under these circumstances, the trial court did not abuse its discretion in determining that the probative value of the pornographic magazines was not substantially outweighed by the danger of unfair prejudice. *Rasmussen v. State*, 2009 Ark. App. 586, — S.W.3d —, 2009 Ark. App. LEXIS 731 (2009).

#### **Relationship Between Victim and Defendant.**

Where in a prosecution for aggravated assault and battery the state attempted to show that the female victim had been trying to break up her relationship with the defendant, her ex-boyfriend, the trial court erred in refusing to permit the defendant to testify concerning foreign travel plans that the defendant and the victim had jointly made about two weeks prior to the altercation, and in failing to allow the defendant to introduce evidence as to a \$1,000 commission he gave the victim about two months before the incident. *Hawksley v. State*, 276 Ark. 504, 637 S.W.2d 573 (1982).

#### **Scientific Evidence.**

The relevancy approach as the standard for determining the admissibility of novel scientific evidence requires that the trial court conduct a preliminary inquiry of any novel scientific evidence and focus on: (1) the reliability of the process used to generate the evidence; (2) the possibility that the jury would be overwhelmed, confused or misled by the evidence; and (3) the connection between the evidence to be offered and the disputed factual issue in the particular case. *Whitson v. State*, 314 Ark. 458, 863 S.W.2d 794 (1993).

Horizontal gaze nystagmus testing is not

"novel scientific evidence." *Whitson v. State*, 314 Ark. 458, 863 S.W.2d 794 (1993).

An investigator with the Arkansas State Police was properly not permitted to testify regarding the alleged superior ability of his canine partner to detect the presence of accelerants after a fire, based on a Master's thesis written by the purported Director of the Florida State Crime Laboratory, since the proponent of the evidence did not produce the study allegedly conducted by the author of the thesis, so there was no way of ascertaining the techniques used or the potential rate of error, and there was no evidence that this scientific theory had ever been tested or subjected to peer review or that it had been otherwise embraced by the particular scientific community. *Farm Bureau Mut. Ins. Co. v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000).

#### **Secondary Gain Motivation.**

In an action to recover damages for injuries sustained in a construction site accident, it was reversible error for the court to allow a defense expert to testify regarding secondary gain motivation and to imply that plaintiffs in personal injury cases may exaggerate their symptoms in order to receive some financial benefit since such testimony was irrelevant where the expert affirmed during cross-examination that he was not testifying that he believed that the plaintiff was malingering or implying that the plaintiff had secondary gain involved in the case and unequivocally stated that he was not giving testimony that it was his opinion that there was any secondary gain involved in the case. *Rodgers v. CWR Constr., Inc.*, 343 Ark. 126, 33 S.W.3d 506 (2000).

#### **Sham Transaction.**

In an eminent domain proceeding the State was entitled to produce any evidence that it might have to show the transaction between a landowner and a vendor was a sick or sham transaction. *Arkansas State Hwy. Comm'n v. First Pyramid Life Ins. Co. of Am.*, 265 Ark. 417, 579 S.W.2d 587 (1979).

#### **Sketch of Defendant.**

Admission of sketch of a man made by police based on description of eyewitness to theft of property from home which showed man wearing two-tone shirt was admissible under Rule 401 and this rule, since defendant was wearing similar shirt when photographed after his arrest and the sketch makes it more probable that defendant was properly identified as having committed the offense; thus, it was relevant. *Morrow v. State*, 271 Ark. 806, 610 S.W.2d 878, cert. denied 454 U.S. 819, 102 S. Ct. 99, 70 L. Ed. 2 89 (1981).

#### **Testimony Establishing Relevancy.**

Where a police officer, who had established his familiarity with the subject matter, explained the use of each article of parapherna-



lia as it was introduced into evidence, such testimony concerning the items enabled the trial court to view the paraphernalia as relevant within the terms of Uniform Rules of Evidence, Rule 401. *State v. Anderson*, 286 Ark. 58, 688 S.W.2d 947 (1985), overruled on other grounds, *Jackson v. State*, 291 Ark. 98, 722 S.W.2d 831 (1987).

Testimony concerning defendant's relationship to militaristic organization, the involvement with weapons, and the methods of operation was held relevant to show motive, etc., in larger plan to obtain money for organization in trial for robbery and murder of pawnbroker. *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986), cert. denied 484 U.S. 872, 108 S. Ct. 202, 98 L. Ed. 2d 153 (1987).

Evidence regarding a telephone conversation between a murder victim and his ex-wife in which the victim stated that the defendant, who was his current wife, had a gun pointed at him and was going to shoot him and in which the defendant stated that she was going to shoot the victim could be admitted into evidence since the statements by the defendant established relevancy. *Thomas v. State*, 62 Ark. App. 168, 973 S.W.2d 1 (1998).

Where defendant alleged that he shot the decedent in self-defense, evidence that defendant fled the scene of the crime and witness's testimony that defendant stated "I'll probably spend the rest of my life in prison" as he fled was probative to prove that defendant's behavior in fleeing the scene was inconsistent with a claim of self-defense. *Anderson v. State*, 354 Ark. 102, 118 S.W.3d 574 (2003).

Although the gay-themed books were improperly admitted into evidence, any error was harmless in light of the wealth of other evidence of defendant's homosexual lifestyle; further, pornographic videos and photographs were properly admitted where two victims were in the photographs and they corroborated other victims' testimony. *Simmons v. State*, 95 Ark. App. 114, 234 S.W.3d 321 (2006).

### Threats Against Victim.

When the evidence against a defendant accused of murder is circumstantial, threats to kill made by other parties are relevant to prove motive on the part of someone other than the accused. *Smith v. State*, 33 Ark. App. 37, 801 S.W.2d 655 (1990).

In defendant's stalking case, the court properly admitted testimony regarding the shredding of the victim's patio furniture and the "keying" of her truck because there was evidence that defendant had engaged in a number of harassing tactics throughout the course of the case, and the evidence of damage to her personal property, which began after the victim and defendant separated, had a tendency to show that he was engaging in conduct in

order to harass her. *Lowry v. State*, 90 Ark. App. 333, 205 S.W.3d 830 (2005).

### Victim Impact Evidence.

Testimony of the chairman of a non-profit group's board about the group's response to a flooding disaster, the resulting funerals, and the chairman's personal relationships with the bereaved was relevant victim-impact evidence under this rule and § 16-97-103 at defendant's sentencing hearing as although the group was able to meet the disaster victims' needs, the testimony illustrated the difficulties the group experienced due to defendant's theft; the evidence was not unduly prejudicial. *Brown v. State*, 2011 Ark. App. 608, — S.W.3d —, 2011 Ark. App. LEXIS 647 (Oct. 12, 2011).

### Weight of Probative Value.

Where, in a personal injury action brought against a retail store and the purchaser of a handgun from said store, the plaintiff alleged that the store negligently sold the handgun to the defendant who used it to shoot the plaintiff, the trial court erred in admitting into evidence the defendant's deposition which indicated he had been treated by a psychiatrist more than 13 years prior to the shooting incident upon which this cause of action was based, since there was simply no connecting evidence between the prior psychiatric treatment and the present condition of the defendant and therefore, although the evidence may have been relevant, its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or was misleading to the jury. *Cullum & Boren-McCain Mall, Inc. v. Peacock*, 267 Ark. 479, 592 S.W.2d 442 (1980).

Circumstantial evidence can constitute substantial evidence. *Dixon v. State*, 311 Ark. 613, 846 S.W.2d 170 (1993).

In a breach of contract case, the court properly allowed insurer to introduce evidence of homeowner's prior late payments and lapses of her homeowner's policies as it showed that homeowner made only one timely payment on her homeowner's policy between November 2000 and November 2001, allowed the policy to lapse twice before the final lapse in November 2001, and had a long history of late payments on her automobile policy; the evidence was admissible to show homeowner's intent to not make the November 2001 payment on time and to show that a mistake did not occur, and the evidence was not unfairly prejudicial. *Jones v. Coker*, 90 Ark. App. 151, 204 S.W.3d 554 (2005).

**Cited:** *Tucker v. State*, 264 Ark. 890, 575 S.W.2d 684 (1979); *Hanna Lumber Co. v. Neff*, 265 Ark. 462, 579 S.W.2d 95 (1979), questioned *Hibbs v. Jacksonville*, 24 Ark. App. 111, 749 S.W.2d 350 (1988); *Harshaw v. State*, 275 Ark. 481, 631 S.W.2d 300 (1982); *Henry v.*



State, 278 Ark. 478, 647 S.W.2d 419 (1983), cert. denied 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983); *Pickens v. State*, 279 Ark. 457, 652 S.W.2d 626 (1983); *Carr v. Suzuki Motor Co.*, 280 Ark. 1, 655 S.W.2d 364 (1983); *E.I. Du Pont de Nemours & Co. v. Dillaha*, 280 Ark. 477, 659 S.W.2d 756 (1983); *Anderson v. State*, 13 Ark. App. 68, 679 S.W.2d 806 (1984), aff'd 286 Ark. 58, 688 S.W.2d 947 (1985); *Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985), cert. denied 475 U.S. 1036, 106 S. Ct. 1245, 89 L. Ed. 2d 354 (1986); *Shelton v. State*, 287 Ark. 322, 699 S.W.2d 728 (1985); *Nelke v. State*, 19 Ark. App. 292, 720 S.W.2d 719 (1986); *Ronning v. State*, 295 Ark. 228, 748 S.W.2d 633 (1988), cert. denied 489 U.S. 1020, 109 S. Ct. 1141, 103 L. Ed. 2d 201 (1989); *McKenzie v. Tom Gibson Ford, Inc.*, 295 Ark. 326, 749 S.W.2d 653 (1988); *Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988); *Bennett v. State*, 297 Ark. 115, 759 S.W.2d 799 (1988), cert. denied, 498 U.S. 851, 111 S. Ct. 144, 112

L. Ed. 2d 110 (1990); *Demarest v. State*, 25 Ark. App. 203, 755 S.W.2d 577 (1988); *Marcum v. State*, 299 Ark. 30, 771 S.W.2d 250 (1989); *Pilcher v. State*, 303 Ark. 335, 796 S.W.2d 845 (1990); *National Bank of Commerce v. Beavers*, 304 Ark. 81, 802 S.W.2d 132 (1990); *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991); *Verdict v. State*, 315 Ark. 436, 868 S.W.2d 443 (1993); *Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 894 S.W.2d 897 (1995); *Thompson v. Perkins*, 322 Ark. 720, 911 S.W.2d 582 (1995); *Moore v. State*, 323 Ark. 529, 915 S.W.2d 284 (1996); *Hill v. State*, 325 Ark. 419, 931 S.W.2d 64 (1996); *Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997); *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000); *Ridling v. State*, 348 Ark. 213, 72 S.W.3d 466 (2002); *Williams v. State*, 374 Ark. 282, 287 S.W.3d 559 (2008); *Jones v. State*, 374 Ark. 475, 288 S.W.3d 633 (2008); *Laswell v. State*, 2012 Ark. 201, — S.W.3d —, 2012 Ark. LEXIS 230 (May 10, 2012).

### **Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

#### **RESEARCH REFERENCES**

**ALR.** Admissibility of computer-generated animation. 111 ALR 5th 529.

Admissibility in state criminal case of results of polygraph (lie detector) test—Post]Daubert cases. 10 ALR 6th 463.

Admissibility of evidence of prior accidents or injuries at same place. 15 ALR 6th 1.

**Ark. L. Notes.** Gitelman, Experiments in and out of the Courtroom: A Review of the Arkansas Cases and a Suggestion, 1989 Ark. L. Notes 23.

Guzman, Impeaching the Credibility of a Witness: Issues, Rules, and Suggestions, 1994 Ark. L. Notes 29.

**Ark. L. Rev. Notes.** A Restrictive Interpretation of Rule 704 of the Arkansas Uniform Rules of Evidence: Grambling v. Jennings, 36 Ark. L. Rev. 178.

Case Note, *Roberts v. State*: A Limitation on the Impeachment of Witnesses by Extrinsic Evidence of Prior Inconsistent Statements, 37 Ark. L. Rev. 688.

Arkansas Adopts a Second Admissibility

Test for Novel Scientific Evidence: Do Two Tests Equal One Standard?, 56 Ark. L. Rev. 21.

**U. Ark. Little Rock L.J.** Impeachment of One's Own Witness by Prior Inconsistent Statements Under the Federal and Arkansas Rules of Evidence, Perroni, 1 U. Ark. Little Rock L.J. 277.

Arkansas Law Survey, Hall, Evidence, 8 U. Ark. Little Rock L.J. 157.

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Evidence — Novel Scientific Evidence — DNA Profiling Held Admissible Under the Relevancy Standard. *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991), 15 U. Ark. Little Rock L.J. 71.

**U. Ark. Little Rock L. Rev.** Annual Survey of Case Law: Practice, Procedure, and Courts, 29 U. Ark. Little Rock L. Rev. 905.

## CASE NOTES

## ANALYSIS

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**In General.**

The probative value of evidence correlates inversely to the availability of other means of proving the issue for which the prejudicial evidence is offered. In other words, if the state has no other means to prove the issue, then the evidence is highly probative and that may

outweigh its prejudicial effect; however, in cases where the state has other means of proving the issue, then the balance is tipped in favor of it being excluded because of its prejudicial effect. *Smith v. State*, 19 Ark. App. 188, 718 S.W.2d 475 (1986), questioned *Bullcock v. State*, 353 Ark. 577, 111 S.W.3d 380 (2003). But see *Brown v. State*, 63 Ark. App. 38, 972 S.W.2d 956 (1998).

**Applicability.**

This rule is not applicable to the cross-examination of character witnesses. *Smith v. State*, 316 Ark. 407, 872 S.W.2d 843 (1994).

In a medical malpractice action brought after her husband died from surgery, evidence that a wife was prohibited from introducing was completely relevant and essential to her cause of action, and its "prejudice" was not unfair where she attached copies of a number of documents that contained evidence of her husband's surgeon's mental impairment, abuse of nitrous oxide gas, and use of Prozac at or before the time of the surgery, excerpts from the surgeon's testimony before the medical board, his sealed medical records, and the affidavits of two doctor's who both opined that, on the day of the surgery, the surgeon was impaired and that he breached the applicable standard of care. *Turner v. Northwest Ark. Neurosurgery Clinic, P.A.*, 84 Ark. App. 93, 133 S.W.3d 417 (2003).

Evidence of defendant's encounter with the prior rape victim was relevant to the issue of whether his encounter with the victim was consensual, and it was also probative evidence that the rape took place; therefore, the circuit judge did not abuse his discretion in allowing this evidence under this rule. *Rounsaville v. State*, 2009 Ark. 479, 346 S.W.3d 289 (2009).

**Admissions.**

In a prosecution for murder, a deputy was properly permitted to testify to statements made by the defendant while he was in custody which the deputy heard over a monitor used for security purposes; those statements were highly probative because they constituted admissions of his involvement in the murder and provided evidence of the circumstances surrounding the crime and his intent to kill the victim and, furthermore, the mere fact that his statements were incriminating did not render them unfairly prejudicial. *Hinkston v. State*, 340 Ark. 530, 10 S.W.3d 906 (2000).

In a murder prosecution, the trial court did not err when it allowed the introduction into evidence of a letter written by the defendant in which he stated that "I know I did murder that man," notwithstanding that, from a review of the entire letter, the alleged confes-



sion contained therein could have been the result of a grammatical error rather than an actual confession; an admission of guilt by the accused is relevant evidence of highly probative value and this rule did not require the court to suppress the letter simply because it was open to interpretation. *Phillips v. State*, 344 Ark. 453, 40 S.W.3d 778 (2001).

Trial court did not err in excluding any mention of a doctor who had been involved as a consultant and legal assistant on a patient's malpractice case because the fact that the doctor participated in consulting with two of the patient's experts had no relevance nor had the fact that he had been convicted of drug possession, causing him to lose his medical license. Because the testimony was irrelevant, there was no need for an analysis under this rule. *McCoy v. Montgomery*, 370 Ark. 333, 259 S.W.3d 430 (2007).

Trial court did not err by allowing two witnesses to testify during sentencing that they had seen defendant "acting suspiciously" in the neighborhood park on the day of his initial contact with police because the trial court specifically instructed the jury that the testimony was only to be considered to show why the witnesses called the police and was not offered for the truth of the matter asserted, the testimony was not unduly prejudicial, and the testimony went to defendant's character. *Adkins v. State*, 371 Ark. 159, 264 S.W.3d 523 (2007).

Trial court did not err by allowing a police officer to testify that defendant's pants were unbuttoned and unzipped at the time of his arrest because defendant cured any prejudice by cross-examining the officer and the appearance of defendant's clothing was relevant to why the officer searched defendant. *Adkins v. State*, 371 Ark. 159, 264 S.W.3d 523 (2007).

During defendant's criminal prosecution for murder, the trial court did not abuse its discretion by admitting defendant's statement to a reporter that his reason for killing the victim was to give him an early Christmas present. For purposes of this rule, the statement was probative of extreme indifference by showing defendant's state of mind at the time of the shooting as well as his lack of remorse. *Vorachith v. State*, 2009 Ark. App. 656, — S.W.3d —, 2009 Ark. App. LEXIS 826 (2009).

#### **Basis for Exclusion.**

Relevant evidence may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. *Gruzen v. State*, 267 Ark. 380, 591 S.W.2d 342 (1979), cert. denied 449 U.S. 852, 101 S. Ct. 144, 66 L. Ed. 2d 64 (1980).

Under this rule, any reference to homosex-

uality through cross-examination would have no relevance to the issues and would have involved a danger of unfair prejudice outweighing any possible probative value of the cross-examination; accordingly, where medical examiner found a few sperm in murder victim's anal area, some anal scars which could either be attributable to the hemorrhoids which the victim had or to anal intercourse, and since the police had no information about the victim being a homosexual, and because it is common for a man to ejaculate when he dies a violent death, it was proper for the trial court to prevent defense counsel from cross-examining the examiner about his findings. *Pitts v. State*, 273 Ark. 220, 617 S.W.2d 849 (1981).

The fact that evidence is prejudicial to a party is not, in itself, reason to exclude evidence; the danger of unfair prejudice must substantially outweigh the probative value of the evidence. *Marvel v. Parker*, 317 Ark. 232, 878 S.W.2d 364 (1994).

Trial court gave a fair and reasonable explanation for excluding expert testimony pertaining to tests as conducted. *Thomson v. Littlefield*, 319 Ark. 648, 893 S.W.2d 788 (1995).

The trial court erred in admitting into evidence a triple-beam balance scale seized from another's residence because there was no evidence by which a jury could infer that the defendant had control, exclusive access, or dominion over such residence. *Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997).

In juvenile proceeding where the defendant was charged with the rape of a victim under the age of 14, the trial court did not abuse its discretion in determining that evidence of the victim's sexual history was irrelevant. *M. M. v. State*, 350 Ark. 328, 88 S.W.3d 406 (2002).

#### **Corroboration of Accomplice.**

Where in a prosecution for theft of property the state introduced a recorded conversation that the defendant had with a police informant, in which the defendant incriminated himself by referring to his participation in other car thefts, the trial court properly admitted such evidence since it had independent relevancy and it corroborated the testimony of the defendant's alleged accomplice. *Price v. State*, 268 Ark. 535, 597 S.W.2d 598 (1980).

#### **Corroboration of Rape Victim.**

In prosecution for rape, the trial court did not err in allowing articles of the defendant's clothing to be introduced into evidence together with testimony that there were human bloodstains on the clothing, where this evidence tended to corroborate the testimony of the rape victim, the police officers, and the medical examiner, and where it also tended to contradict the statement of the defendant

that he had been in the car for only a period of time as to allow him to drive three or four blocks. *Brewer v. State*, 269 Ark. 185, 599 S.W.2d 141 (1980).

Trial court did not err in admitting defendant's prior convictions of rape and sexual assault of his step-daughter and her friend as it went to the depraved sexual instinct of the accused; further, the evidence was not excluded under this rule as it corroborated the victim's testimony. *Anderson v. State*, 93 Ark. App. 454, 220 S.W.3d 225 (2005).

### **Credibility.**

In a witness bribery case, a trial court erred in excluding evidence that the state's main witness could have been biased due to a quiet title lawsuit two years earlier between the witness's parents and the defendant's parents. *Paschal v. State*, 2012 Ark. 127, — S.W.3d —, 2012 Ark. LEXIS 158 (Mar. 29, 2012).

### **Cumulative Evidence.**

This rule was not only designed to exclude relevant evidence on grounds of prejudice, but a trial court in the interest of the efficient administration of criminal justice may exclude evidence, although relevant, where there is a needless presentation of cumulative evidence, upon considerations of undue delays and waste of time. *Lee v. State*, 266 Ark. 870, 587 S.W.2d 78 (1979).

Testimony concerning defendant's relationship to militaristic organization, the involvement with weapons, and the methods of operation was held relevant to show motive, etc., in larger plan to obtain money for organization in trial for robbery and murder of pawnbroker. *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986), cert. denied 484 U.S. 872, 108 S. Ct. 202, 98 L. Ed. 2d 153 (1987).

Federal bankruptcy court order properly excluded from evidence as redundant and likely to confuse issues. *First Nat'l Bank v. Hess*, 23 Ark. App. 129, 743 S.W.2d 825 (1988).

Where the jury had before it evidence that the deceased was a "bouncer," evidence from several witnesses that they had seen the deceased in his capacity as a bouncer throw people out of bars, and that they had seen him win some fist fights, although relevant, was cumulative and need not have been admitted. *Smith v. State*, 33 Ark. App. 37, 801 S.W.2d 655 (1990).

It is not reversible error to exclude evidence which is merely cumulative. *Edwards v. State*, 40 Ark. App. 114, 842 S.W.2d 459 (1992).

There was no prejudicial error where the evidence erroneously admitted was merely cumulative. *Thompson v. Perkins*, 322 Ark. 720, 911 S.W.2d 582 (1995).

Testimony in a divorce proceeding by a

second expert witness with regard to the value of the parties' shares in a company could not be excluded under the rule as a "needless presentation of cumulative evidence" since the 2 expert witnesses were not so similar in their credentials, opinions, and approaches to the valuation that the introduction of the second expert's testimony would have been needless. *Skokos v. Skokos*, 332 Ark. 520, 968 S.W.2d 26 (1998).

In an action against an attorney for breach of contract in his representation of his client in a divorce matter, the attorney was improperly precluded from presenting evidence in his case-in-chief, notwithstanding that some similar evidence had been presented during the plaintiff's case-in-chief, since all of the proffered evidence was cumulative and because the excluded evidence, even if cumulative, was not needlessly so because it was the essence of his case. *Potter v. Magee*, 61 Ark. App. 112, 964 S.W.2d 412 (1998).

The court reversed an award of damages in an action against an attorney for breach of contract in his representation of a client, where the trial court effectively prevented the attorney from presenting his case by excluding as cumulative his testimony during his case-in-chief regarding the exact nature of the services he provided to the client. *Potter v. Magee*, 61 Ark. App. 112, 964 S.W.2d 412 (1998).

Ark. R. Evid. 702 applied to a gang intelligence detective's testimony regarding gang activity and, because the detective's expertise came from his personal experiences, a Daubert analysis was not required; while it was an abuse of discretion to allow the detective to testify that defendant was a "slinger" and a "banger" under this rule, the error was harmless because the evidence was cumulative. *Jackson v. State*, 359 Ark. 297, 197 S.W.3d 468 (2004), cert. denied 544 U.S. 1039, 125 S. Ct. 2266, 161 L. Ed. 2d 1070 (2005).

In a case where a child was determined to be dependent-neglected based on allegations of sexual abuse, it was unnecessary to decide if testimony from the father's mother about what the child said was admissible under Ark. R. Evid. 803(3) to show the child's then-existing mental, emotional, or physical condition because the testimony was excludable as cumulative under this rule. The father was trying to show that the child had made statements denying the abuse had occurred, but other statements to this effect had been introduced. *Sparrow v. Ark. HHS*, 101 Ark. App. 193, 272 S.W.3d 846 (2008).

In a case in which defendant was convicted for committing a terroristic act and first-degree battery, he unsuccessfully argued that the circuit court abused its discretion by denying his objection to the admissibility of a certified copy of a pretrial no-contact order,



entered in an unrelated case, directing him not to have any contact with the victim in the present case. The no-contact order was cumulative evidence to the victim's testimony, to which defendant had not objected, and defendant failed to show prejudice. *Harris v. State*, 2010 Ark. App. 247, — S.W.3d —, 2010 Ark. App. LEXIS 226 (Mar. 10, 2010).

#### **Dangerous Instrumentalities.**

The instrumentality used to inflict fear is patently relevant to crimes of rape, kidnapping and aggravated robbery all of which include an element of force for perpetration. *Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119 (1992).

Knife found at crime site was relevant to corroborate the testimony of the victim concerning stabbings and no prejudice resulted to the defendant. *Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119 (1992).

Defendant's convictions for capital murder and committing a terroristic act were appropriate because evidence of ammunition taken from his former home was relevant and admissible since the shell casings at the scene of the drive-by shooting were the exact types found at defendant's former home and that related to his and his alleged accomplices' knowledge of those types of ammunition, their access thereto, and to their guilt. The supreme court was further unable to say that the circuit court abused its discretion in concluding that the evidence was more probative than prejudicial. *Banks v. State*, 2010 Ark. 108, 366 S.W.3d 341 (2010).

#### **Details of Prior Incident.**

Where the defendant was prosecuted for committing a battery on a deputy sheriff outside of a nightclub, the trial court did not err in limiting introduction into evidence of the details as to what occurred inside the club before the altercation with the deputy sheriff, despite the defendant's contention that what happened inside the club and what happened outside constituted one ongoing episode, was part of the *res gestae*, and would have better enabled the jury to understand the defendant's mental state and the reasonableness of his belief that he was in danger of great bodily harm. *Barnes v. State*, 4 Ark. App. 84, 628 S.W.2d 334 (1982).

Where injured truck driver had described his injuries from a 1999 accident by stating they were insubstantial, but the 2000 demand letter stemming from that accident indicated that he had suffered substantial injuries similar to those he sustained in the 2001 accident, the 2000 demand letter was admissible for impeachment purposes at the damages trial for the 2001 accident; it was also reasonable for the 2004 jury to know the extent of truck driver's claims of injuries from the 1999

accident. *House v. Volunteer Transp., Inc.*, 365 Ark. 11, 223 S.W.3d 798 (2006).

#### **Discretion of Court.**

The mere fact that evidence is cumulative may be a ground for its exclusion, in the sound discretion of the trial judge, but it is hardly a basis for holding that its admission, otherwise proper, constitutes an abuse of discretion. *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980).

Trial court has discretion in determining the relevance of evidence and in gauging its probative value against unfair prejudice. *Simpson v. Hurt*, 294 Ark. 41, 740 S.W.2d 618 (1987).

The balancing of probative value against prejudice is a matter left to the sound discretion of the trial judge, and his decision on such a matter will not be reversed absent a manifest abuse of that discretion. *Wood v. State*, 20 Ark. App. 61, 724 S.W.2d 183 (1987); *Bennett v. State*, 297 Ark. 115, 759 S.W.2d 799 (1988), cert. denied, 498 U.S. 851, 111 S. Ct. 144, 112 L. Ed. 2d 110 (1990); *Noble v. State*, 26 Ark. App. 163, 762 S.W.2d 393 (1988); *Haynes v. State*, 309 Ark. 583, 832 S.W.2d 479 (1992); *Weger v. State*, 315 Ark. 555, 869 S.W.2d 688 (1994).

Where murder defendant attempted to have entered into evidence testimony to show others had a motive to kill the deceased, because there were no specific threats, the trial court's finding that the proffered testimony was collateral and excludable under this rule was not an abuse of discretion. *Ray v. State*, 304 Ark. 489, 803 S.W.2d 894, cert. denied 501 U.S. 1222, 111 S. Ct. 2837, 115 L. Ed. 2d 1005 (1991).

Where murder defendant attempted to have entered into evidence a report concealing a phone call which allegedly showed there was a third person with a motive to kill the deceased, considering the remoteness in time of the reported call and the absence of any subsequent calls or actions stemming from the call, it could not be said that the report was either material or particularly favorable to the defendant's case, and thus the trial court did not abuse its discretion in excluding it from evidence. *Ray v. State*, 304 Ark. 489, 803 S.W.2d 894, cert. denied 501 U.S. 1222, 111 S. Ct. 2837, 115 L. Ed. 2d 1005 (1991).

As with other evidentiary determinations, the balancing of probative value against prejudice is a matter left to the trial court's sound discretion, and its decision on such a matter will not be reversed absent abuse of that discretion. *Robinson v. State*, 314 Ark. 243, 861 S.W.2d 548 (1993).

Just as it is within the trial court's discretion to decide pursuant to this rule that evidence, though relevant, is to be excluded because it is unfairly prejudicial, under ARCP 59(a)(8) it is within the trial court's discretion

to grant a new trial on the basis of an error of law occurring at the trial and objected to by the party making the application. *Burnett v. Fowler*, 315 Ark. 646, 869 S.W.2d 694 (1994).

This rule allows a trial court to exclude relevant evidence if its probative value is outweighed by the possibility of confusion of issues; this weighing is a matter left to the trial court's sound discretion and will not be reversed absent a showing of manifest abuse. *Bohanan v. State*, 324 Ark. 158, 919 S.W.2d 198 (1996).

The court did not abuse its discretion in permitting the introduction of evidence that, at around the date that the defendant murdered his parents, he pulled a pistol out of his truck console and told a friend that he had the pistol in the truck in case someone tried to "fuck with" them since such evidence was not so unfairly prejudicial as to outweigh its probative value. *Hodge v. State*, 332 Ark. 377, 965 S.W.2d 766 (1998).

The trial court did not abuse its discretion in permitting the admission into evidence of a rap tape found in the defendant's automobile since the tape was admissible as corroborative of the intent of the defendant and his accomplices to carry out a criminal plan similar to that suggested by lyrics on the tape. *Britt v. State*, 334 Ark. 142, 974 S.W.2d 436 (1998).

The trial court did not abuse its discretion in admitting "surprise" testimony that the defendant told a witness that, if anyone asked, he was to say that the defendant had cut his hand while filleting fish since, even if the testimony was prejudicial, it was harmless in light of other evidence presented at the trial. *Baker v. State*, 334 Ark. 330, 974 S.W.2d 474 (1998).

The trial court did not abuse its discretion in permitting the introduction into evidence of typewritten notes by a jail matron of statements she heard between the defendants when they visited one another, notwithstanding the absence of the original handwritten notes made by the jail matron, where the jail matron testified that she merely typed without change her missing handwritten notes. *Efurd v. State*, 334 Ark. 596, 976 S.W.2d 928 (1998).

The court did not abuse its discretion in disallowing testimony by a prosecuting attorney in an action for malicious prosecution since his testimony would have added nothing of substance to the testimony already offered by previous witnesses. *Kellerman v. Zeno*, 64 Ark. App. 79, 983 S.W.2d 136 (1998).

Evidence of defendant's friendship with his victim was not prejudicial under this rule where defense counsel, through cross-examination as well as through his closing statement, made his point to the jury that the existence of a friendship did not equal the

existence of a sexual relationship. *Smith v. State*, 354 Ark. 226, 118 S.W.3d 542 (2003).

#### **Drug Evidence.**

In a criminal prosecution for possession of marijuana and cocaine with intent to deliver, the trial court did not abuse its discretion in allowing the marijuana to stay in the courtroom during the first two and a half hours of the trial; the presence and alleged odor of the marijuana was not unduly prejudicial. *McKenzie v. State*, 362 Ark. 257, 208 S.W.3d 173 (2005).

#### **Dying Declarations.**

A dying declaration by a murder victim that the defendant shot him was properly admitted into evidence, notwithstanding the defendant's assertion that the dying declaration was more prejudicial than probative because the state had other means to prove its case, i.e., eyewitness testimony, since the state was entitled to prove its case as conclusively as it can. *Hammon v. State*, 338 Ark. 733, 2 S.W.3d 50 (1999).

#### **Elements of Crime.**

As evidence of checks was part and parcel of the state's evidence establishing robbery, there was no abuse of discretion in the court's receiving this evidence. *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995), cert. denied 517 U.S. 1143, 116 S. Ct. 1436, 134 L. Ed. 2d 558 (1996).

Gang-affiliation evidence held admissible to show motive for murder. *Scott v. State*, 325 Ark. 267, 924 S.W.2d 248 (1996).

Trial court did not err in admitting testimony about the victim's subsequent death a month after the robbery because the evidence of the victim's death was clearly relevant to prove death or serious physical injury as an element of the offense of aggravated robbery, § 5-12-103(2). *Medlock v. State*, 79 Ark. App. 447, 89 S.W.3d 357 (2002).

Where defendant was charged with possession of firearms by certain persons and aggravated assault, the trial court abused its discretion in refusing defendant's offer to stipulate to his prior felony conviction and in overruling defendant's objection to the admission of his prior conviction; thus, defendant's convictions were reversed. *Ferguson v. State*, 90 Ark. App. 119, 204 S.W.3d 113 (2005), reversed 362 Ark. 547, 210 S.W.3d 53 (2005).

#### **Evidence of Insurance.**

Where the trial judge in a personal injury action apparently made no discretionary determination under this rule, that any prejudice resulting from introduction of evidence of insurance would outweigh the probative value of the evidence, there was no justification for the court to have refused to permit the testimony or to have given the requested instruction on admissibility of such evidence



had the testimony been permitted. *Ashmore v. Ford*, 267 Ark. 854, 591 S.W.2d 666 (1979), limited *Druckenmiller v. Cluff*, 316 Ark. 517, 873 S.W.2d 526 (1994).

In a medical malpractice action, the trial court did not abuse its discretion when it refused to permit the plaintiff to ask the expert witness testifying for the defense whether he had previously written a report for an insurance company in which he gave his opinion of the defendant's handling of the case, where the trial judge held that the prejudice which would result from the jury knowing insurance was involved outweighed any probative value. *Hively v. Edwards*, 278 Ark. 435, 646 S.W.2d 688 (1983).

Mention of insurance in an auto accident case would have caused substantial unfair prejudice, and it would have had only a slight probative value on the issue of orchestration; thus, the trial court did not abuse its discretion in refusing to allow the proffered testimony about insurance. *Peters v. Pierce*, 314 Ark. 8, 858 S.W.2d 680 (1993).

Testimony that defendant was injured and out of work did not lead the jury to assume that the defendant could not bear the financial burden of a judgment, and thus did not open the door to evidence regarding whether defendant had liability insurance. *Esry v. Carden*, 328 Ark. 153, 942 S.W.2d 846 (1997).

#### Expert Testimony.

In a medical malpractice action, the court did not abuse its discretion in excluding evidence that the defendant had failed a board certification examination on a number of occasions; although evidence of a physician's lack of board certification may be used to impeach the physician's credibility as an expert witness, a trial court must still properly weigh the interests under this rule and may exclude relevant evidence if its probative value is substantially outweighed by the possibility of unfair prejudice or confusion of the issues. *Jackson v. Buchman*, 338 Ark. 467, 996 S.W.2d 30 (1999).

In a murder case, the court did not err by allowing the state to question the medical examiner about strangulation as a cause of death where the issue was critical to the state's case and defendant suffered no unfair prejudice; defendant confessed to his son that he got his wife in a choke hold and did not let her go, the jury was not misled by testimony, and the medical examiner's opinion on the cause of death was highly probative. *Wyles v. State*, 357 Ark. 530, 182 S.W.3d 142 (2004).

#### Factors Considered.

Under this rule, the probative value and unfair prejudice of the evidence must be assessed somehow, and these values must be compared to determine which will advance the search for truth; on the basis of this

comparison, the proffered evidence is admitted or rejected. *Golden v. State*, 10 Ark. App. 362, 664 S.W.2d 496 (1984), questioned *Bullcock v. State*, 353 Ark. 577, 111 S.W.3d 380 (2003), overruled *Bledsoe v. State*, 344 Ark. 86, 39 S.W.3d 760 (2001).

Where letter purportedly written by defendant was not shown by the state to be in defendant's handwriting and contained no admission of guilt with respect to a stolen camera, the evidence of the camera in the letter was not prejudicial and was not needlessly cumulative where other evidence regarding the stolen camera had been introduced. *Box v. State*, 348 Ark. 116, 71 S.W.3d 552 (2002).

In defendant's murder case, the circuit court did not abuse its discretion in refusing to exclude the reference to defendant's tattoo in the video and transcript of his interview with the detective because there was no follow up or suggestion based on the questions and answers about the tattoo. Based upon the brevity of the discussion in an otherwise completely relevant statement, coupled with the fact that defendant no explanation as to how the tattoo suggested gang affiliation, there was no error. *Navarro v. State*, 371 Ark. 179, 264 S.W.3d 530 (2007).

Although the prejudice clearly outweighed the probative value of the 911 tapes under this rule, the error to admit the tapes was harmless because of the sufficient independent evidence presented in the form of victim testimony and physical evidence. *Snider v. State*, 2009 Ark. App. 472, 323 S.W.3d 635 (2009).

Denial of appellant's, an inmate's, petition for postconviction relief was appropriate after he was convicted of first-degree sexual assault because he failed to prove that he received the ineffective assistance of counsel. In part, there were striking similarities in the testimony of the boys, the evidence in the case was highly probative, and the inmate failed to show that counsel could have prevailed on appeal if the argument regarding witness testimony had been preserved. *Croy v. State*, 2011 Ark. 284, — S.W.3d —, 2011 Ark. LEXIS 253 (June 23, 2011).

During defendant's trial for permitting the abuse of her minor child, the court did not err in allowing defendant's neighbor to testify because the testimony was probative of the material issue of defendant's failure to take action to prevent abuse to her children; it also corroborated other testimony that defendant left her three children unattended for a couple of days while she and her boyfriend went to Texas. *Sullivan v. State*, 2012 Ark. 74, — S.W.3d —, 2012 Ark. LEXIS 93 (Feb. 23, 2012).

Denial of appellant's, an inmate's, Ark. R. Crim. P. 37 petition was proper because he

failed to prove that he received the ineffective assistance of counsel. Had counsel made the objections that the inmate asserted should have been made under this rule and Ark. R. Evid. 404(b), they would have been properly overruled because the inmate himself introduced the issue of a Virginia trip and his treatment of the victim's older sister; thus, the inmate opened the door to the very testimony he now found objectionable. *Gilliland v. State*, 2012 Ark. 162, — S.W.3d —, 2012 Ark. LEXIS 183 (Apr. 19, 2012).

#### **Harmless Error.**

Where prosecutor in rape case elicited from the victim testimony that she had been a virgin prior to the rape but trial court admonished jury to disregard improper question and answer, the statement was harmless error regardless of its relevancy and there was no violation of this rule. *Brewer v. State*, 269 Ark. 185, 599 S.W.2d 141 (1980).

In a prosecution for possession and delivery of a drug, erroneous admission of certain drug paraphernalia was harmless error where there was overwhelming evidence to support a conviction. *Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997).

When the evidence of guilt is overwhelming, slight errors in the introduction of evidence do not constitute reversible error. *Kidd v. State*, 330 Ark. 479, 955 S.W.2d 505 (1997).

Trial court's error in admitting evidence of a neighbor as to incidents when defendant's three children were left unsupervised, if any, was harmless given the overwhelming evidence of defendant's guilt in allowing the abuse of her child by her boyfriend. *Sullivan v. State*, 2011 Ark. App. 576, — S.W.3d —, 2011 Ark. App. LEXIS 620 (Sept. 28, 2011).

#### **Impeachment.**

Rule 608(b) has no application to the issue of impeachment by contradiction, but this rule, which permits the court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, is applicable. However, under this rule the issue must be specifically brought to the attention of the trial court. *Shaver v. State*, 37 Ark. App. 124, 826 S.W.2d 300 (1992).

In a witness bribery case, a trial court erred in excluding evidence that the state's main witness could have been biased due to a quiet title lawsuit two years earlier between the witness's parents and the defendant's parents. *Paschal v. State*, 2012 Ark. 127, — S.W.3d —, 2012 Ark. LEXIS 158 (Mar. 29, 2012).

#### **Incest and Child Abuse.**

In the context of incest and child abuse cases, the question of the admissibility of evidence of prior offenses between different individuals must be determined on a case-by-

case basis. Proper admission of this testimony requires a fact-intensive inquiry conducted by the trial court, keeping in mind the purpose of Rule 404(b), the rationale behind case law which has allowed the admission of such testimony, and the considerations required by this rule. This approach is preferable to a rigid, mechanistic rule which would automatically exclude such evidence regardless of its relevancy, its purpose, or its probative value. *Baldrige v. State*, 32 Ark. App. 160, 798 S.W.2d 127 (1990).

In a prosecution of defendant on four counts of violation of a minor in the first degree, the testimony of defendant's adult daughter, who testified that defendant sexually violated her when she was a child 30 years before, was admissible both to show motive and plan; the probative value of the daughter's testimony outweighed the danger of unfair prejudice. *Tull v. State*, 82 Ark. App. 159, 119 S.W.3d 523 (2003).

Defendant's daughter's testimony was properly admissible under this rule because enough similarities existed between the cases to make the evidence probative on the issue of defendant's deviate sexual impulses; the victim was around 13 when the abuse happened and the daughter was 14 at the time of the incident with her father, both girls were staying in defendant's home at the time of the abuse, and the victim testified that she looked upon defendant as a father. *Flanery v. State*, 362 Ark. 311, 208 S.W.3d 187 (2005).

In an assault case arising from shaking a baby under § 5-13-201(a)(4)(A), testimony of defendant's actions toward the same infant two weeks earlier was admissible under Ark. R. Evid. 404(b) and this rule because it was offered to show state of mind and to negate the claim of accident. *Smith v. State*, 90 Ark. App. 261, 205 S.W.3d 173 (2005).

Trial court did not err by denying defendant the right to elicit evidence tending to corroborate testimony about the victim's alleged molestation of one his children because the grandmother testified only that her granddaughter cried when taken from her grandparents to visit the victim and admitted that she never called any social service agency or any law enforcement authorities to report any incidents of child abuse. *Vidos v. State*, 367 Ark. 296, 239 S.W.3d 467 (2006).

Trial court properly admitted evidence of defendant having an erection during supervised visitation with the victims, his young daughters, during his rape trial as the evidence fell under the pedophile exception to Ark. R. Evid. 404(b) because: (1) evidence of defendant's arousal while watching the victims perform a dance routine demonstrated a "particular proclivity" toward young girls, particularly the victims, thereby establishing the "intimate relationship" between the per-



petrator and the victim; (2) the fact that defendant got an erection demonstrated an unnatural sexual attraction towards his daughters and, therefore, there was a “sufficient degree of similarity” between defendant’s arousal at seeing the victims and his sexual conduct of having intercourse with them; and (3) the evidence was relevant under this rule because it demonstrated why visitation with the victims stopped shortly thereafter. *White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006).

Evidence of defendant’s physical abuse of the victims, his two young daughters, was properly admitted into evidence during his rape trial because defendant’s physical abuse demonstrated that he instilled fear in the victims and intimidated them by both physical and sexual abuse. *White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006).

In defendant’s rape case, the court properly admitted evidence that defendant had touched them in a sexual manner because the relationship between defendant and his daughter, the witness, was clearly an intimate one, and the conduct about which she testified was sufficiently similar to the charged conduct to warrant application of the exception. Both girls were under defendant’s care at the time of the abuse, the victim viewed defendant as her father, and both girls were between the ages of six and nine at the time of the start of the abuse. *Strong v. State*, 372 Ark. 404, 277 S.W.3d 159 (2008).

Trial court did not abuse its discretion in permitting a 30-year old witness from testifying regarding his sexual abuse by defendant when the witness was between the ages of 13 and 18 at defendant’s trial for raping and sexually assaulting his minor step-grandchildren because defendant had subjected the witness to the same type of sexual conduct and because the witness and defendant’s step-grandchildren were, to a certain degree, under defendant’s care at the time of the abuse. Because the similarities were significant and probative on the issue of defendant’s deviate sexual impulses, the probative value of the evidence was not substantially outweighed by any danger of unfair prejudice. *Allen v. State*, 374 Ark. 309, 287 S.W.3d 579 (2008).

Defendant’s convictions for rape as a habitual offender were appropriate because the testimony of a 26-year-old female (witness) whose mother was married to defendant when the witness was a child was permissible under Ark. R. Evid. 404(b) since the testimony was probative of defendant’s depraved sexual instinct toward young girls living in his home. A review of the record further showed that the trial court weighed the probative value and the prejudice in admitting the witness’s testi-

mony. *Price v. State*, 2010 Ark. App. 111, — S.W.3d —, 2010 Ark. App. LEXIS 105 (Feb. 3, 2010).

In defendant’s prosecution under § 5-14-103(a)(3)(A), it was not an abuse of discretion to admit an anatomical chart completed at the child victim’s direction with defendant’s name on the chart because (1) the name was not hearsay, under Ark. R. Evid. 801(c), as the name was not offered to prove defendant abused the victim, (2) if hearsay, the name was admissible, as Ark. R. Evid. 803(4) permitted statements in a medical exam identifying a perpetrator in a child’s household, and (3) this rule did not exclude the exhibit as the victim identified defendant as the victim’s abuser at trial, and any error was harmless, as the exhibit was cumulative. *Elliott v. State*, 2010 Ark. App. 810, — S.W.3d —, 2010 Ark. App. LEXIS 860 (Dec. 8, 2010).

During defendant’s trial for raping his seven-year-old daughter, the court did not err in allowing the admission of a drawing by the victim because the drawing not only enabled the jury to more fully understand the victim’s testimony but also allowed the victim to testify more effectively; there was no prejudice to defendant. *Harlmo v. State*, 2011 Ark. App. 314, — S.W.3d —, 2011 Ark. App. LEXIS 339 (Apr. 27, 2011).

Testimony of defendant’s 12- or 13-year-old daughter that defendant asked her to show him her breasts was properly excluded as: (1) the 12-year-old victim alleged that defendant touched her breasts, buttocks, and vagina; (2) the daughter’s testimony was sufficiently similar to fall within the pedophile exception to Ark. R. Evid. 404(b) as it signified defendant’s sexual interest in the bodies of young teen or pre-teen girls; and (3) the testimony had independent relevance for purposes of this rule. *Stewart v. State*, 2011 Ark. App. 658, — S.W.3d —, 2011 Ark. App. LEXIS 698 (Nov. 2, 2011).

### **Intent.**

Expert testimony on the ability of a defendant to form specific intent to murder is not admissible. *Stewart v. State*, 316 Ark. 153, 870 S.W.2d 752 (1994).

In a negligence action against insurance agent, statements pertaining to insured’s intent that his son not receive any policy benefits were admissible to establish that agent had properly effectuated the intent of the insured. *Easterling v. Weedman*, 54 Ark. App. 22, 922 S.W.2d 735 (1996).

In a prosecution for permanent detention or restraint, defendant’s several contradictory statements that defendant had killed and buried the victim, while the victim was alive and residing in another state, were probative of defendant’s intent and were not so prejudi-

cial as to be excluded under this rule. *Brown v. State*, 54 Ark. App. 44, 924 S.W.2d 251 (1996).

In a prosecution for capital felony murder, evidence that the defendant was receiving Social Security checks might have been confusing to the jury, which could have concluded the federal government's determination that the defendant was entitled to assistance due to a mental disability amounted to proof that he lacked the capacity to commit the crime alleged. *Bowden v. State*, 328 Ark. 15, 940 S.W.2d 494 (1997).

Two documents written by defendant describing a robbery scenario were not prejudicial to defendant because they were probative of defendant's intent to commit aggravated robbery. *Cook v. State*, 345 Ark. 264, 45 S.W.3d 820 (2001).

Evidence of subsequent drug sales was properly admitted at defendant's trial for possession of cocaine with the intent to deliver and possession of methamphetamine with the intent to deliver, both pursuant to § 5-64-401, because, pursuant to Ark. R. Evid. 404(b) and this rule, the evidence was relevant to whether defendant intended to deliver the drugs, and was not unfairly prejudicial. *Turner v. State*, 2009 Ark. App. 822, — S.W.3d —, 2009 Ark. App. LEXIS 1049 (2009).

#### **Intoxication.**

Although Ark. Code Ann. § 27-101-202(7) (Repl. 1994) provides that no person shall operate any motorboat while intoxicated, trial court did not abuse its discretion in excluding testimony regarding beer cans found in the water; there was no evidence that boat operator was intoxicated, and its prejudicial effect outweighed any probative value. *Wade v. Grace*, 321 Ark. 482, 902 S.W.2d 785 (1995).

In a prosecution for murder, the court did not err in refusing to allow the defendant to present evidence that the victim, had cocaine in her bloodstream at the time of her death since such evidence had little probative value with regard to provocation, but was highly prejudicial, and the court allowed the defendant to offer evidence of alcohol in the victim's bloodstream, but he failed to do so. *Jones v. State*, 340 Ark. 390, 10 S.W.3d 449 (2000).

#### **Limited Purpose.**

Where savings and loan association accepted decedent's credit life insurance request as part of a loan package, but failed to advise decedent that an application would have to be taken, so that no insurance was procured, it was not error for the trial court to admit evidence under this rule tending to show that decedent was insurable by companies other than the one used by the association, since it was relevant for the limited purpose of showing decedent's insurability, because its probative value was not substantially outweighed

by the danger of unfair prejudice or misleading the jury. *Home Fed. Sav. & Loan Ass'n v. Bass*, 1 Ark. App. 146, 613 S.W.2d 604 (1981).

#### **Limiting Instruction.**

Where a narcotics agent testified as to a conversation he had with the defendant at the time of the delivery transaction, and when he asked defendant about the quality of the PCP, two packets of white powder, the defendant assured him it was "pretty good," and he had already sold 30 hits that same night, and where following the agent's testimony, the court admonished the jury that the testimony was admitted for the limited purpose of establishing the "entire transaction of the night in question," and not for determining the defendant's guilt or innocence with regard to the offense with which he was being tried, the court did not err in admitting the questioned testimony. *Young v. State*, 269 Ark. 12, 598 S.W.2d 74 (1980).

The court did not abuse its discretion in admitting evidence that narcotics officers had received a call saying there were two black males from the Sallisaw, Oklahoma area who were selling cocaine or had it in their possession, as the evidence had a high probative value, and gave the reason behind the officers' surveillance of the defendant's activity, and since the trial court gave a limiting instruction to the jury, informing them that they were not to look to the evidence for the truth of the matter asserted, but to show why the officers acted as they did. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

#### **Luminol Test.**

The mere presence of human blood found by luminol testing, without factors which relate that evidence to the crime, is not admissible. *Palmer v. State*, 315 Ark. 696, 870 S.W.2d 385 (1994).

When positive luminol tests cannot be confirmed by other evidence, the luminol test results become irrelevant and their admission into evidence confuses the jury. *Young v. State*, 316 Ark. 225, 871 S.W.2d 373 (1994).

#### **Misleading Evidence.**

In suit seeking recovery for personal injuries suffered when plaintiff was struck by auto driven by defendant, the refusal of court to permit plaintiff to show that there was a speed limit sign near the scene of the accident not for the purpose of showing the speed limit but in order to show defendant was not keeping a proper lookout was not error since it was stipulated that there was no ordinance regulating vehicular speed in the area and evidence pertaining to this sign would be calculated to mislead the jury on the issue of speed and the danger of unfair prejudice on this account would substantially outweigh the slight relevance it would have had on the lookout issue. *Ferguson v. Graddy*, 263 Ark.



413, 565 S.W.2d 600 (1978), questioned *Saber Mfg. Co. v. Thompson*, 286 Ark. 150, 689 S.W.2d 567 (1985).

A Rule 702 determination of whether the evidence might confuse or mislead the jury is separate from a weighing under this rule, in which the proponent of the evidence must first prove that it is reliable and will not confuse or mislead the jury. *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991).

Testimony that tended to show that defendant had cleaned himself up for court did not unfairly prejudice or mislead the jury. *Gunter v. State*, 313 Ark. 504, 857 S.W.2d 156, cert. denied 510 U.S. 948, 114 S. Ct. 391, 126 L. Ed. 2d 339 (1993).

#### **Motive.**

In a murder prosecution, evidence of the defendant's participation in uncharged acts of forgery and burglary was properly admitted as proof of his motive for killing the victim. *McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999).

In a criminal prosecution for first-degree murder, the trial court did not abuse its discretion in allowing tattoo evidence at trial; the tattoo, which read "Death Before Dishonor," was probative of defendant's motive in the shooting the victim following an altercation. *Morris v. State*, 358 Ark. 455, 193 S.W.3d 243 (2004).

#### **Objections.**

Where plaintiffs did not ask the trial court to weigh probative value against unfair prejudice, the trial court erred in granting a new trial based on this Rule because no objection was raised either before or during the trial, and ARCP 59(a)(8) provides that a new trial may be granted for an "error of law occurring at the trial and objected to"; lacking an objection, there was no support for the ruling that the evidence was not relevant. *Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 894 S.W.2d 897 (1995).

#### **Opinion Testimony.**

An eyewitness' opinion testimony as to whether a shooting was accidental or intentional was not objectionable as being irrelevant or a waste of time in a murder prosecution. *Mathis v. State*, 267 Ark. 904, 591 S.W.2d 679 (Ct. App. 1979), overruled *Rogers v. State*, 10 Ark. App. 19, 660 S.W.2d 949 (1983), questioned *State v. Murphy*, 315 Ark. 68, 864 S.W.2d 842 (1993), questioned *Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001).

An undercover narcotics officer can be found competent to state his opinion regarding the substance he purchased and where officer, acting in an undercover capacity, and through prior experience, thought he was buying hashish, and in fact thought it was in sufficient quantity to have an effect on six to eight persons, he was properly allowed to

testify to the nature of the transaction in a prosecution for delivery of marijuana. *Euton v. State*, 270 Ark. 121, 603 S.W.2d 468 (Ct. App. 1980).

The state trooper should not have been permitted to testify concerning his opinion on the speed issue absent some indication that his opinion was based on information that went beyond the experience and understanding of the average juror where the question before the jury was whether the defendant was driving negligently when he collided with the decedent's car. *Higgs v. Hodges*, 16 Ark. App. 146, 697 S.W.2d 943 (1985).

#### **Other Crimes.**

Other crimes' evidence will be admitted only if it has independent relevancy and its relevancy is not substantially outweighed by the danger of unfair prejudice; these are issues which the trial judge has wide discretion in deciding, and he will not be reversed on appeal unless he has abused such discretion. *Price v. State*, 268 Ark. 535, 597 S.W.2d 598 (1980); *Carter v. State*, 295 Ark. 218, 748 S.W.2d 127 (1988); *Haynes v. State*, 309 Ark. 583, 832 S.W.2d 479 (1992).

Although the general rule is that evidence of other crimes by the accused, not charged in the indictment or information and not a part of the same transaction, is not admissible at the trial of the accused, evidence of other criminal activity is admissible under the res gestae exception to the general rule to establish the facts and circumstances surrounding the alleged commission of the offense; accordingly, evidence concerning defendant's glue-sniffing during crime was properly admitted in prosecution for aggravated robbery and kidnapping. *Bell v. State*, 6 Ark. App. 388, 644 S.W.2d 601 (1982), criticized *Lincoln v. State*, 670 S.W.2d 819 (1984).

Trial court did not err in refusing to declare a mistrial because the testimony of defendant's probation officer tended to show defendant had been convicted of a crime, where the purpose of this testimony was to show that the vehicle used in robbery was one under the control of defendant; it was properly within the discretion of the circuit judge to admit this relevant evidence by balancing the probative value of the submitted testimony against its possible prejudicial effect. *Mitchell v. State*, 281 Ark. 112, 661 S.W.2d 390 (1983).

Evidence of other crimes is admissible if it is independently relevant, and meets the probative value versus unfair prejudice balancing test of this rule. *Smith v. State*, 19 Ark. App. 188, 718 S.W.2d 475 (1986), questioned *Bullock v. State*, 353 Ark. 577, 111 S.W.3d 380 (2003). But see *Morris v. State*, 21 Ark. App. 228, 731 S.W.2d 230 (1987); *Brown v. State*, 63 Ark. App. 38, 972 S.W.2d 956 (1998).

Even when the evidence of other crimes has independent probative value, the trial judge

may exclude it if its potential prejudice exceeds its probative value. *Thrash v. State*, 291 Ark. 575, 726 S.W.2d 283 (1987).

If those portions of a confession relating to the commission of extraneous offenses are offered under Evid. Rule 404(b), it is for the trial court to determine first whether the evidence is genuinely relevant to some independent issue in the case, as opposed to proving only that the defendant is a "bad man"; if the independent relevancy of this evidence is established, the trial court is then obliged to scrutinize the evidence under this rule. *Tharp v. State*, 20 Ark. App. 93, 724 S.W.2d 191 (1987), questioned *Turner v. State*, 956 S.W.2d 870 (1997).

All of the circumstances connected with a particular crime may be shown, even if those circumstances would constitute a separate crime. *Collins v. State*, 304 Ark. 587, 804 S.W.2d 680 (1991).

The general rule is that evidence of other crimes by the accused, not charged in the indictment or information and not a part of the same transaction, are not admissible at the trial of the accused; however, evidence of other crimes is admissible under the *res gestae* exception to the general rule to establish the facts and circumstances surrounding the alleged commission of the offense. *Haynes v. State*, 309 Ark. 583, 832 S.W.2d 479 (1992).

Where other crimes occurred 6 days prior to the crimes charged and victim's testimony was not necessary to establish facts surrounding charged crimes, *res gestae* exception to the exclusionary rule was inapplicable due to the separability of the alleged crimes with those offenses with which defendant was convicted, both in time and nature of the offenses; the two separate incidents simply did not comprise one continuing criminal episode or an overall criminal transaction. *Haynes v. State*, 309 Ark. 583, 832 S.W.2d 479 (1992).

Where witness' testimony regarding defendant's behavior before the murder described a prior bad act and involvement in "other crimes," the trial court violated this rule and Evid. Rule 404 by accepting this testimony in evidence; this evidence was not independently relevant and unfairly prejudicial in that this evidence of another crime, as accepted, proved the character of defendant and that he acted in conformity therewith in victim's homicide. *Young v. State*, 316 Ark. 225, 871 S.W.2d 373 (1994).

Defendant's flight to avoid arrest, two days after the offense, was admissible as a circumstance in corroboration of evidence tending to establish guilt; the timing was not a factor, and the credibility of defendant's alibi defense and belief that the officers were not authentic was a matter to be weighed by the trier of fact. *Wallace v. State*, 326 Ark. 376, 931 S.W.2d 113 (1996).

Defendant's attempt to induce the victim to drop the charges with an offer of restitution, as evidence of defendant's knowledge of his own guilt, was probative evidence not outweighed by the danger of its unfair prejudice. *Wallace v. State*, 55 Ark. App. 114, 932 S.W.2d 345 (1996).

The evidence of murder defendant's incarceration at a halfway house and escape was relevant and not unduly prejudicial; the escape evidence was an essential part of the facts surrounding the murder. *Regalado v. State*, 331 Ark. 326, 961 S.W.2d 739 (1998).

Law enforcement officer's testimony about a note found during a search of juvenile defendant's room which referred to a planned robbery was not improperly admitted in violation of this rule because it was relevant to show the jury how the officer's investigation was developed to implicate defendant in a murder more than one year earlier, and it was not inherently prejudicial, referring only to a general plan for a robbery but not to defendant's participation. *Shields v. State*, 357 Ark. 283, 166 S.W.3d 28 (2004).

In a rape case, evidence of defendant's prior rape was properly admitted where both victims were close in age and similar in appearance, both were pulled into an area with low visibility and were asked to perform oral sex, and defendant asked both victims similar questions, such as their age, name and where they lived; in addition, the evidence was not more prejudicial than probative as the similarities between the crimes were sufficient to make the evidence probative on the issue of defendant's motive, intent, preparation, plan and scheme. *Morris v. State*, 367 Ark. 406, 240 S.W.3d 593 (2006).

In a rape case, evidence that defendant had confessed to a similar crime in a presentence report was properly admitted under Ark. R. Evid. 404(b); although prejudice resulted from the admission of the evidence, it was probative to show defendant's motive, intent, preparation, plan, and scheme under this rule. Evidence showing defendant's address as a correctional institution was also admissible. *Creed v. State*, 372 Ark. 221, 273 S.W.3d 494 (2008), rehearing denied — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 157 (Mar. 6, 2008), cert. denied — U.S. —, 129 S. Ct. 130, 172 L. Ed. 2d 37 (2008).

There was no abuse of discretion in allowing the state to present witness testimony at defendant's trial for rape, kidnapping and residential burglary concerning his two previous convictions for residential burglary and his escape attempt, because the testimony showing that defendant unlawfully entered the apartments of two other women in similar circumstances within two months of the instant crime was independently relevant to rebut his claim that his encounter with the



victim was consensual, and the flight of a person charged with commission of a crime had some evidentiary value on the question of his probable guilt. *McCullough v. State*, 2009 Ark. 134, 298 S.W.3d 452 (2009).

In defendant's murder trial, the trial court did not abuse its discretion in permitting the state to introduce evidence regarding another murder with which defendant was charged because the evidence was relative where both murders involved elderly victims who were attacked at night in apparent schemes to rob them. The similarities between the crimes rendered the other murder probative of defendant's intent, preparation, plan, and scheme. *Williams v. State*, 2009 Ark. 433, — S.W.3d —, 2009 Ark. LEXIS 595 (2009).

When someone driving appellant's car fled from an officer and ran into the woods, items used to manufacture methamphetamine were found in the car and appellant's girlfriend testified that he was driving; a jury found appellant guilty of manufacturing methamphetamine, possessing drug paraphernalia with intent to manufacture methamphetamine, and fleeing. He was not entitled to postconviction relief under Ark. R. Crim. P. 37.1 based on counsel's failure to object to evidence that appellant and his girlfriend had been convicted of other crimes related to methamphetamine; the admission of the evidence under Ark. R. Evid. 404(b) did not violate this rule, as it was independently relevant to the issue of the identity of the driver and his relationship to the passenger. *Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290 (2009).

Though defendant was acquitted of a rape charge, he was convicted of the lesser included offense of second-degree sexual assault; therefore, evidence presented during the sentencing phase of his previous rape of another victim was neither irrelevant nor inadmissible as unduly prejudicial under this rule. *McElroy v. State*, 2011 Ark. App. 533, — S.W.3d —, 2011 Ark. App. LEXIS 582 (Sept. 14, 2011).

### Photographic Evidence.

The fact that photographic evidence is cumulative or unnecessary will not, standing alone, render it inadmissible; thus, defendant cannot prevent its admission by admitting the facts portrayed. *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938 (1979); *Biniore v. State*, 16 Ark. App. 275, 701 S.W.2d 385 (1985); *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986); *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987).

Photographs will not be excluded simply because they are gruesome, since the danger of unfair prejudice created by a photograph must substantially outweigh its probative

value before the court will exclude it. *Williams v. State*, 267 Ark. 527, 593 S.W.2d 8 (1980).

Fact that some of the photographs were made after the victim was first examined did not bear on their admissibility, since the photographs were properly identified as representing the condition of the child after she had received treatment. *Williams v. State*, 267 Ark. 527, 593 S.W.2d 8 (1980).

Photographs of victims held inadmissible. *Harris v. Damron*, 267 Ark. 1141, 594 S.W.2d 256 (1980); *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981); *Ellis v. State*, 4 Ark. App. 201, 628 S.W.2d 871 (1982); *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987).

Admission and relevancy of photographs is a matter within the sound discretion of the trial court. *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980), criticized *Couch v. State*, 274 Ark. 29, 621 S.W.2d 694 (1981); *Biniore v. State*, 16 Ark. App. 275, 701 S.W.2d 385 (1985).

Photographs of victims held admissible. *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980), criticized *Couch v. State*, 274 Ark. 29, 621 S.W.2d 694 (1981); *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981); *Biniore v. State*, 16 Ark. App. 275, 701 S.W.2d 385 (1985); *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987).

Photographs of victim properly admitted where they were not particularly gruesome or inflammatory and were not cumulative because each served the purpose of making the testimony more understandable and corroborated the testimony of the witnesses. *Tucker v. State*, 3 Ark. App. 89, 622 S.W.2d 202 (1981); *Willett v. State*, 322 Ark. 613, 911 S.W.2d 937 (1995), questioned *Robbins v. State*, 356 Ark. 225, 149 S.W.3d 871 (2004), criticized *Jones v. State*, 329 Ark. 62, 947 S.W.2d 339 (1997).

Even though the defendant agreed to stipulate as to victim's wounds, the trial court did not err in permitting the prosecution to introduce a photograph showing the wounds, because the nature, extent, and location of the wounds were relevant to the questions of intent and state of mind of the defendant, and the state had the burden of proving every element of first-degree murder which included premeditation, deliberation and intent beyond any reasonable doubt. *Cotton v. State*, 276 Ark. 282, 634 S.W.2d 127 (1982).

Photographs properly admitted for the limited purpose of aiding the jury in understanding the oral testimony of an insurance adjuster. *Morrison v. Firemen's Ins. Co.*, 4 Ark. App. 351, 631 S.W.2d 310 (1982).

Photographs showing one of defendants in a rape case engaging in simulations of sexual acts, which were admitted solely for the purpose of impeachment and not as evidence of

guilt, should have been excluded since their probative value was outweighed by the prejudicial effect upon the jury. *Bliss v. State*, 282 Ark. 315, 668 S.W.2d 936 (1984), *aff'd*, 288 Ark. 546, 708 S.W.2d 74 (1986).

Autopsy photographs of victim were properly admitted where they were used by the forensic pathologist to rebut the defendants' claims of accidental injuries; thus, their probative value outweighed any prejudicial effect. *Deviney v. State*, 14 Ark. App. 70, 685 S.W.2d 179 (1985).

The fact that photographs are inflammatory or gruesome is not alone sufficient reason to exclude them. *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986); *Barker v. State*, 21 Ark. App. 56, 728 S.W.2d 204 (1987); *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987).

Inflammatory pictures are admissible in the discretion of the trial judge if they tend to shed light on any issue, to enable a witness to better describe the objects portrayed or the jury to better understand the testimony, or to corroborate testimony. *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986); *Barker v. State*, 21 Ark. App. 56, 728 S.W.2d 204 (1987); *Huls v. State*, 27 Ark. App. 242, 770 S.W.2d 160 (1989).

Where probative value of the photographs of the murder victim was limited to the cause and nature of death and would easily have been satisfied by the introduction of a reasonable number of photographs, the introduction into evidence of six, mostly repetitious, gory, color photographs of the victim was excessive, and their prejudicial nature was obvious. *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986).

Picture of the rings on the hands of victim had probative value if for no other reason than that they tended to demonstrate that the rings had a value in excess of \$2,500 as victim testified, and whatever prejudicial effect the photographs may have did not outweigh their probative value. *Burris v. State*, 291 Ark. 157, 722 S.W.2d 858 (1987).

A prejudicial photograph, which pictured the defendant, charged with possession with intent to distribute, in a room on a bed in the midst of piles of cash, was admissible. *Qualls v. State*, 306 Ark. 283, 812 S.W.2d 681 (1991).

Photographs will not be excluded simply because they are gruesome, but a deferential standard of review will be applied to the admission of photographic evidence. *Ward v. State*, 308 Ark. 415, 827 S.W.2d 110 (1992), *cert. denied* 506 U.S. 841, 113 S. Ct. 124, 121 L. Ed. 2d 79 (1992).

Where a photo used to depict a crime was merely cumulative of the testimony, had only marginal probative value, the jury was informed of the discrepancies in the photograph, and the defendant made no meritorious argument with respect to prejudice, the

photograph was not unfairly prejudicial. *Willis v. State*, 309 Ark. 328, 829 S.W.2d 417 (1992).

The trial court did not err in not excluding the photographs on its own motion; there is no "plain error" rule in this state. *Dixon v. State*, 311 Ark. 613, 846 S.W.2d 170 (1993).

Inflammatory photographs are admissible if they tend to shed light on an issue, enable a witness to better describe the objects portrayed, or enable the jury to better understand the testimony. *Hickson v. State*, 312 Ark. 171, 847 S.W.2d 691 (1993).

Enlargements of photographs showing the wounds defendant inflicted held not unfairly prejudicial. *Harris v. State*, 314 Ark. 379, 862 S.W.2d 271 (1993).

Under Evid. Rule 407, pictures which could not be admitted as evidence of negligence might be admitted for the purpose of impeachment; however, a trial court may prohibit their use for impeachment if it deems the evidence irrelevant under Evid. Rule 401, or prejudicial under this rule. *Carton v. Missouri Pac. R.R.*, 315 Ark. 5, 865 S.W.2d 635 (1993).

Even the most gruesome photographs may be admissible if they assist the trier of fact in any of the following ways: by shedding light on some issue, by proving a necessary element of the case, by enabling a witness to testify more effectively, by corroborating testimony, or by enabling jurors to better understand the testimony; of course, if a photograph serves no valid purpose and could be used only to inflame the jurors' passions, it should be excluded. *Weger v. State*, 315 Ark. 555, 869 S.W.2d 688 (1994).

Gruesome photographs are admissible if they assist the trier of fact by shedding light on some issue, by proving a necessary element of the case, by enabling a witness to testify more effectively, by corroborating testimony or by enabling jurors to better understand the testimony. *Marshall v. State*, 316 Ark. 753, 875 S.W.2d 814 (1994).

Admitting videotape and photographs of the crime scene as well as two autopsy photographs was not error where the evidence aided the jury's perception of the crime scene and condition of the victims' bodies, and was relevant in establishing premeditation and deliberation. *Camargo v. State*, 327 Ark. 631, 940 S.W.2d 464 (1997), *criticized* *Jones v. State*, 329 Ark. 62, 947 S.W.2d 339 (1997).

It was not error to allow the introduction of photographs showing the decomposing bodies of the victims, blood on a couch where one victim apparently lay when he was shot, bloody pillows used to muffle the gunshots, and a bloody trail down a hallway, notwithstanding the defendant's contention that the photographs were more prejudicial than probative, since the photographs were not cumu-



lative and gave a different perspective than a videotape shown to the jury. *Hodge v. State*, 332 Ark. 377, 965 S.W.2d 766 (1998).

It was not error in a prosecution for first degree murder for the trial court to permit the introduction into evidence of 8 crime scene photographs of the victims' bodies, notwithstanding the defendant's stipulation that the victims died as the result of multiple stab wounds, since the photographs depicted locations and types of wounds, the location of the bodies, and evidence of a fire, corroborated testimony of a witness, and tended to prove the defendant's intent. *Baker v. State*, 334 Ark. 330, 974 S.W.2d 474 (1998).

In a prosecution for aggravated assault, a photograph of the victim lying in a pool of blood near a men's restroom at a rest stop was properly admitted into evidence, notwithstanding the assertion that it was too gruesome and that verbal descriptions adequately described the crime scene, where the trial court determined that the photograph was probative because it showed the victim's location in relation to the restroom doors and to pay telephones. *Stewart v. State*, 338 Ark. 608, 999 S.W.2d 684 (1999).

In a prosecution for aggravated assault, two autopsy photographs which showed metal rods inserted through the victim's gunshot wounds were properly admitted into evidence, notwithstanding the assertion that they were inflammatory and prejudicial, where the trial court noted that the autopsy photographs reflected a natural arm position resulting from the arms being up and the hands being toward the face and remarked that the photographs showed the nature and direction of the wounds and the path of the bullet "probably in the most descriptive manner that [the court has] ever seen." *Stewart v. State*, 338 Ark. 608, 999 S.W.2d 684 (1999).

The photographs, although graphic and gruesome, were admissible because they depicted locations and types of wounds and the locations of the bodies, they corroborated the testimony of witnesses who claimed to have heard defendant discuss hiding bodies in a well, and they tended to prove defendant's purposeful intent, an element of the crime. *Sanders v. State*, 340 Ark. 163, 8 S.W.3d 520 (2000).

In a prosecution for murder, the court properly permitted the introduction into evidence of five photographs of the three victims, notwithstanding that the photographs were gruesome, since they helped establish the premeditated and deliberate nature of the crime, showed the condition of the bodies and the locations of the injuries, and refuted the defendant's theory that he had accidentally hit the victims as they struggled by demonstrating that all three victims suffered from

similar lethal neck wounds. *Jones v. State*, 340 Ark. 390, 10 S.W.3d 449 (2000).

In a prosecution for aggravated robbery, it was not error for the trial court to permit the introduction of three photographs of the crime scene, which showed blood stains on the floor, and two photographs of the victim's injuries, as there was no unfair prejudice. *Halford v. State*, 342 Ark. 80, 27 S.W.3d 346 (2000).

Photograph of the murder victim, which depicted the victim's head and upper torso and the injuries he sustained in graphic detail was properly admitted since such photograph was helpful to the jury in determining the severity of the blows the victim received and whether one or more blows was administered in the murder. *Upton v. State*, 343 Ark. 543, 36 S.W.3d 740 (2001).

Trial court did not abuse its discretion in admitting the state's photographs where, although the challenged photographs were gruesome and cumulative in some instances, they served to assist the trier of fact in understanding the testimony. *Mosby v. State*, 350 Ark. 90, 85 S.W.3d 500 (2002).

In a prosecution alleging that defendant sexually assaulted his seven year old daughter, forced the daughter to have intercourse with her brother, who was also under 14, and made the brother have intercourse with the brother's mother, who was defendant's wife, trial court did not abuse its discretion in allowing the state to introduce photographs of the family home showing the general condition of the home, including the fact that defendant kept photographs of nude women in plain view, as the evidence was relevant and its probative value was not outweighed by the risk of prejudice to the defendant. *Clem v. State*, 351 Ark. 112, 90 S.W.3d 428 (2002).

In a trial for capital murder based on the killing of the victim during a robbery, trial court did not abuse its discretion in admitting photographs showing the crime scene with the victim present or photographs of the autopsy performed on the victim as the photographs were relevant to the state's robbery theory and to show that the fatal gunshot was a contact wound from the rear; evidence that defendant was arrested at a nearby liquor store after having just purchased some wine was admissible to show defendant's motive was robbery. *Matthews v. State*, 352 Ark. 166, 99 S.W.3d 403 (2003), appeal dismissed — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 612 (Nov. 15, 2007).

Three crime scene photographs were properly admitted into evidence in a capital murder trial where the trial court exercised its discretion by excluding several more gruesome photographs; moreover, the fact that a videotape of the crime scene was introduced

did not mean that the photographs were cumulative. *Smart v. State*, 352 Ark. 522, 104 S.W.3d 386 (2003).

While the photographs of the victim were gruesome, they were properly admitted in defendant's capital murder trial because the pictures showed the condition of the victim's body and clearly assisted the jury in understanding the nature and extent of the victim's injuries. *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003).

It was not error to admit autopsy photographs of the victim and the condition in which he was found because the medical examiner could not pinpoint a cause of death, and he testified that the photographs would be helpful to the jury in showing why the cause of death was difficult to determine and to more fully explain the damage from the fire to the victim; the trial court properly weighed the potential prejudice against the probative value of the photographs. *Johnson v. State*, 358 Ark. 460, 193 S.W.3d 260 (2004).

Where defendant attempted to challenge the mens rea element of the offense by claiming that he did not intend to murder his wife, photos of the crime scene and autopsy photographs of the victim showing the nature, extent and location of the victim's wounds were relevant to show intent. *Garcia v. State*, 363 Ark. 319, 214 S.W.3d 260 (2005).

When the trial court found that photographs of a murder victim enabled the jury to better understand the testimony and show the nature and extent of the wounds, the condition of the body, the type and location of the injuries, and corroborated a detective's testimony in defendant's prosecution for capital murder and aggravated assault, the trial court gave a specific basis for its ruling and clearly engaged in the kind of balancing required under this rule. *Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006).

Although the gay-themed books were improperly admitted into evidence, any error was harmless in light of the wealth of other evidence of defendant's homosexual lifestyle; further, pornographic videos and photographs were properly admitted where two victims were in the photographs and they corroborated other victims' testimony. *Simmons v. State*, 95 Ark. App. 114, 234 S.W.3d 321 (2006).

Circuit court did not err by admitting into evidence photographs of the murder victim because her wounds were relevant to show defendant's intent to kill her; they also assisted the jury in understanding the crime-scene investigator's description of the scene, and the circuit court performed a proper evaluation of the photographs before allowing them to be presented to the jury. *Davis v. State*, 368 Ark. 401, 246 S.W.3d 862 (2007).

Although relevant, the probative value of

photographic images of pornography that were introduced into evidence in a sexual assault case was outweighed by the danger of unfair prejudice, because the images numbered 1,022, they depicted a wide range of pornographic materials, the inflammatory nature of the images was readily apparent, many of the photographs were duplicates, and many portrayed similar subject matter over and over again. *Blanchard v. State*, 104 Ark. App. 31, 289 S.W.3d 129 (2008), rev'd, 2009 Ark. 335, — S.W.3d — (2009).

During defendant's criminal trial for first degree felony murder, the trial court exercised its discretion in admitting a gruesome photograph of the victim's injuries. The photograph showed both blood pooling and spattering, which indicated to the medical examiner that the victim was shot in the back of the head while lying face down on the bed; the photograph was needed in the state's presentation of its case, and the probative value was not outweighed by the risk of unfair prejudice. *Lockhart v. State*, 2009 Ark. App. 587, — S.W.3d —, 2009 Ark. App. LEXIS 735 (2009).

Admitting all twelve photographs into evidence was not an abuse of discretion where the individual pictures dispelled any notion that defendant photographed innocent activity and the testimony of the other victims was admissible under the pedophile exception of subsection (b) of this rule. *Mason v. State*, — Ark. App. —, 330 S.W.3d 445, 2009 Ark. App. LEXIS 740 (2009).

In a capital murder prosecution, the trial court did not abuse its discretion by allowing the state to show the jury enlarged photos of the victim's body on a projection screen, as the photos illustrated the crime scene, autopsy photographs were used by the forensic examiner to explain the nature of the injuries and cause of death, and the court examined each photo and applied the proper balancing test. *Marcyniuk v. State*, 2010 Ark. 257, — S.W.3d —, 2010 Ark. LEXIS 296 (May 27, 2010).

There was no abuse of discretion by the circuit court in admitting crime scene photographs because they were relevant to corroborate both the victim's testimony as to the manner and violence in which the victim was attacked, as well as the testimony of the victim's treating physician regarding the amount of blood loss the victim suffered. *Wallace v. State*, 2010 Ark. App. 706, — S.W.3d —, 2010 Ark. App. LEXIS 748 (Oct. 27, 2010).

Defendant's conviction for capital-felony murder was appropriate because there was no error in the admission of autopsy photographs. The pictures were used to enhance and clarify testimony regarding the condition of the body and the pictures also helped explain how the injuries received were consistent with having skidded for some distances over a rough surface; further, the probative



value of the photographs outweighed any prejudicial effect. *Dixon v. State*, 2011 Ark. 450, — S.W.3d —, 2011 Ark. LEXIS 537 (Oct. 27, 2011).

### **Prejudicial Evidence.**

In prosecution for manslaughter, evidence regarding the condition and treatment afforded the victim was relevant, but its probative value was substantially outweighed by the danger of unfair prejudice, possible confusion of the issues or misleading the jury. *Lee v. State*, 266 Ark. 870, 587 S.W.2d 78 (1979).

Before allowing questions regarding a defendant's previous misconduct, the court may require evidence of good faith; that is, the questioner must have credible knowledge that the offense has been committed, not just information based on rumor or speculation; next, the court in its discretion should decide if the probative value of the question outweighs the prejudicial effect of such a question; finally, the misconduct must relate to truthfulness or untruthfulness and that character trait. *Gustafson v. State*, 267 Ark. 278, 590 S.W.2d 853 (1979), criticized *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982), questioned *Sitz v. State*, 23 Ark. App. 126, 743 S.W.2d 18 (1988).

The trial judge, in a tort action arising from an automobile accident, abused his discretion in failing to hold that the slight probative value of evidence that, as a result of his injuries, the plaintiff had received specified disability payments from his employer and from insurance companies was outweighed by the prejudicial effect of proof that the plaintiff had received substantial income from outside sources, notwithstanding the defendant's contention that the evidence supported her defense of malingering. *Evans v. Wilson*, 279 Ark. 224, 650 S.W.2d 569 (1983), rev'd on other grounds, 284 Ark. 101, 679 S.W.2d 205 (1984).

Where film of a professional driver riding a motorcycle similar to the one involved in motocross accident over motocross-type terrain, did not duplicate the exact conditions of the actual accident in that the rider in the test was a professional whereas plaintiff was an amateur, the professional rider knew he was riding a bike with only one shock absorber functioning while plaintiff did not, the test demonstrated only one jump of 18 inches, but plaintiff made two successive jumps of 30 inches and, furthermore, the springs on the two bikes were different, it was error for the trial court to admit the film for the limited purpose of determining whether or not there was any perceptible difference in rebound of a motorcycle with one nonfunctioning shock as opposed to a motorcycle with both shocks functioning, and the experiment should have been excluded as prejudicial and misleading under this rule. Undoubtedly, the jury concen-

trated on the extraordinary skills of the test driver rather than the mechanics of the motorcycle and after viewing the film, the mindset of the jury was that one shock would work just as well as two, not because of any perceptible difference in the mechanical performance of the motorcycle, but because the professional driver was not thrown over the handlebars as was plaintiff; the prejudicial impact of the film on the jury far outweighed any probative value it might have had. *Carr v. Suzuki Motor Co.*, 280 Ark. 1, 655 S.W.2d 364 (1983).

Where, in a manslaughter prosecution arising from a car accident in which the allegedly intoxicated driver struck and killed a policeman, the probative value of testimony by a member of the state police, that in his opinion if the driver had been alert and practicing reasonable safety the death could have been prevented, was substantially outweighed by the danger of unfair prejudice. *Ethridge v. State*, 9 Ark. App. 111, 654 S.W.2d 595 (1983).

In a prosecution for murder, the trial court properly excluded evidence that the state criminalist had been demoted where the demotion was based upon a personality clash with a supervisor and was not based upon any lack of competency; the excluded evidence was unduly prejudicial and could not demonstrate any bias or lack of credibility. *Maxwell v. State*, 284 Ark. 501, 683 S.W.2d 908 (1985).

Admonishing statement of trial court was not sufficient to remove prejudicial error. *Free v. State*, 293 Ark. 65, 732 S.W.2d 452 (1987).

Evidence of witness' abortions excluded where neither the pregnancy nor the abortions were relevant to any issue in the case, because they did not go to the credibility, believability, truthfulness, or veracity of the witness under Evid. Rules 401, 608, or 609; and, in addition, even if relevant, the prejudicial impact would outweigh any probative value because of the controversial nature of abortion. *Billett v. State*, 317 Ark. 346, 877 S.W.2d 913 (1994).

Although there was no doubt that the proof in controversy would have an adverse impact on defendant at trial, unfair prejudice did not occur. *Lindsey v. State*, 319 Ark. 132, 890 S.W.2d 584 (1994).

The prejudice referred to in this rule denotes the effect of the evidence upon the jury, not the defendant. Hence the nature of the sentence that may be imposed in the event of the defendant's conviction is not a factor in the trial court's analysis under this rule. *Sasser v. State*, 321 Ark. 438, 902 S.W.2d 773 (1995).

Testimony regarding doctor's verbal discourse with lawyers was highly prejudicial; if doctor was being called as an expert witness, the fact that he enjoyed engaging in verbal street fighting with lawyers in the courtroom

would be admissible to show bias and prejudice, but as a fact witness, such testimony was not probative, but prejudicial. *National Bank of Commerce v. Quirk*, 323 Ark. 769, 918 S.W.2d 138 (1996), amended, 325 Ark. 31, 922 S.W.2d 717 (1996), overruled in part on other grounds, *Ark. HHS v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006).

In an action against an attorney for breach of contract in his representation of his client in a divorce matter, the client was properly precluded from presenting evidence about the attorney's dealings with another client since there was a very real danger that the proffered testimony would prejudice the jury with an assertion that the attorney had tried to cheat an elderly lady and almost certainly confuse the issue under litigation. *Potter v. Magee*, 61 Ark. App. 112, 964 S.W.2d 412 (1998).

In an action against an attorney for breach of contract in his representation of a client, the court properly excluded testimony that the attorney had previously wrongfully refused to return money to a person with whom he had a fiduciary relationship, notwithstanding the assertion that such allegedly similar conduct was admissible to prove intent or motive, since there was a very real danger that the proffered testimony would have prejudiced the jury with an assertion that the attorney had tried to cheat an elderly lady and almost certainly would have confused the issue under litigation. *Potter v. Magee*, 61 Ark. App. 112, 964 S.W.2d 412 (1998).

Where prison escapee robbed and killed a man and then fled to another state in the man's vehicle where he was captured following a high speed auto chase in which he killed the driver of another vehicle in a collision, evidence as to the chase was admissible at the guilt phase of the trial because possessions of the man the prison escapee robbed and killed were found in the vehicle defendant had stolen and was driving; further, evidence of the chase was admissible at the penalty phase of the trial because it had been submitted at the trial, so no prejudice resulted, and evidence of the death of the other driver was admissible at the punishment phase of defendant's trial because it was used as an aggravating circumstance. *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002).

In a wrongful death action brought by the administrator of the deceased patient's estate against a nursing center and its parent company, although documentary evidence showing the nursing center's understaffing problem was prejudicial to the nursing center and the company, that prejudice did not outweigh the strong probative value of the evidence. *Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003), cert. denied, 540 U.S. 1012, 124 S.

Ct. 532, 157 L. Ed. 424 (2003), cert. denied, 540 U.S. 1004, 124 S. Ct. 535, 157 L. Ed. 2d 409 (2003).

Trial court found that the evidence of the amount of damages assessed by the jury in a default trial was of little probative value in a subsequent attorney malpractice action, given that neither insurer defended during the proceeding; any probative value was substantially outweighed by the danger of unfair prejudice to the attorney and the misleading nature of the evidence. *Barnes v. Everett*, 351 Ark. 479, 95 S.W.3d 740 (2003).

Trial court abused its discretion by allowing the state to introduce the name and nature of defendant's prior felony conviction over his objection after defendant offered to stipulate that he was among the class of persons prohibited from possessing a firearm. *Ferguson v. State*, 90 Ark. App. 119, 204 S.W.3d 113 (2005), reversed 362 Ark. 547, 210 S.W.3d 53 (2005).

In a drug case, the court erred by admitting evidence that the witness was defendant's parole officer for his prior drug convictions because there was clearly no probative value in introducing that fact and the prejudice was manifest; allowing defendant's parole officer to so testify was tantamount to making defendant appear in the court room in shackles or prison garb. *Cluck v. State*, 91 Ark. App. 220, 209 S.W.3d 428 (2005).

Circuit court did not err in excluding the finding of the Arkansas State Board of Chiropractic Examiners that the physical therapist was practicing chiropractic medicine without a license because the board did not find that his practice of chiropractic medicine was negligent or below the standard of care; the court found that the fact that the therapist had committed a statutory violation would have been unfairly prejudicial. *Fryar v. Touchstone Physical Therapy, Inc.*, 365 Ark. 295, 229 S.W.3d 7 (2006).

Finding in favor of the passenger in her personal-injury action against the driver was proper, in part because the passenger had sufficiently shown that the digital motion x-ray evidence was reliable and that it was accepted by the chiropractic and medical communities. There was no question that the evidence was prejudicial to the driver's position; however, the evidence was not unfairly prejudicial. *Graftenreed v. Seabaugh*, 100 Ark. App. 364, 268 S.W.3d 905 (2007).

Victim stated that she had viewed pornography with defendant at his home, and the items seized corroborated her testimony; photographs of the partially clad victim in suggestive poses were found in close proximity to pornographic magazines, and under these circumstances, the trial court did not abuse its discretion in determining that the probative value of the pornographic magazines was not



substantially outweighed by the danger of unfair prejudice. *Rasmussen v. State*, 2009 Ark. App. 586, — S.W.3d —, 2009 Ark. App. LEXIS 731 (2009).

In a lessee's action for conversion against an owner, the trial court did not abuse its discretion in excluding evidence of the fair market value of the lessee's dogs on its finding that any relevance was substantially outweighed by the prejudice, because evidence that the owner killed the dogs would have been prejudicial. *Schmidt v. Stearman*, 2010 Ark. App. 274, — S.W.3d —, 2010 Ark. App. LEXIS 269 (Mar. 31, 2010).

In a manslaughter case, the court properly excluded evidence of the victim's alleged violent propensities because defendant admitted that he fired his gun without knowing who was riding toward him; therefore, because he did not know who he was shooting, he could not have considered the victim's background and state of mind before firing his weapon. Accordingly, such evidence would only have served to prejudice the victim. *Sipe v. State*, 2012 Ark. App. 261, — S.W.3d —, 2012 Ark. App. LEXIS 388 (Apr. 18, 2012).

#### **Prior Charges or Convictions.**

Where, in a prosecution for burglary, the state had direct as well as circumstantial evidence from which the jury could have inferred that the defendant intended to commit theft in the building in which he was caught, the trial court erred in allowing the state to prove the defendant's intent by introducing evidence of the defendant's three prior convictions for burglary. *Golden v. State*, 10 Ark. App. 362, 664 S.W.2d 496 (1984), questioned *Bullock v. State*, 353 Ark. 577, 111 S.W.3d 380 (2003), overruled *Bledsoe v. State*, 344 Ark. 86, 39 S.W.3d 760 (2001).

A prior felony conviction was relevant evidence in a prosecution for possession of a firearm by a felon in that it was an element of the crime, and the trial court's decision that the state could elect to introduce evidence of a conviction for delivery of heroin, rather than an earlier conviction for grand larceny, was not an abuse of discretion. The defendant's contention that he should be permitted to select the prior conviction to be introduced by the state was not tenable. *Clinkscale v. State*, 15 Ark. App. 166, 690 S.W.2d 740 (1985).

A 1982 charge of endangering the welfare of a minor, a charge which resulted from defendant's having abandoned her infant daughter, was admissible at defendant's 1984 trial for negligent homicide and concealing birth, where the earlier charge was relevant in proving defendant's intent, motive, preparation or plan regarding her actions in 1984. *Smith v. State*, 15 Ark. App. 266, 692 S.W.2d 622 (1985).

Since the state's evidence would have amply supported the defendant's conviction, evi-

dence of the defendant's prior convictions should not have been admitted, as the probative value of evidence of a 14-year-old conviction was slight, if present at all, and the probability of unfair prejudice was great. *Smith v. State*, 19 Ark. App. 188, 718 S.W.2d 475 (1986), questioned *Bullock v. State*, 353 Ark. 577, 111 S.W.3d 380 (2003); *Brown v. State*, 63 Ark. App. 38, 972 S.W.2d 956 (1998).

Where, without the defendant's prior theft and burglary convictions the state had no evidence showing defendant's reason for unlawfully entering the victim's house, the probative value of these convictions became paramount in the state's obligation to show defendant's entry was for the purpose of committing a felony, and allowing defendant's convictions into evidence was not an abuse of the trial court's discretion. *Rudd v. State*, 308 Ark. 401, 825 S.W.2d 565 (1992).

Motion in limine was proper to prohibit introduction of evidence in wrongful death action brought after one passenger died in automobile accident, the evidence was that both drivers pleaded *nolo contendere* to the charge of negligent homicide under §§ 27-50-307 and 27-50-804 resulting from the collision. *Patterson v. Odell*, 322 Ark. 394, 909 S.W.2d 648 (1995).

In a prosecution for murder and conspiracy to commit aggravated robbery, the fact that the defendant met his coperpetrator in the penitentiary was relevant to the conspiracy charge because it established a prior association. The inherent prejudice that resulted from informing the jury that the defendant was a convicted felon who had served time in the penitentiary outweighed the probative value of such fact; therefore, it was an abuse of discretion to admit such fact into evidence. *Johnson v. State*, 337 Ark. 477, 989 S.W.2d 525 (1999).

Where defendant offered to stipulate to the convicted-felon element of the felon-in-possession-of-a-firearm charge, the state's introduction of the certified copy of defendant's conviction was unfairly prejudicial and should have been excluded; the right of the state to prove its case had to be balanced against the right of a defendant to a trial free from unfair prejudice. *Ferguson v. State*, 362 Ark. 547, 210 S.W.3d 53 (2005).

Prior convictions were improperly admitted where, although defendant's 1987 offenses involved possession and delivery of methamphetamine, the 2002 charges were related to possession of pseudoephedrine and possession of paraphernalia with intent to manufacture; the 2002 offenses were different in nature as they were related to the actual manufacture, further lessening the probative value of the earlier convictions. *Nelson v. State*, 92 Ark. App. 275, 212 S.W.3d 31 (2005).

Although the state was required to prove

that defendant was in prison when he killed his cell mate to prove capital murder, that element could have been proven by stipulation and the trial court abused its discretion by allowing the state, over defendant's objections, to introduce evidence of his life sentence and convictions for rape, kidnapping, and burglary; the error was harmless however, as defendant was not prejudiced by the evidence in that the jury did not sentence him to death but, rather, to a second life sentence. *Diemer v. State*, 365 Ark. 61, 225 S.W.3d 348 (2006).

Defendant's prior drug conviction was properly admitted into evidence under Ark. R. Evid. 404(b) as he testified that he knew nothing of the significance of the chemicals found in his house. His prior conviction was probative of his knowledge and not unfairly prejudicial under this rule. *Fowler v. State*, 2011 Ark. App. 321, — S.W.3d —, 2011 Ark. App. LEXIS 350 (May 4, 2011).

#### **Prior Misconduct.**

Where the defendants were prosecuted under § 5-54-104 for allegedly forcibly preventing a police officer from taking an intoxicated person into custody, the trial court did not abuse its discretion in not allowing the defendants to offer proof of certain alleged incidents of prior misconduct on the part of the officer, which the defendants offered in an effort to show that the officer may not have been engaged in official business at the time of the incident in question, since the trial court had concluded that the possible relevance of the earlier incidents was outweighed by the confusion of issues and the delay that would have resulted from the exploration of such collateral matters. *Blakemore v. State*, 268 Ark. 145, 594 S.W.2d 231 (1980).

Evidence concerning planning of the convenience store robberies was admissible because it showed the defendant's participation in a continuing course of conduct or plan to commit an aggravated robbery. *Beebe v. State*, 301 Ark. 430, 784 S.W.2d 765 (1990).

In action for breach of duty by defendant trustee, trial court did not abuse its discretion in excluding as unfairly prejudicial to defendant proffered testimony concerning defendant's use of drugs and alcohol, his gambling habit, indebtedness, and evidence that his conduct as a bank director resulted in adverse action against him taken by bank regulators. *Motes v. Johnson*, 304 Ark. 23, 799 S.W.2d 798 (1990).

Where defendant denied prior bad acts when on the witness stand, and the rebuttal witness called by the state also denied the prior acts occurred, an admonition to the jury that the scope of the testimony which the state asserted was offered to impeach the rebuttal witness was limited to impeachment purposes, would not have been an adequate

safeguard against prejudice, and the prejudicial effect of the testimony offered to impeach the rebuttal witness outweighed its value. *Evans v. State*, 38 Ark. App. 42 (1992).

In a rape prosecution, the court properly permitted the introduction of evidence of a prior burglary by the defendant where (1) the defendant claimed that he had consensual sex with the victim, and (2) information about a gun and a flashlight stolen in the robbery lent credence to the victim's testimony that the act was not consensual. *Bledsoe v. State*, 344 Ark. 86, 39 S.W.3d 760 (2001).

#### **Prior Psychiatric Treatment.**

Where in a personal injury action brought against a retail store and the purchaser of a handgun from said store, the plaintiff alleged that the store negligently sold the handgun to the defendant who used it to shoot the plaintiff, the trial court erred in admitting into evidence the defendant's deposition which indicated he had been treated by a psychiatrist more than 13 years prior to the shooting incident upon which this cause of action was based, since there was simply no connecting evidence between the prior psychiatric treatment and the present condition of the defendant and therefore, although the evidence may have been relevant, its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or was misleading to the jury. *Cullum & Boren-McCain Mall, Inc. v. Peacock*, 267 Ark. 479, 592 S.W.2d 442 (1980).

#### **Prior Settlement.**

Where the trial judge chose to exclude evidence of amounts received by plaintiff in a previous settlement, the appellate court was unable to say he abused his discretion in doing so. *Gipson v. Garrison*, 308 Ark. 344, 824 S.W.2d 829 (1992).

#### **Prior Statements.**

In a prosecution for rape, burglary and theft, evidence of victim's prior inconsistent statement concerning identification of defendant, which statement included the phrase "so many niggers look alike," was not irrelevant nor was its probative value substantially outweighed by the danger of unfair prejudice; accordingly, the trial court erred in refusing to allow cross-examination of victim concerning the statement and such error was not harmless where defendant received the maximum sentence on all three charges. *Miller v. State*, 269 Ark. 409, 601 S.W.2d 845 (1980).

The trial court erred when it allowed the State to impeach its own witness with his prior hearsay statement by asking him if he had in fact made the prior inconsistent statements, because the probative value of such testimony was far outweighed by the danger of unfair prejudice. *Roberts v. State*, 278 Ark. 550, 648 S.W.2d 44 (1983).



The trial court, in a murder and kidnapping prosecution, abused its discretion when it allowed the state to ask an uncooperative state's witness about a prior incriminating unsworn statement he had allegedly made, where the prosecution knew from an in-chambers hearing that the witness was going to testify that he never made such a statement, and where any advantage the state might gain by discrediting him was far outweighed by the risk of prejudice resulting from disclosing to the jury the content of the statement; however, since the impeaching questions related only to the murder and not to the kidnapping, the error was reversible only as it related to the murder conviction. *Gross v. State*, 8 Ark. App. 241, 650 S.W.2d 603 (1983).

In prosecution for aggravated robbery, the trial court did not abuse its discretion in admitting into evidence the statements of defendants when they were intoxicated as to how they came into possession of the car and the manner in which blood came to be upon themselves and the car where the statements were not concessions or admissions. *Glisson v. State*, 286 Ark. 329, 695 S.W.2d 121 (1985).

In deciding whether statements of the defendant should be suppressed because the defendant was intoxicated when the statements were given, the issue before the trial judge is whether the statements are relevant and then whether they should be excluded because they are unfairly prejudicial. In considering whether the prejudice to the defendant is unfair, the court may consider the defendant's contention that the statement is a product of his drunkenness and how the case will be affected if the defendant is, in effect, required to prove he was drunk when the statement was made. *Glisson v. State*, 286 Ark. 329, 695 S.W.2d 121 (1985).

In prosecution for rape of stepdaughter, where at trial stepdaughter stated that defendant had not engaged in oral intercourse with her nor touched her, state's use of prior inconsistent statements by stepdaughter exceeded parameters of proper impeachment and posed the danger that the jury would accord the statements substantive value; the prior inconsistent statements were not admissible for purposes of impeachment since the stepdaughter admitted making them, and the statements were not admissible as substantive evidence because they were not made under oath. *Hinzman v. State*, 53 Ark. App. 256, 922 S.W.2d 725 (1996).

During defendant's criminal trial for rape and tampering, defendant was not permitted to question the victim as to whether her New Year's resolution was to stop lying; the remark was too nebulous to show that the victim had any tendency to lie. Thus, the trial court did not abuse its discretion in weighing the evidence under this rule and denying its

admission. *Payton v. State*, 2009 Ark. App. 690, — S.W.3d —, 2009 Ark. App. LEXIS 837 (2009).

#### **Proper Evidence.**

Probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *Tucker v. State*, 3 Ark. App. 89, 622 S.W.2d 202 (1981); *Hoback v. State*, 286 Ark. 153, 689 S.W.2d 569 (1985); *Free v. State*, 293 Ark. 65, 732 S.W.2d 452 (1987); *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988); *Clark v. State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989).

Weapons found with defendant were relevant evidence of the element of premeditation and deliberation on the part of the defendant in the murder of policeman and should have been admitted at trial. *Snell v. State*, 287 Ark. 264, 698 S.W.2d 289 (1985).

Evidence properly admitted. *Crossno v. State*, 15 Ark. App. 341, 692 S.W.2d 626 (1985); *McFadden v. State*, 290 Ark. 177, 717 S.W.2d 812 (1986); *Miller v. State*, 19 Ark. App. 36, 715 S.W.2d 885 (1986); *Simpson v. Hurt*, 294 Ark. 41, 740 S.W.2d 618 (1987); *Hubbard v. State*, 306 Ark. 153, 812 S.W.2d 107 (1991).

Testimony which had a direct bearing on knowledge and intent, and was not of such character as to arouse undue hostility in the jury, was admissible. *Morris v. State*, 21 Ark. App. 228, 731 S.W.2d 230 (1987).

Testimony between defendant and his roommate was admissible and relevant in showing a possible motive for the killing. *Easter v. State*, 306 Ark. 615, 816 S.W.2d 602 (1991).

Where there was evidence that defendant scaled a chain-link fence adjacent to the building he attempted to enter illegally and was apprehended within that enclosure, the trial judge did not abuse his discretion in admitting items found along the chain-link fence adjacent to the building a few days later, into evidence for the consideration of the jury. *Ward v. State*, 35 Ark. App. 148, 816 S.W.2d 173 (1991).

Trial court did not err in refusing to permit certain evidence tending to show that defendant was a member of a street gang. *State v. Jones*, 322 Ark. 32, 907 S.W.2d 674 (1995).

Circuit court did not abuse its discretion in denying defendant's motion in limine to prohibit any reference to the unborn fetus by name; the fetus was at term at the time of death, the fetus had been named, and the name was included in the criminal information. *Bullock v. State*, 353 Ark. 577, 111 S.W.3d 380 (2003).

Evidence that defendant flirted with a guard after he killed his ill live-in companion was not unfairly prejudicial as it was a statement against interest under Ark. R. Evid. 801(d)(2)(i); the guard's testimony suggested

that defendant's state of mind hours after the murder was not one of grief, but of relief. *Boyle v. State*, 363 Ark. 356, 214 S.W.3d 250 (2005).

In a breach of contract case, the court properly allowed insurer to introduce evidence of homeowner's prior late payments and lapses of her homeowner's policies as it showed that homeowner made only one timely payment on her homeowner's policy between November 2000 and November 2001, allowed the policy to lapse twice before the final lapse in November 2001, and had a long history of late payments on her automobile policy; the evidence was admissible to show homeowner's intent to not make the November 2001 payment on time and to show that a mistake did not occur, and the evidence was not unfairly prejudicial. *Jones v. Coker*, 90 Ark. App. 151, 204 S.W.3d 554 (2005).

In a drug manufacturing case, the trial court did not err by allowing officers to testify solely for the purposes of establishing prior criminal acts other than the one for which defendant was being tried because defendant's 1998 judgment for possession of drug paraphernalia after he was first charged with manufacturing methamphetamine and his arrest for shoplifting methamphetamine precursors was independently relevant and sufficiently similar to the charged offense of manufacturing methamphetamine; similar past conduct supporting defendant's knowledge of the methamphetamine manufacturing process and his shoplifting of methamphetamine precursors was certainly probative of intent. *Saul v. State*, 365 Ark. 77, 225 S.W.3d 373 (2006).

Defendant's convictions for possession of drug paraphernalia with intent to manufacture methamphetamine and possession of pseudoephedrine were upheld as the trial court properly allowed the state to introduce evidence of defendant's prior convictions because they concerned his culpability and intent; further, those convictions were independently relevant because they made it more probable that defendant understood the components of methamphetamine and the manufacturing process, that he knew that the items in his possession were illegal in that quantity, and that he knew the items were used for manufacturing methamphetamine. *Nelson v. State*, 365 Ark. 314, 229 S.W.3d 35 (2006), appeal dismissed — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 494 (Sept. 27, 2007).

In a capital murder case, testimony of witness who overheard a conversation about the location of a planned robbery was relevant and not unduly prejudicial because it placed defendant at the scene of a later double homicide. *Harris v. State*, 366 Ark. 190, 234 S.W.3d 273 (2006).

Circuit court did not abuse its discretion in

admitting evidence of defendant's recorded conversation with another where, what prompted defendant's statement be it his frustration over not being able to speak to his wife or his frustration over his wife's conversation with police, was a matter for the jury to decide; the circuit court did not abuse its discretion in concluding that the statement was admissible pursuant to this rule. *Holman v. State*, 372 Ark. 2, 269 S.W.3d 815 (2007).

Defendant's convictions for capital murder and kidnapping were appropriate because evidence that defendant possessed a gun similar to that used in the murder was independently relevant proof on the issue of defendant's identity, Ark. R. Evid. 404(b). Moreover, its probative value was not substantially outweighed by the danger of unfair prejudice. *Gilcrease v. State*, 2009 Ark. 298, 318 S.W.3d 70 (2009).

Testimony that defendant was hiding in a closet that had been nailed shut when the police arrived at his home to arrest him was admissible because it was relevant to prove that defendant was hiding from the police due to his consciousness of guilt in having committed sexual assault against 15-year-old girl. *Williams v. State*, 2009 Ark. App. 639, — S.W.3d —, 2009 Ark. App. LEXIS 779 (2009).

Absence of a state-mandated lifeline was relevant under Ark. R. Evid. 401 as: (1) the violation of a government regulation was evidence of negligence; (2) the purposes of a lifeline were to demarcate the shallow and deep ends of the pool and to provide a swimmer with something to grasp onto, which were relevant to proximate cause; and (3) the substantial probative value of the violation was not substantially outweighed by the danger of unfair prejudice under this rule. *Bishop v. Tariq, Inc.*, 2011 Ark. App. 445, — S.W.3d —, 2011 Ark. App. LEXIS 477 (June 22, 2011).

Court did not err during defendant's trial for first-degree murder as an accomplice in admitting testimony from defendant's fellow inmate that defendant told the inmate he had no remorse for his wife's death; the testimony reflected defendant's consciousness of guilt and was independently relevant. The testimony was more probative than prejudicial. *Camp v. State*, 2011 Ark. 155, — S.W.3d —, 2011 Ark. LEXIS 141 (Apr. 14, 2011).

Defendant's rape conviction was proper because the victim's testimony fell squarely under the pedophile exception to Ark. R. Evid. 404(b). The relationship between the victim and her father was clearly an intimate one and the similar acts she described were exactly of the same nature as the acts that occurred in the time frame listed in the information; it was an ongoing sexual relationship and the evidence was not more prejudicial



than probative. *Chunestudy v. State*, 2012 Ark. 222, — S.W.3d —, 2012 Ark. LEXIS 246 (May 24, 2012).

#### **Rebuttal Evidence.**

Genuine rebuttal evidence consists of evidence offered in reply to new matters, and evidence can still be categorized as genuine rebuttal evidence even if it overlaps with the evidence-in-chief. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993), cert. denied 510 U.S. 1197, 114 S. Ct. 1306, 127 L. Ed. 2d 657 (1994).

Where defendant, in a trial for manufacturing a Schedule II controlled substance, testified, as part of his affirmative defense, that he did not know how to manufacture drugs and had never done so either before or after his arrest, the state could rebut this testimony. *Hill v. State*, 314 Ark. 275, 862 S.W.2d 836 (1993).

Circuit court properly allowed car manufacturer to introduce Japanese and Canadian reports on sudden acceleration into evidence in mother's defective design action as the evidence was relevant to support manufacturer's claim that it did not act with malice in response to mother's request for punitive damages; the evidence's relevance was not outweighed by the danger of unfair prejudice because the mother had ample opportunity to prepare to defend against the reports, as their admission was a contested issue until and throughout the trial. *Chapman v. Ford Motor Co.*, 368 Ark. 328, 245 S.W.3d 123 (2006).

#### **Scientific Evidence.**

The relevancy approach as the standard for determining the admissibility of novel scientific evidence requires that the trial court conduct a preliminary inquiry of any novel scientific evidence and focus on: (1) the reliability of the process used to generate the evidence; (2) the possibility that the jury would be overwhelmed, confused or misled by the evidence; and (3) the connection between the evidence to be offered and the disputed factual issue in the particular case. *Whitson v. State*, 314 Ark. 458, 863 S.W.2d 794 (1993).

#### **Similar Occurrences.**

Where the issue was whether a fire was set deliberately to claim insurance, the existence of other fires, if not too remote in time or dissimilar in circumstances, may have been admissible without showing the same or substantially similar circumstances; such evidence had relevance to show motive, intent, absence of mistake or accident. Where the issue involved a claim of negligence, proof of similar occurrences required evidence of the same or substantially similar conditions. *Johnson v. Truck Ins. Exch.*, 285 Ark. 470, 688 S.W.2d 728 (1985).

In a sexual assault case, introduction of evidence that defendant had stopped another

church member and persuaded that victim to go to an isolated area where unwanted sexual advances were made was relevant to show modus operandi and lack of consent by the second victim and, as such, did not violate this rule. *Davis v. State*, 362 Ark. 34, 207 S.W.3d 474 (2005).

In a child rape case, a court properly allowed evidence of defendant's prior sexual acts with children because in both cases, defendant occupied a caregiver role for the victims, the sexual act alleged, oral sex, was identical, and the evidence of defendant's prior sexual acts with his daughters tended to show his depraved sexual instinct. The similarities between defendant's admitted abuse of his daughters and the alleged rape of the victim, tended to show defendant's intent to commit the charged offense, and the evidence that defendant forced his daughter to perform oral sex on him tended to corroborate the victim's testimony that he forced her to perform oral sex. *Lamb v. State*, 372 Ark. 277, 275 S.W.3d 144 (2008).

During defendant's trial for the rape of his nine-year-old stepdaughter, the trial court correctly applied the pedophile exception to Ark. R. Evid. 404(b) when admitting testimony from another young woman, who testified that she had been molested by digital penetration by defendant when she was a child, because the similarities were significant and probative on the issue of defendant's deviate sexual impulses; the probative value of the evidence was not substantially outweighed by any danger of unfair prejudice. *Eubanks v. State*, 2009 Ark. 170, 303 S.W.3d 450 (2009).

In defendant's criminal trial involving allegations and convictions for capital murder and kidnapping, the admission of testimony from a witness about a 27-year-old incident was admissible under Ark. R. Evid. 404(b) because the similarities between the alleged prior act and the charged offense tended to show defendant's intent to commit the charged offense. The similarities between the two acts were clearly probative of defendant's intent, motive, and plan, as theorized by the state's charges and the probative value of the witness testimony was not outweighed by the danger of unfair prejudice. *Osburn v. State*, 2009 Ark. 390, 326 S.W.3d 771 (2009).

Circuit court did not err in allowing the state to present evidence during his trial of the rape committed against one victim in her home on April 21, 2008, some six months prior to similar crimes committed against another victim on October 20, 2008. While the first victim's testimony might have been prejudicial, as most Ark. R. Evid. 404(b) evidence was, it was also independently relevant to defendant's intent, scheme, or plan, and its probative value was not outweighed by the

danger of unfair prejudice. *Vance v. State*, 2011 Ark. 243, — S.W.3d —, 2011 Ark. LEXIS 223 (June 2, 2011).

### **Specific Act.**

Where the connection between a fraudulent conveyance and defendant's possible civil liability had a remote bearing upon a witness's credibility, the court should have disallowed cross-examination about the specific act. *Morrison v. Lowe*, 267 Ark. 361, 590 S.W.2d 299 (1979).

### **Standard of Review.**

The standard of review of a trial court's weighing of probative value against unfair prejudice is whether the trial court abused its discretion. *Peters v. Pierce*, 314 Ark. 8, 858 S.W.2d 680 (1993).

The balancing of probative value and unfair prejudice mandated by this section is a matter left to the sound discretion of the trial court, and will not be reversed absent a showing of manifest abuse. *Mixon v. State*, 330 Ark. 171, 954 S.W.2d 214 (1997).

Circuit court did not manifestly abuse its discretion by allowing the state to introduce appellant's letters to his wife; any suggestion of a guilty conscience in the letter to appellant's wife was slight. He never confessed to the crime in the letter, and as the weigher of credibility, the jury was charged with interpreting appellant's state of mind and intentions in writing the letter. *Bryant v. State*, 2010 Ark. 7, — S.W.3d —, 2010 Ark. LEXIS 22 (Jan. 14, 2010).

### **Subsequent Remedial Measures.**

When evidence of a subsequent remedial measure is not barred by Evid. Rule 407, its probative value should outweigh any dangers associated by its admission. *Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 894 S.W.2d 897 (1995).

### **Tape Recording.**

The trial court did not abuse its discretion in admitting tape of a 911 call; even though the state had clear proof that someone entered caller's home without resorting to the "911" call, the call served to explain why the police were in the area, and defendant offered no authority for how caller's alleged "frantic voice" inflamed the jury. *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996).

A recording of a 911 call in which a witness reported a murder was properly admitted into evidence, notwithstanding the contention that it was more prejudicial than probative, since the tape showed that the defendant was fully armed and acted with premeditation and deliberation and that the victim was not armed. *Henry v. State*, 337 Ark. 310, 989 S.W.2d 894 (1999).

Circuit court did not err by admitting into evidence a recording of the kidnapping victim's 911 call because the evidence contained

in the recording was relevant to prove the restraint element of the kidnapping offense and to counter defendant's argument that he released the victim; in the call, the victim told the operator the circumstances of the crimes and that she was bound and could not escape, and defendant did not produce any authority to support his position that the 911 recording was unduly prejudicial because the victim's voice was hysterical. *Davis v. State*, 368 Ark. 401, 246 S.W.3d 862 (2007).

### **Testimony Improper.**

It was improper to allow an officer to testify as to the details of what an anonymous telephone caller told him relating to the manner in which the crime was committed, but it was proper to allow the officer to relate the portions of the telephone call which caused him to take the course of action which he subsequently took. *Van Cleave v. State*, 268 Ark. 514, 598 S.W.2d 65 (1980), questioned *Wingfield v. State*, 303 Ark. 291, 796 S.W.2d 574 (1990).

Testimony was prejudicial and of little or no probative value in determining defendant's guilt. *McCoy v. State*, 270 Ark. 145, 603 S.W.2d 418 (1980).

Proffered remarks had minimal probative value and no relevance. *Hughes v. State*, 292 Ark. 619, 732 S.W.2d 829 (1987).

A witness should not be compelled to invoke his Fifth Amendment privilege in front of the jury, and if forced to take the stand and invoke the privilege against self-incrimination question by question any probative value would be substantially outweighed by the possibility of confusing the jury. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

In a drug case, the court erred by admitting evidence from an undisclosed "rebuttal witness" regarding items that were seized from defendant's house in a prior, unrelated search because the so-called rebuttal testimony did not "merely" respond to defendant's contention that the alleged contraband had legitimate uses, but delved into the details of a prior crime; further, the testimony went well beyond the mere existence of a drug manufacturing conviction. *Cluck v. State*, 91 Ark. App. 220, 209 S.W.3d 428 (2005).

Defendant's conviction for raping his daughter under § 5-14-103(a)(4)(A)(i) was appropriate because the evidence was sufficient and because the circuit court properly denied defendant's rape-shield motions. Consent was never an issue in a rape-by-guardian case, and when consent was not an issue, whether the victim had sexual relations with a third person was entirely collateral and irrelevant, § 16-42-101(b), (c); further, even if the supreme court had concluded that the conduct was relevant, it could not say that the proba-



tive value of such evidence was not substantially outweighed by the danger of unfair prejudice under this rule. *Vance v. State*, 2011 Ark. 392, — S.W.3d —, 2011 Ark. LEXIS 495 (Sept. 29, 2011).

#### **Testimony on Victim's Injuries.**

The trial court did not err when it allowed the state to call a physician to the stand to testify as to the robbery victim's injuries despite the defendant's offer to stipulate as to the injuries the victim sustained, where the doctor's testimony was only a brief and general description of the victim's injuries and the permanent effect of her paralysis, and the testimony was relevant to show the infliction or intent to inflict death or serious injury to another. *Harshaw v. State*, 275 Ark. 481, 631 S.W.2d 300 (1982).

Where essentially the same evidence of the fact that witnesses had seen that murder victim had been "beat up" on several occasions was admitted without objection, any potential error in allowing another witness to testify to essentially the same facts was harmless. *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993), appeal dismissed 316 Ark. 249, 871 S.W.2d 372 (1994).

#### **Testimony Time Limit.**

The trial court did not abuse its discretion by limiting the testimony to instances within six months of the accident, as there was nothing to suggest that the six-month period was unreasonable or unfair to either party. *Miller v. Nix*, 315 Ark. 569, 868 S.W.2d 498 (1994).

#### **Tests.**

Probative value of gaze nystagmus test results to show an alcohol level above the legal limit was substantially outweighed by the potential for unfair prejudice. *Middleton v. State*, 29 Ark. App. 83, 780 S.W.2d 581 (1989).

The trial's admission of genital herpes test results, to corroborate the testimony of the rape victim, was not a manifest abuse of discretion. *Cole v. State*, 307 Ark. 41, 818 S.W.2d 573 (1991).

DNA tests should not be ruled admissible before the accused's expert has had a chance to examine the evidence, procedures, and protocol, ideally, an accused should even be provided with the actual DNA samples in order to reproduce the tests, an accused must be given the opportunity for independent expert review before a determination of reliability is made. *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991).

It was error for trial court to admit evidence of luminol testing where there was no follow-up testing done to establish that the substance causing the luminol reaction was, in fact, human blood related to the alleged mur-

der. *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993), appeal dismissed 316 Ark. 249, 871 S.W.2d 372 (1994).

It was error to allow criminalist to testify that he thought that luminol reactions indicated the presence of blood without adequate follow-up testing having been done to establish that what caused the reactions was, in fact, blood, since the testimony was likely to be misleading and confusing to the jury. *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993), appeal dismissed 316 Ark. 249, 871 S.W.2d 372 (1994).

#### **Undue Delay or Waste of Time.**

It was error to suppress evidence relevant to the issues of whether the machine was properly certified and whether it was functioning properly at the time the appellant's test was administered. *McKim v. State*, 25 Ark. App. 176, 753 S.W.2d 295 (1988).

The trial court has discretion to exclude testimony, even if relevant, if it would confuse the issues or waste time. *Caldwell v. State*, 319 Ark. 243, 891 S.W.2d 42 (1995).

#### **Victim Impact Evidence.**

Testimony of the chairman of a non-profit group's board about the group's response to a flooding disaster, the resulting funerals, and the chairman's personal relationships with the bereaved was relevant victim-impact evidence under Ark. R. Evid. 402 and § 16-97-103 at defendant's sentencing hearing as although the group was able to meet the disaster victims' needs, the testimony illustrated the difficulties the group experienced due to defendant's theft; the evidence was not unduly prejudicial. *Brown v. State*, 2011 Ark. App. 608, — S.W.3d —, 2011 Ark. App. LEXIS 647 (Oct. 12, 2011).

#### **Videotapes.**

Videotapes, like photographs, are not rendered inadmissible merely because they are cumulative. *Hickson v. State*, 312 Ark. 171, 847 S.W.2d 691 (1993).

The trial court did not abuse its discretion in admitting videotape of the crime scene and the victims' bodies where the videotape gave an overall perspective of the crime scene at the time the crimes were committed and was helpful to the jury's understanding of the nature and extent of the victims' injuries. *Jefferson v. State*, 328 Ark. 23, 941 S.W.2d 404 (1997).

Trial court did not err in permitting the state to introduce videotapes depicting defendant engaged in sexual acts with his minor victims and with each other because the video footage was relevant to proving the elements of both the charges of rape and the charges of engaging children in the production of child pornography and because it could not be said that the video served no valid purpose other

than to inflame the passions of the jury. *Williams v. State*, 374 Ark. 282, 287 S.W.3d 559 (2008).

Where defendant was charged with numerous counts of rape and engaging children in the production of child pornography, the probative value of a DVD depicting defendant engaged in sexual contact with the young boys was not substantially outweighed by the danger of unfair prejudice because the state had the burden of proving the elements of all of the charges against defendant and because the state was entitled to prove the elements of the charges with its best evidence and the videos were certainly the state's best evidence. *Williams v. State*, 374 Ark. 282, 287 S.W.3d 559 (2008).

#### Waiver.

In a capital murder case, where the record reflected that appellant failed to make an argument under this rule at trial as to the admissibility of a .22 caliber rifle found in his home, the court would not review the argument on appeal. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003).

Defendant's conviction for capital-felony murder was appropriate because he did not receive a ruling from the circuit court regarding his argument under this rule; accordingly the issue was not preserved for our review. *Dixon v. State*, 2011 Ark. 450, — S.W.3d —, 2011 Ark. LEXIS 537 (Oct. 27, 2011).

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#### **Rule 404. Character evidence not admissible to prove conduct, exceptions — Other crimes.**

(a) *Character Evidence Generally.* Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) *Other Crimes, Wrongs, or Acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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## CASE NOTES

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Rebuttal.  
Standard of review.  
State of mind.  
Subsequent acts.  
Testimony improper.  
Testimony on transaction.  
Victim's character.

**In General.**

The admissibility of relevant evidence under subsection (b) of this rule may be decided on a case by case basis. *Conley v. State*, 267 Ark. 713, 590 S.W.2d 66 (Ct. App. 1979).

To be admissible under subsection (b) of this rule, the evidence must be independently relevant and its probative value must not be substantially outweighed by the danger of unfair prejudice. *Crutchfield v. State*, 25 Ark. App. 227, 763 S.W.2d 94 (1988); *Garner v. Kees*, 312 Ark. 251, 848 S.W.2d 423 (1993).

Evidence offered under subsection (b) of

this rule must be independently relevant. *Larimore v. State*, 317 Ark. 111, 877 S.W.2d 570 (1994).

Exceptions under subsection (b) of this rule go beyond a plan or scheme and include any independently relevant proof such as motive, opportunity, intent, absence of mistake, and other categories; this list of exceptions is not all-inclusive, since there may be other examples where the proof offered is independently probative. *Lindsey v. State*, 319 Ark. 132, 890 S.W.2d 584 (1994).

Prior acts need not exhibit the same or strikingly similar methodology, which is one so unique that only one person could have perpetrated both the prior act and the present crime, in order to be admissible to prove the motive, plan, and intent of the perpetrator. *Haire v. State*, 340 Ark. 11, 8 S.W.3d 468 (2000).

The list of exceptions to inadmissibility in subsection (b) of this rule is not an exclusive list, but instead, it is representative of the types of circumstances under which evidence of other crimes or wrongs or acts would be relevant and admissible. *Barnes v. State*, 346 Ark. 91, 55 S.W.3d 271 (2001), opinion withdrawn, substituted opinion 65 S.W.3d 389 (2001).

Evidence that defendant had shot his cousin was relevant and admissible under subsection (b) of this rule to prove that killing the victim was not a mistake or accident, and the similar nature of the previous battery conviction to the crime charged made the earlier conviction relevant to impeach defendant's testimony that he had reformed his violent behavior. *Herron v. State*, 362 Ark. 446, 208 S.W.3d 779 (2005).

In a capital murder case, defendant's use of crack cocaine was admissible as part of the *res gestae* where the witness testified that defendant took the items he had stolen to the witness's home, discussed his crimes with the witness, solicited help in burning down the victim's home, and then smoked crack cocaine with the witness that was purchased with money taken from the victim. *Thessing v. State*, 365 Ark. 384, 230 S.W.3d 526 (2006).

Although the gay-themed books were improperly admitted into evidence, any error was harmless in light of the wealth of other evidence of defendant's homosexual lifestyle; further, pornographic videos and photographs were properly admitted where two victims were in the photographs and they corroborated other victims' testimony. *Simmons v. State*, 95 Ark. App. 114, 234 S.W.3d 321 (2006).

In attorney's disciplinary proceeding, the special judge did not err when he disallowed certain evidence because the attorney had not



been given notice that the Executive Director of the Arkansas Supreme Committee on Professional Conduct planned to introduce that evidence at the hearing. *Ligon v. Dunklin*, 368 Ark. 443, 247 S.W.3d 498 (2007).

### **Construction.**

Once the admissibility of character evidence is established under this rule, Evid. Rule 405 establishes the methods of proof which may be utilized. *Rank v. State*, 318 Ark. 109, 883 S.W.2d 843 (1994).

Subsection (b) of this rule does not mention *modus operandi* as one of the bases for introducing evidence of other crimes; however, the list of exceptions to inadmissibility contained in the rule is not an exclusive list but rather represents examples of the types of circumstances where evidence of other crimes or wrongs would be relevant and admissible. *Christian v. State*, 54 Ark. App. 191, 925 S.W.2d 428 (1996).

### **Applicability.**

This rule is inapplicable to show a habit of lying. *Biggers v. State*, 317 Ark. 414, 878 S.W.2d 717 (1994).

There was no issue from subsection (b) of this rule that arose from defendant's request for a redaction of portions of a telephone conversation between defendant and a rape victim's mother because the statement in question would not have made the jury aware that there was an alleged prior similar crime; there had been a prior trial for the alleged rape of the same victim that resulted in a mistrial and no retrial. *White v. State*, 370 Ark. 284, 259 S.W.3d 410 (2007).

Circuit court did not abuse its discretion in admitting evidence of defendant's recorded conversation with another where, what prompted defendant's statement be it his frustration over not being able to speak to his wife or his frustration over his wife's conversation with police, was a matter for the jury to decide; the circuit court did not abuse its discretion in concluding that the statement was admissible pursuant to Ark. R. Evid. 403. *Holman v. State*, 372 Ark. 2, 269 S.W.3d 815 (2007).

Defendant argued that certain testimony was inadmissible under subdivision (b) of this rule; as a threshold matter, the court had to first determine whether the rule even applied in the context of defendant's case. *White v. State*, 2009 Ark. 374, 326 S.W.3d 421 (2009).

Subsection (b) of this rule was not applicable to a witness's testimony; the only testimony related to the gun was that the witness had seen defendant with a .380 caliber handgun, it is not a crime to possess a handgun, and thus the jury was not informed of any prior criminal or other bad act on the part of defendant. *White v. State*, 2009 Ark. 374, 326 S.W.3d 421 (2009).

Under subsection (b) of this rule, the circuit court abused its discretion by admitting evidence of other allegations of sexual misconduct as there was no issue of intent with respect to the harassment charge; the appellate court could not perceive of any independent relevance that the testimony of the alleged victims in other two severed charges had in this case. *Donaldson v. State*, 2009 Ark. App. 119, 302 S.W.3d 622 (2009).

### **Absence of Duress.**

In a prosecution for murder, the trial court properly permitted the introduction of evidence regarding the defendant's presence at the murder of another person earlier on the same day as such evidence belied her defense that she acted with her coperpetrator only out of duress. *Arnett v. State*, 342 Ark. 66, 27 S.W.3d 721 (2000).

### **Absence of Mistake.**

Testimony that the defendant said he had shot one individual and was probably going to prison was admissible to show defendant's intent, knowledge, and absence of mistake regarding the murder at issue. *Williams v. State*, 338 Ark. 178, 992 S.W.2d 89 (1999).

Where children are concerned, evidence of physical injuries to other children in the home and even to a child in another home is probative of intent and the absence of mistake or accident. *Branstetter v. State*, 346 Ark. 62, 57 S.W.3d 105 (2001).

Evidence of defendant's prior conviction for domestic battering of the victim was properly admitted as evidence of lack of mistake or accident where defendant testified in his trial for attempted first-degree murder that he had learned a valuable lesson and inferred that the current incident was a mistake. *McCoy v. State*, 354 Ark. 322, 123 S.W.3d 901 (2003).

In an assault case arising from shaking a baby under § 5-13-201(a)(4)(A), testimony of defendant's actions toward the same infant two weeks earlier was admissible under Ark. R. Evid. 403 and subsection (b) of this rule because it was offered to show state of mind and to negate the claim of accident. *Smith v. State*, 90 Ark. App. 261, 205 S.W.3d 173 (2005).

### **Alibi Defense.**

The admissibility of testimony about another crime, to rebut a defense of alibi, is uniformly recognized. *Williams v. State*, 276 Ark. 399, 635 S.W.2d 265 (1982).

Where in a prosecution for first-degree murder committed in the perpetration of a robbery at a motel the defendant and his wife testified that the defendant was at home at the time of the murder, the trial court did not err in allowing the state on rebuttal to introduce evidence that the defendant had held up another person in the same vicinity a short time before the robbery at the motel, because

the state's evidence was relevant to disprove the defendant's alibi and was not merely offered to show the defendant's bad character. *Williams v. State*, 276 Ark. 399, 635 S.W.2d 265 (1982).

#### **Appeal.**

State did not argue that the circuit court misinterpreted subsection (b) of this rule, instead, it only contended that the trial court abused its discretion in applying the rule; state appeals were not allowed merely to demonstrate the fact that the trial court erred. *State v. Fuson*, 355 Ark. 652, 144 S.W.3d 250 (2004).

Appellate court was unable to review the trial court's decision to allow polygraph evidence under subsection (b) of this rule during rebuttal in a rape case because defendant failed to meet the burden of providing the evidence in question in the record on appeal. *Rollins v. State*, 362 Ark. 279, 208 S.W.3d 215 (2005).

#### **Bias.**

The purpose of the state's cross-examination of the defense witness was to show that the witness was a friend of defendant and would testify favorably for that reason; because the evidence that the defense witness and defendant met in prison was relevant to proving the witness's bias, the trial court did not abuse its discretion in allowing the state to delve into this area of cross-examination. *Jones v. State*, 349 Ark. 331, 78 S.W.3d 104 (2002).

In defendant's murder trial, the key witness who was at the scene of the shooting allegedly battered a woman in retaliation against her for not relaying the information the key witness wanted the woman to impart to the police, but that key witness was not charged with any offense; those matters were relevant, reflecting upon the key witness's interest, motives in testifying, and bias, and the trial court committed reversible error in restricting cross-examination on the subject. *Ghoston v. State*, 84 Ark. App. 387, 141 S.W.3d 907 (2004).

#### **Character of Accused.**

Where in a prosecution for theft of property the prosecutor made improper and prejudicial remarks about the defendant's character and his associates before the jury, the trial court had wide discretion in deciding whether to declare a mistrial or merely admonish the jury, and since the prosecutor's statements were not so highly prejudicial as to warrant a mistrial, the admonition by the trial court was adequate to offset the impropriety of the statements. *Gustafson v. State*, 267 Ark. 830, 593 S.W.2d 187 (Ct. App. 1979).

Where the defendant in a murder prosecution raised the defense of self-defense, the trial court erred in prohibiting the defendant

from putting on testimony as to his reputation for being a peaceful and law-abiding citizen, and his conviction was therefore reversed, since the traits of being peaceful and law-abiding were pertinent to both the crime with which he was charged and the defense upon which he relied, and such character evidence should have been admitted. *Finnie v. State*, 267 Ark. 638, 593 S.W.2d 32 (1980).

Where eight of state's 15 witnesses in manslaughter trial testified about two fighting incidents with patrons which defendant, as doorman at club, was involved in prior to fight with victim, who died of broken neck, and there was no evidence that the first two encounters which occurred at the front of the club had any connection with the fatal fight which occurred at the back of the club, or that the victim was acquainted with the other persons involved, evidence of the first incidents was not admissible under subsection (b) of this rule, since the only purpose served by the evidence is to prove that defendant was a bad man. *Slavens v. State*, 1 Ark. App. 245, 614 S.W.2d 529 (1981).

Where in a prosecution for burglary, aggravated assault, criminal mischief and battery, the defendant on cross-examination did not testify to a character trait of nonviolence, no rebutting character trait evidence was admissible. *Hawksley v. State*, 276 Ark. 504, 637 S.W.2d 573 (1982).

If other conduct of the accused is independently relevant to the main issue, in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal, that conduct may be admissible with a proper cautionary instruction by the court. *Setters v. State*, 4 Ark. App. 46, 627 S.W.2d 263 (1982).

While defendant in murder prosecution did plead self-defense, or justification, such plea did not permit the state to offer evidence of specific instances of prior misconduct to show she may have been the aggressor because her character was not an essential element of her claim of self-defense. *Rowdean v. State*, 280 Ark. 146, 655 S.W.2d 413 (1983).

Court erred in admitting evidence, in murder prosecution, that defendant had been known to carry a knife prior to murder since such testimony was evidence of a character trait and defendant had not placed her general character in evidence nor had she offered any evidence of her character for peacefulness, or the victim's for violence. *Rowdean v. State*, 280 Ark. 146, 655 S.W.2d 413 (1983).

By testifying to his past exemplary conduct, the defendant in a damages action thereby opened the door to the admission of rebuttal evidence, otherwise inadmissible, concerning his reputation for peacefulness; thus, the trial court did not abuse its discretion in admitting a police officer's testimony that the defendant



had a reputation in the community for violence when he was drinking. *Pursley v. Price*, 283 Ark. 33, 670 S.W.2d 448 (1984).

Where testimony of the police officer could have been considered evidence that the defendant was predisposed to violence but did not directly show that defendant had such a character trait nor demonstrate in any way that he would be violent towards his own children, a mistrial would not be granted. *Burnett v. State*, 287 Ark. 158, 697 S.W.2d 95 (1985), overruled *Midgett v. State*, 292 Ark. 278, 729 S.W.2d 410 (1987).

The trial court was right to exclude proof of character through specific instances of conduct on direct examination, but should have admitted opinion evidence of a "pertinent trait;" evidence that defendant was not a discipline problem, that he had an aversion to violence, and that he was immature and of limited intelligence should have been admitted in the capital murder trial. *Shelton v. State*, 287 Ark. 322, 699 S.W.2d 728 (1985).

In incest and child abuse cases, character evidence which would ordinarily be inadmissible under subsection (b) of this rule is admissible when it is helpful to show a proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship. *Baldrige v. State*, 32 Ark. App. 160, 798 S.W.2d 127 (1990).

Where defendant in murder trial raised the character issue by testifying that there was no violence in his relationship with the murder victim and that he never had been charged with a criminal offense, the clear implication was that violence was not a character trait, and by testifying as he did, he invited a retort from the state on the peacefulness of his character, and when the state obliged by asking about a woman that defendant had held against her will in another state, there was no abuse of discretion in admitting defendant's testimony as to the unrelated incident. *Spohn v. State*, 310 Ark. 500, 837 S.W.2d 873 (1992).

It is clearly the defendant's obligation to object to testimony violating subdivision (a)(2) of this rule, and to ask for a curative instruction; the failure to do so will not inure to his benefit on appeal. *Vick v. State*, 314 Ark. 618, 863 S.W.2d 820 (1993).

The state is limited in character evidence about the victim under subdivision (a)(2) of this rule to rebutting what the defense has presented. *Stewart v. State*, 316 Ark. 153, 870 S.W.2d 752 (1994).

When an accused offers character evidence in his own behalf, the character witness is subject to cross-examination as to his or her knowledge of relevant specific instances of conduct by the accused; when that occurs, cross-examination as to specific instances of

conduct is allowed irrespective of prejudice. *Smith v. State*, 316 Ark. 407, 872 S.W.2d 843 (1994).

Where defendant put his character and reputation for peacefulness in issue by testifying that he usually did not even carry a knife, the trial court did not err in permitting the rebuttal evidence of his knife-carrying reputation offered by the state. *Landrum v. State*, 47 Ark. App. 165, 887 S.W.2d 314 (1994), aff'd 320 Ark. 81, 894 S.W.2d 933 (1995).

Testimony by defendant that he usually did not carry a knife or sometimes did not carry a knife was not evidence of his good character or of a particular character trait, and was not subject to rebuttal evidence. *Landrum v. State*, 320 Ark. 81, 894 S.W.2d 933 (1995).

No mistrial granted where a question that could have led to a prejudicial comment was asked, but never answered. *Standridge v. State*, 329 Ark. 473, 951 S.W.2d 299 (1997).

Witness' statement that defendant looked like "an animal" on the night of the murders was not a representation of his character. *Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998).

Witness' statement that she forged a prescription because she had heard that defendant "was out" was not improper character evidence; the jury could just as easily have concluded that defendant "was out" on bail. *Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998).

Defendant was properly convicted of four counts of rape in light of the testimony regarding the rape of two victims, the incident involving another, the vehicle and license-plate information, the presence of duct tape in the victim's garbage can, and the unequivocal identification by the victims and witnesses of defendant as the perpetrator; although defendant argued that the trial court erred by permitting the state to introduce character evidence in violation of this rule, he did not object to the character evidence at trial, and the appellate court would not consider the argument for the first time on appeal. *Moore v. State*, 87 Ark. App. 385, 192 S.W.3d 271 (2004).

Although defendant had been accused but not yet convicted of forgery, evidence that defendant was out on bond when he committed residential burglary and theft of property provided proof of his character and was relevant to the jury's determination of an appropriate punishment; the jury need not have learned of the details of defendant's bond requirements to understand that the fact that defendant was out on bond when he committed the new crimes said something about his character. *Helms v. State*, 92 Ark. App. 79, 211 S.W.3d 53 (2005).

Trial court properly denied defendant's mo-

tion for a mistrial after a witness testified that defendant was unemployed as it was doubtful whether the fact of unemployment was the type of character evidence contemplated by this rule and the evidence was relevant to defendant's motive for the murder; defendant had been living with the victim, his girlfriend, and relying on her for transportation, and there was evidence that she had broken up with defendant shortly before her murder. *Tate v. State*, 367 Ark. 576, 242 S.W.3d 254 (2006).

In a first-degree murder trial, defendant's testimony concerning his lack of intent to commit a violent act, along with testimony of two defense witnesses that he was not a violent person, invited inquiry into whether defendant had cut his finger while slashing a tire during an angry outburst shortly before the murder. *Ross v. State*, 96 Ark. App. 385, 242 S.W.3d 298 (2006).

Character evidence, which included defendant's prior convictions in another state, was admissible under this rule and Ark. R. Evid. 405 because defendant opened the door to the admission of such evidence when he questioned his wife about her opinion of his character. *Frye v. State*, 2009 Ark. 110, 313 S.W.3d 10 (2009).

#### **Circumstances Surrounding Crime.**

In a murder prosecution, evidence of the defendant's flight to Utah and subsequent arrest there was properly admitted to show the circumstances surrounding the crime. *McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999).

In defendant's murder case, the presentation by the state of various incidents of defendant's obsessive behavior towards the victim was proper because, in so doing, the state established defendant's state of mind towards the victim by showing his strange behavior during the months leading up to the murder and the drastic measures that defendant was willing to take to keep the victim under his control; the testimony also established that defendant was aware of the victim's relationship with another man and thereby established defendant's possible motive in committing the murders. *Brunson v. State*, 368 Ark. 313, 245 S.W.3d 132 (2006).

In defendant's murder case, a witness testimony about being scared to live in the family home with defendant was properly admitted because the prosecutor asked the witness if she was scared in order to establish the state of the marital relationship between defendant and the victim, rather than to link defendant to another alleged crime. *Brunson v. State*, 368 Ark. 313, 245 S.W.3d 132 (2006).

#### **Civil Cases.**

The exceptions to the general rule which are set out in subdivisions (a)(1) and (2) of this

rule are not applicable to civil cases. *Brown v. Conway*, 300 Ark. 567, 781 S.W.2d 12 (1989); *Razorback Cab of Ft. Smith, Inc. v. Lingo*, 304 Ark. 323, 802 S.W.2d 444 (1991).

The general rule does not prohibit the introduction of evidence of character or traits of character in a civil case where: (1) trait of character is in issue; (2) the evidence is being offered to reflect upon the credibility of the witness; that is, showing the witness's character for veracity under Evid. Rules 608 and 609, or (3) the evidence is offered to prove something other than that the defendant acted in conformity with his character. *Brown v. Conway*, 300 Ark. 567, 781 S.W.2d 12 (1989).

Rule did not prevent a plaintiff in a civil assault action from showing in rebuttal that the defendant had a trait of violence where the defendant first put his own traits of character in evidence by testifying to his peacefulness. *Brown v. Conway*, 300 Ark. 567, 781 S.W.2d 12 (1989).

In a products liability action arising from an airplane accident, it was reversible error for the court to permit testimony that the plaintiff's decedent was a "cowboy" who was "hard on an airplane" since there was no purpose for such testimony other than to show that the decedent was flying recklessly at the time of the accident and given that the key question at trial was whether the crash was caused by mechanical failure or by pilot error. *Lawhon v. Ayres Corp.*, 67 Ark. App. 66, 992 S.W.2d 162 (1999).

#### **Consciousness of Guilt.**

Evidence of the refusal to submit to a chemical test can properly be admitted as circumstantial evidence showing consciousness of guilt of a defendant charged with offense of driving while intoxicated, and once admitted, the weight of this evidence is a question to be resolved by the trier of fact, which may also consider the circumstances surrounding the refusal and any explanation given for declining to take the test. *Spicer v. State*, 32 Ark. App. 209, 799 S.W.2d 562 (1990).

A factfinder is entitled to know whether a defendant attempted to thwart his prosecution by secreting a witness who had implicated him in the charged offense. Thus, proof regarding defendant and his travel with confidential informant on the day set for trial was relevant circumstantial evidence of his knowledge or consciousness of guilt and was not unfairly prejudicial. *Henderson v. State*, 322 Ark. 402, 910 S.W.2d 656 (1995).

The defendant's conviction for escape, while awaiting trial on the rape charges at issue, was properly introduced into evidence to show consciousness of guilt. *Elliott v. State*, 342 Ark. 237, 27 S.W.3d 432 (2000).

Defendant's convictions were affirmed where, after the evidence was considered ab-



sent an officer's testimony about threats made to the officer by defendant at a pretrial hearing, admitted under subsection (b) of this rule, there was still abundant evidence as all three victims testified they were robbed at gunpoint and kidnapped at defendant's direction. *Mendiola v. State*, 92 Ark. App. 359, 214 S.W.3d 271 (2005).

Under subsection (b) of this rule, the trial court did not err in allowing the testimony of two witnesses as they were independently relevant to show defendant's consciousness of guilt, and thus, the trial court did not abuse its discretion in allowing the testimony. *Banks v. State*, 2009 Ark. 483, 347 S.W.3d 31 (2009).

Defendant's convictions for capital murder and committing a terroristic act were appropriate pursuant to subsection (b) of this rule because evidence of another drive-by shooting that defendant allegedly ordered while incarcerated was admissible since it reflected his consciousness of guilt and was independently relevant. Attempts to tamper with or silence witnesses to thwart prosecution for the charged offense was evidence of consciousness of guilt and constituted relevant evidence. *Banks v. State*, 2010 Ark. 108, 366 S.W.3d 341 (2010).

Court did not err under subsection (b) of this rule during defendant's trial for first-degree murder as an accomplice in admitting testimony from defendant's fellow inmate that defendant told the inmate he had no remorse for his wife's death; the testimony reflected defendant's consciousness of guilt and was independently relevant. *Camp v. State*, 2011 Ark. 155, — S.W.3d —, 2011 Ark. LEXIS 141 (Apr. 14, 2011).

#### **Corroboration of Accomplice.**

Where in a prosecution for theft of property the state introduced a recorded conversation that the defendant had with a police informant, in which the defendant incriminated himself by referring to his participation in other car thefts, the trial court properly admitted such evidence since it had independent relevancy and it corroborated the testimony of the defendant's alleged accomplice. *Price v. State*, 268 Ark. 535, 597 S.W.2d 598 (1980).

In defendant's drug case, the court properly allowed the state to introduce testimony concerning items that were found in defendant's work vehicle sixteen days after he was arrested at the accomplice's residence, together with defendant's statement to an officer that the items in the vehicle were his, for the purpose of corroborating the accomplice's testimony. *Fitting v. State*, 94 Ark. App. 283, 229 S.W.3d 568 (2006).

#### **Cross-Examination.**

Where witness testified on direct examination that defendant charged with kidnapping and burglary was like a member of the family and had been a protector of her children, the State was well within its rights on cross-examination to delve into defendant's character once the door had been opened by his own witness. *Rush v. State*, 324 Ark. 147, 919 S.W.2d 933 (1996).

#### **Evidence Necessary.**

Where in prosecution for rape, prosecutor questioned defendant about "touching" eight-year-old victim earlier in the day on the date of the incident, but there was no prior evidence about such conduct, such questioning was an improper attempt to impeach the witness under Rule 608, since the questions had no relationship to the truthfulness or untruthfulness of his testimony and the probative value of the answers did not outweigh their prejudicial effect, nor did the questions qualify under this rule as tending to show motive, intent, preparation or plan, since there was no prior evidence of the conduct and this rule cannot apply without evidence. *Harper v. State*, 1 Ark. App. 190, 614 S.W.2d 237 (1981).

#### **Evidence of Defense.**

Where defendant in double homicide prosecution for killing his wife and her paramour, raised defense of justification under § 5-2-607, it was improper to exclude evidence which showed that defendant's wife had shot him on two prior occasions within two years of the murder, the first causing permanent injury to defendant's shoulder and the second causing loss of his thumb and finger, that both victims had threatened to kill defendant, and that the paramour had pulled a gun and threatened to kill defendant three months before the homicide, since, under this rule, where a claim of justification is raised, such evidence is relevant to the issue of who was the aggressor and whether or not the accused reasonably believed he was in danger of suffering unlawful deadly physical force. *Smith v. State*, 273 Ark. 47, 616 S.W.2d 14 (1981).

Evidence of other acts or crimes is usually admissible in rebuttal to the defense of entrapment. *Jackson v. State*, 12 Ark. App. 378, 677 S.W.2d 866 (1984).

#### **Evidence of Different Charge.**

If, in a prosecution for the possession of heroin the state had introduced the evidence of a different offense having been charged against the defendant, the defendant would have been entitled to show he was acquitted of that charge. *Philmon v. State*, 267 Ark. 1121, 593 S.W.2d 504 (Ct. App. 1980), questioned *Hall v. State*, 11 Ark. App. 53, 666 S.W.2d 408 (1984).

Where in a prosecution for possession of

heroin, to whatever extent the knowledge of the jury that the defendant had been accused of a different offense from the one for which he was being tried may have prejudiced him, it was invited or created by him and should not be a basis for relief on appeal, since the defendant's trial counsel had objected to a police detective's testimony about the arrest warrant by saying that the arrest warrant was for a different offense. *Philmon v. State*, 267 Ark. 1121, 593 S.W.2d 504 (Ct. App. 1980), questioned *Hall v. State*, 11 Ark. App. 53, 666 S.W.2d 408 (1984).

### **Factors Considered.**

Similarity and time connections are factors in determining the probativeness of the evidence, which must be weighed against the possibility of confusing the issues and wasting time. *Larimore v. State*, 317 Ark. 111, 877 S.W.2d 570 (1994).

The focal point of an analysis under subsection (b) of this rule is whether the proof of the other crime, wrong, or act is relevant, not whether it was part of a single plan or scheme. *Lindsey v. State*, 319 Ark. 132, 890 S.W.2d 584 (1994).

Denial of appellant's, an inmate's, Ark. R. Crim. P. 37 petition was proper because he failed to prove that he received the ineffective assistance of counsel. Had counsel made the objections that the inmate asserted should have been made under Ark. R. Evid. 403 and subdivision (b) of this rule, they would have been properly overruled because the inmate himself introduced the issue of a Virginia trip and his treatment of the victim's older sister; thus, the inmate opened the door to the very testimony he now found objectionable. *Gilliland v. State*, 2012 Ark. 162, — S.W.3d —, 2012 Ark. LEXIS 183 (Apr. 19, 2012).

### **Failure to Raise Issue of Character.**

Where the defendant was charged with manslaughter, and produced evidence of the decedent's aggressive acts against him and the prosecution cross-examined the defense witness as to defendant's violent background, such cross-examination was impermissible under this rule, since the defendant did not make an issue of his own character. *West v. State*, 265 Ark. 52, 576 S.W.2d 718 (1979).

### **Habits of Victim.**

Where a capital murder was alleged to have occurred, but the victim's body was never found, evidence that the victim had not been heard from in the three years prior to the trial, that he was very dependable in his routine and kept a fairly rigid schedule, plus the fact that he had a good samaritan's tendency to stop and help people in need, including hitchhikers, which, under other evidence introduced, could have included defendant, was properly admitted on the issue of habit pursuant to Rule 406, since the trial judge

admonished the jury several times that he was not admitting the evidence as character evidence. *Derring v. State*, 273 Ark. 347, 619 S.W.2d 644 (1981).

### **Harmless Error.**

Appellate court agreed with defendant that the trial court improperly allowed the state to introduce evidence of the other thefts since the fact that the items were stolen was not independently relevant to defendant's identity and there was no need for the state to present testimony from the victims regarding the fact that the items were stolen, however, the error in admitting the improper evidence under subsection (b) of this rule was harmless, because any error in allowing the victims to testify about the theft of their property was slight in comparison to the overwhelming evidence of guilt. *Tomboli v. State*, 100 Ark. App. 355, 268 S.W.3d 918 (2007).

Because defendant testified at trial concerning his prior violent crimes, he could not demonstrate any prejudice resulting from the trial court's failure to give an instruction under subsection (b) of this rule, even if one had been requested. *Miller v. State*, 2010 Ark. 1, 362 S.W.3d 264 (2010).

### **Identification of Defendant.**

When challenging identification of defendant, under subsection (b) of this rule, the defendant should have the right to show that crimes of a similar nature have been committed by some other person when the acts of such other person are so closely connected in point of time and method of operation as to cast doubt upon the identification of the defendant as the person who committed the crime charged against him. *Larimore v. State*, 317 Ark. 111, 877 S.W.2d 570 (1994).

Where the relevance of the evidence went to the issue of identification, as well as intent or lack or absence of mistake, the testimony of an earlier drug transaction was admissible under subsection (b) of this rule. *Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997).

The similarities of the two rapes were not sufficient to support a finding that the witness's testimony was admissible pursuant to subsection (b) of this rule to identify the defendant. *Akins v. State*, 330 Ark. 228, 955 S.W.2d 483 (1997).

### **Independent Relevance.**

Although the State did not attempt to establish that defendant committed any crime in connection with the first fire that occurred, it was independently relevant under subsection (b) of this rule because it was a catalyst for defendant's statement that the fire should have "came down a little further" to reach his girlfriend's apartment, suggesting his desire that she be harmed. *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000).

Evidence suggesting or implying a kidnap-



ping, namely evidence that defendant forced the victim into his truck at gun point and drove him to another location, was independently relevant to prove an element of the aggravated robbery charge. *Smith v. State*, 351 Ark. 468, 95 S.W.3d 801 (2003).

In a drug manufacturing case, the trial court did not err by allowing officers to testify solely for the purposes of establishing prior criminal acts other than the one for which defendant was being tried because defendant's 1998 judgment for possession of drug paraphernalia after he was first charged with manufacturing methamphetamine and his arrest for shoplifting methamphetamine precursors was independently relevant and sufficiently similar to the charged offense of manufacturing methamphetamine; similar past conduct supporting defendant's knowledge of the methamphetamine manufacturing process and his shoplifting of methamphetamine precursors was certainly probative of intent. *Saul v. State*, 365 Ark. 77, 225 S.W.3d 373 (2006).

In defendant's capital murder case, the court erred by denying a motion for a mistrial where it allowed defendant's children and wife to testify that defendant was not law abiding and had physically abused them; the control defendant had over his family was not independently relevant to whether he committed the crimes. *Green v. State*, 365 Ark. 478, 231 S.W.3d 638 (2006).

Where defendant was charged with raping and sexually assaulting his minor stepdaughter, evidence that he had threatened and assaulted his wife, the victim's mother, immediately before she contacted the police was relevant and admissible under subsection (b) of this rule because it showed that defendant was attempting to silence a witness and was thus independently relevant to prove the crimes charged. *Rohrbach v. State*, 374 Ark. 271, 287 S.W.3d 590 (2008).

Even if subsection (b) of this rule did apply, evidence that defendant possessed a .380 caliber handgun was certainly relevant in light of the fact that a .380 caliber shell hull was recovered at the scene of the crime and the trial court did not err in admitting the testimony. *White v. State*, 2009 Ark. 374, 326 S.W.3d 421 (2009).

Trial court properly admitted evidence of a prior murder five days earlier under subsection (b) of this rule, as a prior bad act, to establish that defendant had access to a .45 caliber pistol on the night he murdered the victim by showing that five days prior to that murder, he was present when the same caliber pistol was used to murder the first victim. The shell casings from both murders matched. *Lockhart v. State*, 2010 Ark. 278, — S.W.3d —, 2010 Ark. LEXIS 330 (June 3, 2010).

### **Injuries to Child.**

If evidence of physical injuries to other children is admissible under subsection (b) of this rule, then evidence of mistreatment against the same child is certainly admissible under the same provision. *Smith v. State*, 90 Ark. App. 261, 205 S.W.3d 173 (2005).

### **Instructions.**

Where evidence was introduced that defendant had purchased stolen property in return for controlled substances on two prior occasions, which was admissible under this rule to show a system or design in the present case, the trial court, which gave a precautionary instruction at the end of the trial, was not also required to give the same precautionary instruction at the close of the state's case when the evidence was admitted. *Vernon v. State*, 2 Ark. App. 305, 621 S.W.2d 17 (1981).

It is the defendant's duty to request a curative instruction; his failure to ask for an admonition at trial cannot inure to his benefit on appeal. *Hall v. State*, 314 Ark. 402, 862 S.W.2d 268 (1993).

### **Intent.**

Where the defendant was charged with possession with intent to deliver methamphetamine, evidence that he admitted to having sold drugs to other named persons was admissible to show his intent. *Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998).

In a breach of contract case, the court properly allowed insurer to introduce evidence of homeowner's prior late payments and lapses of her homeowner's policies as it showed that homeowner made only one timely payment on her homeowner's policy between November 2000 and November 2001, allowed the policy to lapse twice before the final lapse in November 2001, and had a long history of late payments on her automobile policy; the evidence was admissible to show homeowner's intent to not make the November 2001 payment on time and to show that a mistake did not occur, and the evidence was not unfairly prejudicial. *Jones v. Coker*, 90 Ark. App. 151, 204 S.W.3d 554 (2005).

Evidence of subsequent drug sales was properly admitted at defendant's trial for possession of cocaine with the intent to deliver and possession of methamphetamine with the intent to deliver, both pursuant to § 5-64-401, because, pursuant to subsection (b) of this rule and Ark. R. Evid. 403, the evidence was relevant to whether defendant intended to deliver the drugs, and was not unfairly prejudicial. *Turner v. State*, 2009 Ark. App. 822, — S.W.3d —, 2009 Ark. App. LEXIS 1049 (2009).

### **Knowledge of Defendant.**

In prosecution for theft of automobile by receiving where identification numbers had been removed from the vehicle, proof that

police officers found other vehicles with identification numbers removed on defendant's premises was admissible as tending to show defendant's knowledge that the vehicle in question had been stolen. *Reeves v. State*, 263 Ark. 227, 564 S.W.2d 503, cert. denied 439 U.S. 964, 99 S. Ct. 450, 58 L. Ed. 2d 422 (1978), criticized *Reeves v. Mabry*, 615 F.2d 489 (8th Cir. 1980).

Where defendant was charged with the crime of theft by receiving, slides could be introduced to show other vehicles that had the V.I.N. numbers bored out and covered up, for the purpose of linking the defendant to the premises where these stolen vehicles were found and to prove the defendant's knowledge that the subject of the offense had been altered in a similar way to indicate the defendant's knowledge that the vehicle he possessed was stolen. *Reeves v. Mabry*, 480 F. Supp. 529 (W.D. Ark. 1979), aff'd 615 F.2d 489 (8th Cir. 1980).

Testimony held relevant as tending to show appellant's knowledge of her own guilt, from which it could be inferred that she was the person who committed the crime. *Morris v. State*, 21 Ark. App. 228, 731 S.W.2d 230 (1987).

Where defendant, in a trial for manufacturing a Schedule II controlled substance, testified, as part of his affirmative defense, that he did not know how to manufacture drugs and had never done so either before or after his arrest, the state could rebut this testimony. *Hill v. State*, 314 Ark. 275, 862 S.W.2d 836 (1993).

Defendant's refusal to submit to a chemical test can be properly admitted as circumstantial evidence showing a knowledge or consciousness of guilt. *Medlock v. State*, 332 Ark. 106, 964 S.W.2d 196 (1998).

The similarities between an act charged and extrinsic acts admitted, under subsection (b) of this rule, to show the act charged was not performed inadvertently, accidentally, involuntarily, or without guilty knowledge need not be as extensive and striking as is required to show *modus operandi*. *Barnes v. State*, 346 Ark. 91, 55 S.W.3d 271 (2001), opinion withdrawn, substituted opinion 65 S.W.3d 389 (2001).

#### **Modus Operandi.**

In a prosecution for rape arising from an incident in which the defendant stopped the victim's car at night by following her and flashing a blue light, the trial court properly permitted introduction of another rape which followed a similar fact pattern as the evidence showed a *modus operandi*, especially as the rape kits from each crime supported an expert opinion that the source of the DNA was the same individual. *Birmingham v. State*, 342 Ark. 95, 27 S.W.3d 351 (2000).

In a prosecution for murder, the trial court

erred in allowing a prior aggravated robbery to be introduced into evidence to show *modus operandi*, notwithstanding that the crimes took place close in time; the evidentiary similarities were not so unique that they independently identified the defendant as the perpetrator of both crimes. *Williams v. State*, 343 Ark. 591, 36 S.W.3d 324 (2001).

To offer evidence to prove *modus operandi*, two requirements must be met: (1) both acts must be committed with the same or strikingly similar methodology; and (2) the methodology must be so unique that both acts can be attributed to one individual. *Barnes v. State*, 346 Ark. 91, 55 S.W.3d 271 (2001), opinion withdrawn, substituted opinion 65 S.W.3d 389 (2001).

Prisoner's argument, that the Arkansas Supreme Court improperly relied upon evidence of the prisoner's transgressions on another occasion with the date-rape victim as evidence of guilt in the present case, in violation of subsection (b) of this rule, was without basis as the evidence showed plan and *modus operandi* by demonstrating that the prisoner had gone through a similar sequence with the date-rape victim — taking the victim on a drive to another town, drugging the victim with Rohypnol such that the victim was unconscious, taking the victim to a bed and breakfast, and removing the victim's clothes. *Sera v. Norris*, 400 F.3d 538 (8th Cir. 2005), cert. denied 546 U.S. 915, 126 S. Ct. 283, 163 L. Ed. 2d 250 (2005).

In a sexual assault case, introduction of evidence that defendant had stopped another church member and persuaded that victim to go to an isolated area where unwanted sexual advances were made was relevant to show *modus operandi* and lack of consent by the second victim and, as such, did not violate Ark. R. Evid. 403. *Davis v. State*, 362 Ark. 34, 207 S.W.3d 474 (2005).

#### **Motive.**

In the prosecution of the defendant for the murder of his parents and his sister, the court properly admitted evidence of the defendant's party behavior, including his use of alcohol and marijuana, his engaging in sexual relations with a teenaged girl, and his unauthorized use of his father's credit card and business checks to obtain cash and goods, where the state argued that such evidence tended to prove the defendant's motive. *Hodge v. State*, 332 Ark. 377, 965 S.W.2d 766 (1998).

In a murder prosecution, evidence of the defendant's participation in the beating of another person for "snitching" on the defendant and the coperpetrators, was relevant to show as motive for kidnapping, beating, and killing the victim. *McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999).

Where the purpose of evidence is to disclose a motive for a killing or attempted killing,



anything that might have influenced the commission of the act may be shown. *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000).

In a murder prosecution in which the state's theory of the case was that the defendant sold drugs and that the victim's alleged theft of the defendant's drug money was the motive for the murder, it was not error to allow the introduction of evidence that the defendant sold drugs to a third party as his dealing drugs was a vital cog in the state's proof of motive. *Bowen v. State*, 342 Ark. 581, 30 S.W.3d 86 (2000).

In a prosecution for attempted capital murder of an inmate arising from his attack on a corrections officer with a table leg, the trial court properly allowed the introduction of evidence of the inmate's prior conviction for second degree murder arising from an incident in which he struck the victim on the head with a baseball bat since such evidence was relevant to show that the defendant knew that a club such as a baseball bat or table leg could cause death, and that he planned to use the same type of weapon to kill the officer as he did to kill his first victim. *Jones v. State*, 72 Ark. App. 271, 35 S.W.3d 345 (2000).

Trial court did not abuse its discretion in allowing the admission of evidence into defendant's trial for murder that defendant was under investigation for the alleged abuse of the victim's sister when the evidence tended to show defendant's motive for not seeking medical attention for the victim sooner. *Burley v. State*, 348 Ark. 422, 73 S.W.3d 600 (2002).

In a trial for capital murder based on the killing of the victim during a robbery, trial court did not abuse its discretion in admitting photographs showing the crime scene with the victim present or photographs of the autopsy performed on the victim as the photographs were relevant to the state's robbery theory and to show that the fatal gunshot was a contact wound from the rear; evidence that defendant was arrested at a nearby liquor store after having just purchased some wine was admissible to show defendant's motive was robbery. *Matthews v. State*, 352 Ark. 166, 99 S.W.3d 403 (2003), appeal dismissed — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 612 (Nov. 15, 2007).

If the evidence of another crime, wrong, or act is relevant to show that the offense of which the appellant is accused actually occurred and is not introduced merely to prove bad character, it will not be excluded; the test for establishing motive, intent, or plan as an exception under subsection (b) of this rule is whether the evidence of the other act has independent relevance. *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004).

Because defendant's drug use was probative of his motive in committing the offenses

of first-degree murder and aggravated robbery in an attempt to get money to buy drugs, although the evidence was prejudicial, it was relevant to motive and intent and it was not more prejudicial than probative; thus, the evidence of defendant's drug use was admissible under subsection (b) of this rule. *Hudson v. State*, 85 Ark. App. 85, 146 S.W.3d 380 (2004).

Circuit court properly admitted the disputed evidence under subsection (b) of this rule to show appellant's motive, intent, plan, and knowledge where (1) there was evidence that, within days of appellant's arrest and his possession of a credit card and driver's license in the victim's name, someone went to three banks to withdraw money from the victim's account, using as identification a California driver's license and credit card bearing his name; (2) surveillance photographs at two of the locations apparently showed appellant to be the person, a determination that the jury could have made by comparing the photos with his actual person; and (3) the car in which appellant was riding contained checks bearing the victims' names, and one victim had reported fraudulent action on his account. *Stephens v. State*, 2009 Ark. App. 804, — S.W.3d —, 2009 Ark. App. LEXIS 981 (2009).

### Objections.

Where prosecutor did not deliberately induce a prejudicial response and where defendant never requested a cautionary instruction or admonition to the jury, trial court did not abuse its discretion in denying defendant's motion for mistrial. *Brown v. State*, 320 Ark. 201, 895 S.W.2d 909 (1995).

In order to preserve an argument for review, an appellant must make a specific objection that apprises the trial court of the current argument, and may not change arguments on appeal. *Foreman v. State*, 328 Ark. 583, 945 S.W.2d 926 (1997).

Trial court did not abuse its discretion in concluding that the parties reached no stipulation that no evidence of defendant's prior acts, wrongs, or crimes would be admitted because the prosecutor's statement during a pretrial conference that the state did not intend to offer any prior acts evidence did not constitute an agreement that no evidence of other crimes, wrongs, or acts would be offered. *Davis v. State*, 375 Ark. 368, 291 S.W.3d 164 (2009).

### Other Acts.

The trial court, in a case alleging theft by receiving in violation of § 5-36-106 in which the defendant paid for goods with LSD and marijuana, properly admitted evidence that on two prior occasions the defendant had purchased property which he knew was stolen and made payment in marijuana or LSD,

since, under subsection (b) of this rule, evidence of other acts under similar circumstances is admissible as tending to show a system, design or guilty knowledge in the case at hand where there is a question whether the crime was committed with guilty knowledge, and since the court gave cautionary instructions in which the jury was informed of the limited purpose for which the evidence might be considered. *Vernon v. State*, 2 Ark. App. 305, 621 S.W.2d 17 (1981).

In a prosecution for the sale of a controlled substance, LSD, it was not error for the trial court to permit an undercover police investigator to testify that the defendant sold the LSD to him and that on two other occasions the defendant sold marijuana to him, where all the meetings and transactions between the defendant and the undercover agent occurred during a 22-hour period, and the acts which occurred at those meetings were so interrelated by time and substance as to form one transaction. *Setters v. State*, 4 Ark. App. 46, 627 S.W.2d 263 (1982).

In murder prosecution, evidence concerning an incident earlier on the evening of the murder, in which defendant was observed by the owner of a drive-in to be pulling a gun on another female patron of the establishment was totally unrelated to the charge in question and was clearly inadmissible since it was not relevant to motive, opportunity, intent, preparation or planning of the murder. *Rowdean v. State*, 280 Ark. 146, 655 S.W.2d 413 (1983).

Where the record reflected sufficient evidence from which the jury could have found that defendant and accomplice planted an explosive in the victim's car which, when detonated, failed to kill her, this evidence was probative of their intent to commit murder since the bombing incident, which occurred five weeks before the actual murder, and was not so remote in time that the jury was prevented from connecting the incident to the murder. Accordingly, such evidence was properly admitted. *Orsini v. State*, 281 Ark. 348, 665 S.W.2d 245, cert. denied 469 U.S. 847, 105 S. Ct. 162, 83 L. Ed. 2d 98 (1984).

In a prosecution for incest, the court did not err in denying defendant's request to admonish the jury to disregard his former girl friend's statement, on redirect examination, that he asked her to perform oral sex on him; the scope of redirect examination lies within the sound discretion of the trial court, and a witness should be allowed full opportunity to explain matters brought out on cross-examination, or to rebut any discrediting effect they may have had, or to correct any wrong impression that may have been created on cross-examination, even though the evidence brought out on redirect would not have been

admissible on direct examination. *Hall v. State*, 11 Ark. App. 53, 666 S.W.2d 408 (1984).

In the prosecution of defendant for carnal abuse of the 11-year-old daughter of his live-in girlfriend, evidence that the defendant had made a sexual overture to the little girl in her mother's presence and that he had been sexually molesting her for three years was admissible under subsection (b) of this rule to show purpose, plan, and opportunity. *Collins v. State*, 11 Ark. App. 282, 669 S.W.2d 505 (1984).

In a prosecution for attempted murder, evidence that the defendant had an argument with another man earlier the same night, and that he waved a pistol around during that argument, should not have been admitted; it was unrelated to the shooting for which the defendant was charged and tried and was not relevant to the later incident. *Lincoln v. State*, 12 Ark. App. 46, 670 S.W.2d 819 (1984).

Evidence of prior sexual contact between the defendant stepfather and the stepdaughter rape victim was admissible as probative of both the victim's fear of the defendant and the fact that a rape could have occurred in the bathroom of a house which might have been full of people, after the accused merely shoved the victim to the floor. *Sullivan v. State*, 289 Ark. 323, 711 S.W.2d 469 (1986).

Subsection (b) of this rule means that if the evidence of prior bad acts is relevant to show the offense of which the defendant was accused occurred and is thus not being introduced to show only bad character, it will not be excluded; while the evidence may not be able to be tied specifically to proof of "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident," if it has an independent relevancy it will be regarded as being, in the words of the rule, "such as" one of those permissible objects of proof. *Sullivan v. State*, 289 Ark. 323, 711 S.W.2d 469 (1986); *Bonds v. State*, 296 Ark. 1, 751 S.W.2d 339 (1988).

In trials for incest or carnal abuse, the state may show other acts of intercourse between the same parties to show the relation and intimacy of the parties, their disposition, and antecedent conduct toward each other. *Free v. State*, 19 Ark. App. 84, 717 S.W.2d 215 (1986), rev'd 293 Ark. 65, 732 S.W.2d 452 (1987).

Testimony to show similar acts with the same child or other children in the same household was permitted since testimony of prior carnal abuse helps in proving the depraved sexual instinct of the accused. *Free v. State*, 293 Ark. 65, 732 S.W.2d 452 (1987).

Where no evidence of other alleged acts or misconduct was admitted into evidence, defendant's contention of error has no merit. *Bussard v. State*, 295 Ark. 72, 747 S.W.2d 71 (1988).

In trials for incest or carnal abuse, the state



may show other acts of intercourse between the same parties. Such evidence helps in proving the sexual instinct of the accused, and is expressly applicable to cases of sodomy. *Young v. State*, 296 Ark. 394, 757 S.W.2d 544 (1988).

Evidence of other prior or similar transactions involving the offer and sale of securities is admissible to show habit, practice, or a common scheme, plan, and course of conduct, provided that the previous conduct is not too remote in time from the offense charged and is similar in nature to the offense charged. *Hardcastle v. State*, 25 Ark. App. 157, 755 S.W.2d 228 (1988).

Daughter's testimony that defendant had used physical force against his wife, threatened to kill her with a gun, and beat her clearly tended to show defendant's motive, intent or plan to kill his wife and was admissible. *Starling v. State*, 301 Ark. 603, 786 S.W.2d 114 (1990).

In light of the fact that defendant testified that his wife's shooting was accidental, trial court properly ruled that evidence of defendant's prior bad acts concerning mistreatment of his wife was relevant to show intent and lack of accident, and that any prejudice was outweighed by probative value. *Huckabee v. State*, 30 Ark. App. 82, 785 S.W.2d 223 (1990).

Where the defendant's proclivity toward unnatural sex acts was a material issue in the case, his niece's testimony of his incestuous relationship with her, reflected directly on the rape charge, on the defendant's unnatural sexual instinct of opportunity, plan or motive, and was admissible pursuant to this rule. *Baldrige v. State*, 32 Ark. App. 160, 798 S.W.2d 127 (1990).

When self-defense is clearly not applicable, excluding evidence of the victim's prior acts of violence is not an abuse of the trial court's discretion, and subsection (b) of this rule and Rule 405(b) do not apply. *Heinze v. State*, 309 Ark. 162, 827 S.W.2d 658 (1992).

State's attempts to elicit from witnesses evidence of defendant's drug and gang activity was relevant to explain the circumstances of the murder and showed both a motive and appellant's state of mind. *Smith v. State*, 310 Ark. 247, 837 S.W.2d 279 (1992).

Where the charges based on the possession of cocaine had not as yet gone to trial, and the trial court permitted the testimony to show concerted actions, or conspiracy, and to show substantial income was being generated by the enterprise, this evidence was relevant as to time, place and type of the activity where a continuing marketing of drugs was the issue, and its relevance was a matter for the discretion of the trial court. *Hughey v. State*, 310 Ark. 721, 840 S.W.2d 183 (1992).

Testimony of police officer stating, "We've

had previous occasions and stuff ..." and "We've had problems with him in the past ..." were not sufficiently violative of subsection (b) of this rule to warrant a mistrial. *Hall v. State*, 314 Ark. 402, 862 S.W.2d 268 (1993).

Where witness' testimony regarding defendant's behavior before the murder described a prior bad act and involvement in "other crimes," the trial court violated Evid. Rule 403 and this rule by accepting this testimony in evidence; this evidence was not independently relevant and unfairly prejudicial in that this evidence of another crime, as accepted, proved the character of defendant and that he acted in conformity therewith in victim's homicide. *Young v. State*, 316 Ark. 225, 871 S.W.2d 373 (1994).

Where it is material whether a criminal defendant has intentionally burned a third person's property, proof that the third person has suffered prior unintentional fires is relevant to show the existence of yet another mistake or accident. *Armstrong v. State*, 45 Ark. App. 72, 871 S.W.2d 420 (1994).

There are two requirements for introducing evidence of an unrelated prior act to show a method of operation: (1) both acts must be committed with the same or strikingly similar methodology; and (2) the methodology must be so unique that both acts can be attributed to one individual. In sum, to be admissible, the two related acts must be so distinctive, so unique, and so uncommon that they become identifying, and they must be independently relevant to show a method of operation. *Diffie v. State*, 319 Ark. 669, 894 S.W.2d 564 (1995).

Testimony about prior, uncharged drug sales held admissible to negate defendant's testimony that the drugs found in a police search of his home had been "planted" there by some other person. *Neal v. State*, 320 Ark. 489, 898 S.W.2d 440 (1995).

The court erred in admitting into evidence a previous violent incident involving the defendant where there was no logical connection between the previous acts and the crime charged; the error was harmless where there was other admissible evidence of defendant's guilt. *Abernathy v. State*, 325 Ark. 61, 925 S.W.2d 380 (1996).

Witness's testimony that she worked with defendants in manufacturing methamphetamine two months before they were arrested for drug-related charges was admissible as independently relevant to the issues of whether defendants were actually manufacturing methamphetamine, were using certain ordinary household items in the manufacturing process, merely possessed the drug or possessed it with intent to deliver, and whether the items found in the house could be used as drug paraphernalia. *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996).

Evidence of defendant's extramarital affair

held admissible where he testified himself that he wanted to have the affair and that he had no problem with extramarital affairs if the timing were right. *Stephens v. State*, 328 Ark. 81, 941 S.W.2d 411 (1997).

The evidence of defendant's incarceration at a halfway house and escape was probative of his motive, plan, and intent to murder his wife. *Regalado v. State*, 331 Ark. 326, 961 S.W.2d 739 (1998).

In a prosecution for conspiracy to deliver a controlled substance and possession of a controlled substance with intent to deliver, the court properly permitted the introduction of evidence that the defendant sold a controlled substance to one witness and that she concealed a controlled substance during the time her husband was under investigation. *Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998).

In an action for inter alia, assault and battery, the court properly permitted evidence of a prior violent incident involving the defendant since that incident and the incident at issue involved very similar methods and specific threats to inflict physical harm upon both victims and, ultimately, to kill them. *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998).

In an action against an attorney for breach of contract in his representation of a client, the court properly excluded testimony that the attorney had previously wrongfully refused to return money to a person with whom he had a fiduciary relationship, notwithstanding the assertion that such allegedly similar conduct was admissible to prove intent or motive, since there was no temporal nexus linking the events and the events were clearly unrelated. *Potter v. Magee*, 61 Ark. App. 112, 964 S.W.2d 412 (1998).

Proof of modus operandi is not the same as proof of an exception to other bad acts, for which the test is whether the evidence of the other act has independent relevance as provided in subsection (b) of this rule. *Haire v. State*, 340 Ark. 11, 8 S.W.3d 468 (2000).

Evidence of drug use and drug dealing was clearly intermingled and contemporaneous with the arson, culminating in the commission of the crimes charged, and as such, it was part of the *res gestae* and admissible as an exception to this rule. *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000).

Because defendant stated that he hurt other people and questioned why such acts had not been brought up, defendant opened the door to the prosecutor's cross-examination concerning the prior bad acts, and the trial court did not err in denying defendant's objection to the questioning. *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003).

In a capital murder trial, evidence that appellant had hit the victim on prior occasions was admissible given the fact that the victim sustained injuries during her murder

that were similar to those she had previously suffered at the hands of appellant. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003).

In a criminal prosecution for rape, the circuit judge erred by admitting hearsay statements that defendant was accused of rape in Alabama without direct proof of the offense. *Hanlin v. State*, 356 Ark. 516, 157 S.W.3d 181 (2004).

Trial court properly admitted evidence of other acts of violence by defendant on the victim to show an absence of mistake on the part of defendant; evidence of prior violence proved defendant acted with a purposeful intent as he had previously exhibited violence toward the victim, and the fact that the previous acts were not ones in which he struck her with a vehicle was irrelevant because, under case law, the previous acts did not have to be identical, just similar. *Morgan v. State*, 359 Ark. 168, 195 S.W.3d 889 (2004).

Evidence that defendant abused his adopted daughter and niece, both close familial relationships, showed a proclivity for that kind of sexual contact and would have been relevant to the alleged rape of defendant's son; although the specific acts complained of were not identical, allegations of vaginal touching were admissible in cases of vaginal or oral penetration to show a defendant's attraction to the characteristics of young children. *Swift v. State*, 363 Ark. 496, 215 S.W.3d 619 (2005).

Trial court properly admitted testimony by victim's roommate that defendant had fired a handgun into a couch two days before the murder as: (1) defendant claimed that his shooting of the victim was accidental; (2) defendant's intentional discharge of the murder weapon was relevant to show lack of mistake or accident; and (3) considered in conjunction with the testimony that defendant uttered a contingent threat against the victim's life on the night before her murder, the shot into the couch was probative of defendant's motive and intent to commit the murder. *Tate v. State*, 367 Ark. 576, 242 S.W.3d 254 (2006).

Defendant's conviction of delivery of methamphetamine in violation of § 5-64-401 was reversed because the trial court erred by admitting evidence of a prior controlled drug buy under subsection (b) of this rule that occurred approximately two weeks before the instant crime because the court could not perceive of any reason for the admission of the prior crime other than to show that he was a drug dealer likely to have sold drugs again on the particular date for which he was tried. The record did not show that identity was an issue at trial, and it showed that the controlled buys were fairly routine drug transactions and failed to show a unique methodol-



ogy; defendant's intent was not at issue. *Phavixay v. State*, 373 Ark. 168, 282 S.W.3d 795 (2008).

Where defendant was charged with raping and sexually assaulting his minor stepdaughter, evidence that he had threatened and assaulted his wife, the victim's mother, was relevant and admissible under subsection (b) of this rule because the threat of physical violence provided defendant with the opportunity to molest the young girl without her mother's intervention. *Rohrbach v. State*, 374 Ark. 271, 287 S.W.3d 590 (2008).

During a client's action against an attorney, which alleged that the attorney demanded sexual favors as a condition of his continued legal representation of the client, the trial court did not err in allowing the client to introduce evidence of the attorney's relationship with another woman; the evidence was admissible under subsection (b) of this rule to show a plan or scheme. *Rees v. Smith*, 2009 Ark. 169, 301 S.W.3d 467 (2009).

In defendant's criminal trial involving allegations and convictions for capital murder and kidnapping, the admission of testimony from a witness about a 27-year-old incident was admissible under subsection (b) of this rule because the similarities between the alleged prior act and the charged offense tended to show defendant's intent to commit the charged offense. The similarities between the two acts were clearly probative of defendant's intent, motive, and plan, as theorized by the state's charges and the probative value of the witness testimony was not outweighed by the danger of unfair prejudice. *Osburn v. State*, 2009 Ark. 390, 326 S.W.3d 771 (2009).

Trial court did not abuse its discretion in permitting witnesses to testify that defendant threatened his wife on the day before and the day upon which he admittedly murdered her because the testimony permitted the jury to conclude that defendant's actions on the day before the shooting and the day of the shooting were purposeful and deliberate, and the testimony further showed motive, opportunity, preparation, plan, knowledge, and absence of mistake or accident. *Davis v. State*, 2009 Ark. 478, 348 S.W.3d 553 (2009).

Evidence that defendant raped a prior victim under similar circumstances was independently relevant in light of his argument that his April 2004 sexual encounter with the victim was consensual, and the circuit judge did not abuse his discretion by admitting the evidence of defendant's rape of the victim under subsection (b) of this rule. *Rounsaville v. State*, 2009 Ark. 479, 346 S.W.3d 289 (2009).

Defendant's maximum sentence of 20 years confinement after he was convicted of sexual assault in the second degree was improper because the trial court erred in permitting

35-year-old, uncharged-misconduct evidence to be admitted during the sentencing phase of the trial, pursuant to subsection (b) of this rule. *Brown v. State*, 2010 Ark. App. 154, — S.W.3d —, 2010 Ark. App. LEXIS 159 (Feb. 17, 2010).

Defendant's conviction for capital-felony murder was appropriate because evidence that defendant sold drugs during the particular time frame surrounding the victim's murder was not offered to prove defendant's character or to show that he acted in conformity therewith; such testimony was an integral and interwoven part of the circumstances surrounding the murder and robbery and explained the scope and nature of the interactions between defendant and the victim. Because testimony that defendant sold drugs constituted *res gestae* evidence, there was no abuse of discretion in the circuit court's admission of such evidence under subsection (b) of this rule. *Dixon v. State*, 2011 Ark. 450, — S.W.3d —, 2011 Ark. LEXIS 537 (Oct. 27, 2011).

Circuit court did not err in allowing the state to present evidence during his trial of the rape committed against one victim in her home on April 21, 2008, some six months prior to similar crimes committed against another victim on October 20, 2008. While the first victim's testimony might have been prejudicial, as most evidence was under subsection (b) of this rule, it was also independently relevant to defendant's intent, scheme, or plan, and its probative value was not outweighed by the danger of unfair prejudice. *Vance v. State*, 2011 Ark. 243, — S.W.3d —, 2011 Ark. LEXIS 223 (June 2, 2011).

Defendant's rape conviction was proper because the circuit court did not err when it allowed the state to introduce evidence of other sexual activity with the victim prior and subsequent to the offense dates of which he was charged under subsection (b) of this rule. The evidence not only corroborated the victim's testimony of what occurred in Greene County during the years relevant to the charge, but also demonstrated defendant's proclivity for sex with her and his opportunity, intent, and plan. *Chunestudy v. State*, 2012 Ark. 222, — S.W.3d —, 2012 Ark. LEXIS 246 (May 24, 2012).

#### **Other Crimes.**

In a prosecution for delivery of marijuana the trial court improperly admitted evidence of two other instances of criminal conduct which occurred at a later time and for which the defendant was not charged, where the state's purpose in offering the evidence was simply to prove that defendant had made the delivery with which he was charged. *Rios v. State*, 262 Ark. 407, 557 S.W.2d 198 (1977).

Evidence that a second child had had both his arms broken was properly admissible

against husband and wife charged with murder by child abuse. *Limber v. State*, 264 Ark. 479, 572 S.W.2d 402 (1978).

Where the state proved actual delivery, by testimony that the witness bought 16 bags of marijuana from the defendant, there could be no question about the defendant's intent; in such a situation the state could not create a fictitious issue of intent by charging possession with intent to deliver and use that device as a basis for proving prior sales of a controlled substance by the accused. *Moser v. State*, 266 Ark. 200, 583 S.W.2d 15 (1979).

In allowing testimony covering prior dealings involving stock transactions defendant had with other individuals, the court has two criteria as a guide: the previous conduct must not be too remote from the offense charged and it must be similar in nature to the offense charged; when such evidence is admitted it must be accompanied by a limiting instruction. *Smith v. State*, 266 Ark. 861, 587 S.W.2d 50 (Ct. App. 1979), cert. denied 445 U.S. 905, 100 S. Ct. 1082, 63 L. Ed. 2d 321 (1980).

This rule should be interpreted to exclude evidence of other offenses when its only purpose is to show the accused's character or some general propensity he might have to commit the particular sort of crime in question; it should not be interpreted to exclude evidence of other offenses when that evidence is probative of the accused's participation in the particular crime charged and if it is probative of his participation the only remaining question should be whether it is so prejudicial that it should be excluded because the prejudice brought about by exposition of other offenses is not sufficiently balanced by the probative value of the evidence on the facts sought to be proved. *Price v. State*, 267 Ark. 1172, 599 S.W.2d 394 (Ct. App. 1980).

Trial judge has wide discretion in deciding admissibility of evidence of other crimes and he will not be reversed on appeal unless he has abused such discretion. *Price v. State*, 268 Ark. 535, 597 S.W.2d 598 (1980); *Bennett v. State*, 297 Ark. 115, 759 S.W.2d 799 (1988), cert. denied, 498 U.S. 851, 111 S. Ct. 144, 112 L. Ed. 2d 110 (1990).

Evidence of other crimes is admissible under subsection (b) of this rule if the evidence is independently relevant, and probative value of the evidence outweighs the dangers of unfair prejudice. *Price v. State*, 268 Ark. 535, 597 S.W.2d 598 (1980); *Golden v. State*, 10 Ark. App. 362, 664 S.W.2d 496 (1984), questioned *Bullock v. State*, 353 Ark. 577, 111 S.W.3d 380 (2003), overruled *Bledsoe v. State*, 344 Ark. 86, 39 S.W.3d 760 (2001); *Smith v. State*, 19 Ark. App. 188, 718 S.W.2d 475 (1986), questioned *Bullock v. State*, 353 Ark. 577, 111 S.W.3d 380 (2003). But see *Brown v. State*, 63 Ark. App. 38, 972 S.W.2d 956 (1998); *Morris v. State*, 21 Ark. App. 228, 731 S.W.2d

230 (1987); *Carter v. State*, 295 Ark. 218, 748 S.W.2d 127 (1988); *Bennett v. State*, 297 Ark. 115, 759 S.W.2d 799 (1988), cert. denied, 498 U.S. 851, 111 S. Ct. 144, 112 L. Ed. 2d 110 (1990); *Henry v. State*, 309 Ark. 1, 828 S.W.2d 346 (1992); *Houston v. State*, 41 Ark. App. 67, 848 S.W.2d 430 (1993).

Where policeman was murdered after being seen stopping van and automobile which were implicated in earlier burglary of clothing store, and circumstantial evidence was amply sufficient to connect defendant with the burglary, proof of the burglary was clearly admissible under this rule as being relevant to prove both the motive and identity of the murderers. *Cassell v. State*, 273 Ark. 59, 616 S.W.2d 485 (1981).

Where there was testimony that murder defendant had made harassing telephone calls to the victim's wife and had mailed a package to victim containing a bullet with the victim's name on it, such evidence was admissible under this rule both to show motive and to support identification of defendant by the victim's wife. *Pitts v. State*, 273 Ark. 220, 617 S.W.2d 849 (1981).

Where defendant testified that he had done nothing illegal prior to the date in question, it was proper for the prosecution, under subsection (b) of Rule 608, to ask defendant if he was guilty of possessing marijuana with intent to deliver on a previous date, since specific instances of the conduct of the witness may be inquired into on cross-examination for the purpose of attacking or supporting his credibility, other than conviction of a crime; however, since the defendant did not admit guilt of the crime asked about and since there was no other evidence to show it, subsection (b) of this rule did not apply to this question with respect to the defendant's prior knowledge and involvement with marijuana. *Spicer v. State*, 2 Ark. App. 325, 621 S.W.2d 235 (1981).

In a prosecution for first-degree murder, the trial court did not err in admitting evidence of defendant's involvement in a stolen car ring since such evidence was relevant to establish defendant's motive to kill the victim in order to prevent discovery of defendant's complicity in the car theft ring. *Edgemon v. State*, 275 Ark. 313, 630 S.W.2d 26 (1982), aff'd, 292 Ark. 465, 730 S.W.2d 898 (1987).

Evidence of other crimes may not be introduced merely for the purpose of showing the accused to be a man of bad character likely to commit the crime charged. *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, cert. denied 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982).

Where, in a prosecution for the murder of a police officer, the evidence showed that defendant had been serving time for particular convictions prior to his escape, it was proper to refer to them in the murder prosecution in order to show the defendant's motive or intent



in trying to avoid apprehension for the other crimes and the escape. *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, cert. denied 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982).

Where particular crimes were admissible under subsection (b) of this rule for the purpose of showing intent, it was not error to mention them in the closing argument. *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, cert. denied 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982).

The words in § 5-13-201(a)(3), "under circumstances manifesting extreme indifference to the value of human life," are defined in the nature of a culpable mental state and therefore are akin to "intent," for the proof of which evidence of other offenses is admissible under subsection (b) of this rule. *State v. Vowell*, 276 Ark. 258, 634 S.W.2d 118 (1982).

Where the evidence indicated the defendant was drinking most of the day and was driving in an intoxicated condition when his automobile crossed the center line of a highway and collided with the victim's vehicle, and the defendant took the stand testifying on direct examination that the wreck was an accident caused by a mechanical malfunction of his automobile, a cross-examination by the state, regarding the defendant's three convictions within the past 26 months for driving while under the influence of intoxicants and regarding the revocation of the defendant's license, was not improper. *State v. Vowell*, 276 Ark. 258, 634 S.W.2d 118 (1982).

Although the general rule is that evidence of other crimes by the accused, not charged in the indictment or information and not a part of the same transaction, is not admissible at the trial of the accused, evidence of other criminal activity is admissible under the *res gestae* exception to the general rule to establish the facts and circumstances surrounding the alleged commission of the offense; accordingly, evidence concerning defendant's glue-sniffing during crime was properly admitted in prosecution for aggravated robbery and kidnapping. *Bell v. State*, 6 Ark. App. 388, 644 S.W.2d 601 (1982), criticized *Lincoln v. State*, 670 S.W.2d 819 (1984).

In capital felony murder prosecution, admission of evidence that two defendants were involved in a robbery committed using similar methods just prior to the offense on trial did not violate the rule against admitting evidence of prior bad acts, where jury was admonished in accordance with subsection (b) of this rule and it was defense cross-examination of witness which brought the evidence into trial. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), cert. denied 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984), cert. denied sub nom. 512 U.S. 1272, 115 S. Ct. 17, 129 L. Ed. 2d 916 (1994).

Where the state never attempted to show

defendant committed the burglary by physically entering the home and stealing property but, rather, the state's case revealed that defendant was an accomplice in the burglary because he planned it, the trial court correctly allowed the state's witnesses, who were involved or had knowledge of the burglary, to testify that defendant's role in a series of other burglaries was to plan the burglaries — not to physically enter the respective houses; the other crimes evidence also showed knowledge and lack of mistake. *Bradley v. State*, 8 Ark. App. 300, 651 S.W.2d 113 (1983).

Evidence of other crimes has no place in a trial and the admission of such evidence is cause for a new trial. *Lackey v. State*, 283 Ark. 150, 671 S.W.2d 757 (1984).

In an assault and battery action, the trial court properly prohibited the plaintiff from introducing rapes, for which the defendant had been arrested but not convicted, as evidence of the defendant's violent character. *Boren v. Qualls*, 284 Ark. 65, 680 S.W.2d 82 (1984).

Subsection (b) of this rule only codified the law in existence before the rule was adopted, and the rule clearly permits evidence of other criminal activity committed by a defendant if it has relevancy independent of a mere showing that the defendant is a bad character. *Collins v. State*, 11 Ark. App. 282, 669 S.W.2d 505 (1984).

Where the defendant denied that he had any knowledge of the sale of the Toyota truck, testimony concerning other crimes committed by the defendant and his accomplice was admissible under subsection (b) of this rule as evidence of intent and plan. *Walker v. State*, 13 Ark. App. 124, 680 S.W.2d 915 (1984).

In a prosecution for multiple counts of robbery and burglary, evidence of the defendant's possession of other stolen property was properly admitted to impeach the defendant where the entire defense theory was that he was being "set up" by prosecution witnesses. *McFarland v. State*, 284 Ark. 533, 684 S.W.2d 233 (1985).

Reference to another burglary should only have been allowed if it were so intertwined factually with the burglary case before the court that exclusion of any reference to it would be confusing to the jury or unnecessarily hamper the state's proof of the charged crime. It cannot be said that, merely because they occurred on the same night and involved items of similar nature, that the state should be allowed to freely bring in all the evidence it could find on the other burglary to implicate the defendant. *Evans v. State*, 287 Ark. 136, 697 S.W.2d 879 (1985).

Where the state was arguing that the motive for killing the officer was to avoid discovery of the burglary, while defendant was contending he was only a witness to the shooting,

evidence of the burglary was admissible to show motive and intent; additionally, the time of the burglary and the murder was probative of an ongoing, uninterrupted course of conduct. *Shelton v. State*, 287 Ark. 322, 699 S.W.2d 728 (1985).

In prosecution for incest, proof of defendant's prior incestuous acts with the same person was admissible. *Johnson v. State*, 288 Ark. 101, 702 S.W.2d 2 (1986).

In prosecution for murder, the testimony of the record clerks at the hospital visited by the victim about the prior beating of the victim by the defendant was admissible, as it reflected a specific propensity to commit the particular sort of crime in question with the same person, and the probative value of the evidence outweighed any prejudice. *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

The list of exceptions under subsection (b) of this rule is exemplary only and not exhaustive; accordingly, in prosecution for murder, testimony of the record clerks at the hospitals visited by the victim about a prior beating of the victim by the defendant was admissible so long as it was for some purpose other than to prove the character of the defendant in order to show he acted in conformity therewith. *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

Where the defendant was charged with rape of his stepdaughter, and on direct examination he testified he had not raped her or any of the other children who had been living with him and their now deceased mother, it was not error to permit the prosecution to present rebuttal testimony from another, younger stepdaughter that she too had been raped by the defendant. *McFadden v. State*, 290 Ark. 177, 717 S.W.2d 812 (1986).

While subsection (b) of this rule precludes the introduction of evidence of another crime by the state just for the purpose of showing that the defendant was a person of bad character, "or to show that he acted in conformity therewith," this rule does not preclude evidence showing the commission of another crime if there is some other, proper purpose for its admission into evidence. *McFadden v. State*, 290 Ark. 177, 717 S.W.2d 812 (1986).

Where, in prosecution for rape of his nine-year-old nephew, the defendant claimed that it was the victim who initiated any sexual contact, the victim's testimony about the instances of anal sex was admissible to show that the defendant's participation was not just passive acceptance of the victim's advances. *Free v. State*, 19 Ark. App. 84, 717 S.W.2d 215 (1986), rev'd 293 Ark. 65, 732 S.W.2d 452 (1987).

Under subsection (b) of this rule, there was no error in allowing the introduction of evidence of the sale of marijuana during the week preceding arrest for possession with

intent to deliver. *Vanderkamp v. State*, 19 Ark. App. 361, 721 S.W.2d 680 (1986).

This rule permits the admissibility of other criminal activity if it is independently relevant to a material point in the case and not just to prove the defendant is of bad character. *Henderson v. State*, 291 Ark. 138, 722 S.W.2d 842 (1987), cert. denied 493 U.S. 896, 110 S. Ct. 247, 107 L. Ed. 2d 197 (1989).

While subsection (b) of this rule does not mention *modus operandi* as one of the legitimate bases for introducing evidence of other crimes, the rule contemplates that the list of exceptions is not exclusive, for it discusses admission of such evidence for "other purposes, such as" the ones listed. Evidence of a crime other than the one charged may be admitted to show the defendant committed the crime charged where both involved the same unique method of operation. *Thrash v. State*, 291 Ark. 575, 726 S.W.2d 283 (1987).

If those portions of the confession relating to the commission of extraneous offenses are offered under subsection (b) of this rule, it is for the trial court to determine first whether the evidence is genuinely relevant to some independent issue in the case, as opposed to proving only that the defendant is a "bad man;" if the independent relevancy of this evidence is established, the trial court is then obliged to scrutinize the evidence under URE 403. *Tharp v. State*, 20 Ark. App. 93, 724 S.W.2d 191 (1987), questioned *Turner v. State*, 956 S.W.2d 870 (1997).

Evidence concerning an offense committed after the one for which the defendant was charged was held not logically relevant to some independent issue in the case and not to fall within the exceptions of subsection (b) of this rule. *Tharp v. State*, 20 Ark. App. 93, 724 S.W.2d 191 (1987), questioned *Turner v. State*, 956 S.W.2d 870 (1997). But see *Turner v. State*, 59 Ark. App. 249, 956 S.W.2d 870 (1997).

To be admissible under subsection (b) of this rule, the evidence must be independently relevant and its probative value must not be substantially outweighed by the danger of unfair prejudice. *Crutchfield v. State*, 25 Ark. App. 227, 763 S.W.2d 94 (1988).

Evidence concerning planning of the convenience store robberies was admissible because it showed defendant's participation in a continuing course of conduct or plan to commit an aggravated robbery. *Beebe v. State*, 301 Ark. 430, 784 S.W.2d 765 (1990).

In the context of incest and child abuse cases, the question of the admissibility of evidence of prior offenses between different individuals must be determined on a case-by-case basis. Proper admission of this testimony requires a fact-intensive inquiry conducted by the trial court, keeping in mind the purpose of subsection (b) of this rule, the rationale be-



hind case law which has allowed the admission of such testimony, and the considerations required by Rule 403. This approach is preferable to a rigid, mechanistic rule which would automatically exclude such evidence regardless of its relevancy, its purpose, or its probative value. *Baldrige v. State*, 32 Ark. App. 160, 798 S.W.2d 127 (1990).

All of the circumstances connected with a particular crime may be shown, even if those circumstances would constitute a separate crime. *Collins v. State*, 304 Ark. 587, 804 S.W.2d 680 (1991).

Proof of aggravated burglary, committed by the defendant an hour after the offense he was on trial for, was clearly admissible as being relevant to prove both his intent and plan, as well as his identity, in the commission of the first incident and because it was so factually intertwined with the present offense, although the circumstantial evidence was amply sufficient to connect the defendant with the first incident. *Gillie v. State*, 305 Ark. 296, 808 S.W.2d 320 (1991).

While evidence of an attempted robbery conviction may not have been admissible for impeachment purposes in the guilt phase of a capital murder trial, it was admissible in the penalty phase to prove the aggravating circumstance found in § 5-4-604(3). *Whitmore v. Lockhart*, 834 F. Supp. 1105 (E.D. Ark. 1992), aff'd 8 F.3d 614 (8th Cir. Ark. 1993).

Prior drug sale occurring only the day before the drug charge transaction was admissible, where no actual delivery was shown to have occurred on the date of the drug transaction with which defendant was charged, and defendant's intent to deliver was in issue. *Crawford v. State*, 308 Ark. 218, 822 S.W.2d 386 (1992).

Girls' testimony concerning defendant's sexual acts with them was admissible, in rape case involving other victims, under subsection (b) of this rule to show motive, intent, or plan; the evidence was especially probative since defendant denied having any sexual contact with the victims, blamed another person, and stated that it was physically impossible for him to have sexual intercourse. *Morgan v. State*, 308 Ark. 627, 826 S.W.2d 271 (1992).

Whether the probative value of evidence of other crimes outweighs the prejudice is a matter left to the sound discretion of the trial judge. *Henry v. State*, 309 Ark. 1, 828 S.W.2d 346 (1992).

Where evidence of other crimes was offered in a conspiracy case, the proof was admissible under subsection (b) of this rule since it was not evidence of another crime, but rather was offered as direct evidence of the fact in issue, regular drug sales, and not circumstantial evidence requiring an inference as to the character of the accused. *Henry v. State*, 309 Ark. 1, 828 S.W.2d 346 (1992).

Evidence of other crimes is independently relevant, if it tends to prove some material point rather than merely trying to prove the defendant is a criminal. *Henry v. State*, 309 Ark. 1, 828 S.W.2d 346 (1992); *McDonald v. State*, 37 Ark. App. 61, 824 S.W.2d 396 (1992).

Where the trial court sustained an objection to statements referring to charges pending in another state in the prosecutor's opening statement, no further comment was made, and the trial judge instructed the jurors that statements of counsel not supported by evidence were not to be treated as evidence and any such statements should be disregarded, the admonition was adequate and defendant's motion for mistrial was properly denied. *Miller v. State*, 309 Ark. 117, 827 S.W.2d 149 (1992).

Indictment remark mentioning a prior warrant was insufficient to cause a mistrial. *Mitchael v. State*, 309 Ark. 151, 828 S.W.2d 351 (1992).

Under subsection (b) of this rule, testimony of similar acts of sexual abuse with other children will be allowed when it tends to show a proclivity to the same behavior. *Fry v. State*, 309 Ark. 316, 829 S.W.2d 415 (1992).

Where testimony regarding other crimes was relevant as to defendant's intent and state of mind and as an explanation for his behavior in committing the offenses in question, its independent relevance was negligible where defendant's actions could be explained through the police officers' testimony, and admission of victim's testimony was improper. *Haynes v. State*, 309 Ark. 583, 832 S.W.2d 479 (1992).

Testimony of female rape victim of defendant that defendant had started forcing her to have sexual intercourse with him, when she was about ten years old, and this continued until three to four months before trial, was relevant to prove the charge of rape of female rape victim's brother by defendant and its probative value far outweighed any prejudice it may have had. *Jarrett v. State*, 310 Ark. 358, 833 S.W.2d 779 (1992).

The defendant waived any objection he may have had to any testimony of other crimes when he introduced the transcript of an accomplice's testimony taken at the accomplice's trial, which contained references to the other crime. *McDonald v. State*, 37 Ark. App. 61, 824 S.W.2d 396 (1992).

Testimony of prior marijuana use and sale, as reflective of the accused's predisposition toward committing the crime of delivery of a controlled substance, is generally admissible to rebut the defense of entrapment, and is relevant on a material point in issue. *Kellogg v. State*, 37 Ark. App. 162, 827 S.W.2d 166 (1992).

Testimony of one victim was admissible as evidence that defendant followed a plan, or

modus operandi, with another; modus operandi evidence is admissible in rape cases to prove a common plan. *Dillon v. State*, 311 Ark. 529, 844 S.W.2d 944 (1993).

In a trial for delivery of cocaine, where defendant had several other cases pending in which he had been charged with past drug dealings with witness, subsection (b) of this rule permitted the prosecutor to ask the witness about these earlier events in order to establish defendant as the perpetrator of the subject crime. *Smith v. State*, 314 Ark. 241, 862 S.W.2d 234 (1993).

Where witness testified on direct examination that defendant was not a current drug user, but was asked on cross-examination whether he was aware that defendant had a previous conviction for possession of cocaine, that evidence of his prior drug conviction had no independent relevance, and the court should have declared a mistrial. *Value v. State*, 48 Ark. App. 70, 891 S.W.2d 798 (1994).

Witness' brief reference to an arrest report was harmless error. *Aaron v. State*, 319 Ark. 320, 891 S.W.2d 364 (1995).

Evidence that defendant may have used an ice pick in a prior assault on her ex-husband, sought to be admitted in defendant's trial for stabbing victim some twenty-two times in various parts of her body, was not permitted under subsection (b) of this rule, there were no specific threats to him or other evidence of an intent or plan to inflict harm or take his life. Admission of this testimony was prejudicial error which mandated a new trial. *Diffie v. State*, 319 Ark. 669, 894 S.W.2d 564 (1995).

Although subsection (b) of this rule does not mention modus operandi as one of the bases for introducing evidence of other crimes, the list of exceptions contained in the rule is not exclusive. *Kennedy v. State*, 49 Ark. App. 20, 894 S.W.2d 952 (1995).

Where defendant and victim had had conversations prior to the victim's slaying which tended to provide a motive for the murder, the fact that the conversations came about in the context of an attempted drug deal was not grounds for excluding testimony about the proposed transaction. *Johnson v. State*, 326 Ark. 430, 934 S.W.2d 179 (1996), cert. denied 520 U.S. 1242, 117 S. Ct. 1848, 137 L. Ed. 2d 1051 (1997).

Evidence that was seized six months after the act for which defendant was being tried, and that lacked any temporal or logical link to the current charge, held inadmissible. *Warren v. State*, 59 Ark. App. 155, 954 S.W.2d 298 (1997).

In a conspiracy case, evidence of an accused's prior crimes may be admissible under the rule as direct evidence of the accused's participation in the conspiracy. *Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998).

The court did not abuse its discretion when

it allowed the state to question a defense character witness regarding her knowledge of a prior conviction of the defendant for which she was incarcerated more than 10 years earlier. *Smith v. State*, 334 Ark. 190, 974 S.W.2d 427 (1998).

Trial court properly admitted evidence of defendant's prior crimes because they fell within the exception to subsection (b) of this rule in that they were independently relevant as proof of knowledge and intent to commit an offense; further, in determining whether an object is drug paraphernalia under § 5-64-101(v), courts are directed to consider prior convictions and expert testimony concerning its use. *Cluck v. State*, 365 Ark. 166, 226 S.W.3d 780 (2006).

Defendant's convictions for possession of drug paraphernalia with intent to manufacture methamphetamine and possession of pseudoephedrine were upheld as the trial court properly allowed the state to introduce evidence of defendant's prior convictions because they concerned his culpability and intent; further, those convictions were independently relevant because they made it more probable that defendant understood the components of methamphetamine and the manufacturing process, that he knew that the items in his possession were illegal in that quantity, and that he knew the items were used for manufacturing methamphetamine. *Nelson v. State*, 365 Ark. 314, 229 S.W.3d 35 (2006), appeal dismissed — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 494 (Sept. 27, 2007).

In a rape case, evidence that defendant had confessed to a similar crime in a presentence report was properly admitted under subsection (b) of this rule; although prejudice resulted from the admission of the evidence, it was probative to show defendant's motive, intent, preparation, plan, and scheme under Ark. R. Evid. 403. Evidence showing defendant's address as a correctional institution was also admissible. *Creed v. State*, 372 Ark. 221, 273 S.W.3d 494 (2008), rehearing denied — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 157 (Mar. 6, 2008), cert. denied — U.S. —, 129 S. Ct. 130, 172 L. Ed. 2d 37 (2008).

There was no abuse of discretion in allowing the state to present witness testimony at defendant's trial for rape, kidnapping and residential burglary concerning his two previous convictions for residential burglary and his escape attempt, because the testimony showing that defendant unlawfully entered the apartments of two other women in similar circumstances within two months of the instant crime was independently relevant to rebut his claim that his encounter with the victim was consensual, and the flight of a person charged with commission of a crime had some evidentiary value on the question of



his probable guilt. *McCullough v. State*, 2009 Ark. 134, 298 S.W.3d 452 (2009).

Where defendant was convicted of delivery of methamphetamine in violation of § 5-64-401, his judgment was reversed on direct appeal because the trial court erred in admitting evidence of a prior crime pursuant to subsection (b) of this rule. *Phavixay v. State*, 2009 Ark. 452, 352 S.W.3d 311 (2009).

When someone driving appellant's car fled from an officer and ran into the woods, items used to manufacture methamphetamine were found in the car and appellant's girlfriend testified that he was driving; a jury found appellant guilty of manufacturing methamphetamine, possessing drug paraphernalia with intent to manufacture methamphetamine, and fleeing. He was not entitled to postconviction relief under Ark. R. Crim. P. 37.1 based on counsel's failure to object to evidence that appellant and his girlfriend had been convicted of other crimes related to methamphetamine; the evidence was admissible under subsection (b) of this rule, as it was independently relevant to the issue of the identity of the driver and his relationship to the passenger. *Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290 (2009).

Defendant's convictions for two counts of delivery of cocaine and one count of delivery of a narcotic drug were proper because the trial court did not abuse its discretion in failing to grant a mistrial, nor was there manifest prejudice to defendant. The state had a right to impeach the credibility of a witness with prior convictions under Ark. R. Evid. 609 and the trial court did not permit the State to inquire about the underlying facts of those convictions, under subsection (b) of this rule. *Porter v. State*, 2011 Ark. App. 545, — S.W.3d —, 2011 Ark. App. LEXIS 591 (Sept. 21, 2011).

After defendant was convicted of second-degree sexual assault, a woman was properly allowed to testify at the sentencing hearing that he had raped her nine years earlier, as other crime evidence that might not be admissible at the guilt phase under subsection (b) of this rule was admissible at sentencing under § 16-97-103(5) as relevant evidence of defendant's character that the jury could consider in determining the appropriate sentence. *McElroy v. State*, 2011 Ark. App. 533, — S.W.3d —, 2011 Ark. App. LEXIS 582 (Sept. 14, 2011).

#### **Pedophile Exception.**

Evidence of other crimes is inadmissible character evidence under subsection (b) of this rule except in cases of child abuse or incest, where such evidence helps to prove the depraved sexual instinct of the accused. *Greenlee v. State*, 318 Ark. 191, 884 S.W.2d 947 (1994); *Thompson v. State*, 322 Ark. 586, 910 S.W.2d 694 (1995).

Permitting an eight-year-old child to de-

velop a severe case of trench foot is a form of neglect by the parent and that neglect of a child's physical needs is necessarily a form of abuse; hence, a father's perpetration of child abuse by neglect is relevant to a case of sexual abuse against that same child, when both forms of abuse are occurring at the same time. Such evidence is pertinent in that it establishes an intentional pattern of abusive behavior on the part of the parent toward the child — the first by neglecting her basic hygienic needs and the second by soliciting her to engage in sexual activity. A contemptible lack of caring for a child's essential healthcare needs easily intertwines with sexual abuse of the child. Both forms of abuse are intentional and evidence lack of care, concern, and respect for the child's well-being and admissible under Evid. Rule 403 and subsection (b) of this rule. *Lindsey v. State*, 319 Ark. 132, 890 S.W.2d 584 (1994).

Evidence of prior sexual acts by the accused with the victim or another child in the same household is admissible under a pedophile exception to show a proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship; such evidence helps to prove the depraved sexual instinct of the accused. *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996).

In trials for incest or carnal abuse, the state may show other acts of intercourse between the same parties. *Mosley v. State*, 325 Ark. 469, 929 S.W.2d 693 (1996).

Evidence of prior conviction of a sexual offense involving his stepdaughter held admissible in defendant's trial for rape of his daughter, given the similarity of the prior conviction to the current charges and the parental relationship of the defendant with the two victims. *Mosley v. State*, 325 Ark. 469, 929 S.W.2d 693 (1996).

When the charge concerns the sexual abuse of a child, evidence of other crimes or wrongs such as sexual abuse of that child or other children is admissible to show motive, intent, or plan, pursuant to this rule; the same evidence can be used for each of several counts. *Douthitt v. State*, 326 Ark. 794, 935 S.W.2d 241 (1996); *Dougan v. State*, 330 Ark. 827, 957 S.W.2d 182 (1997).

Where defendant was accused of sexually assaulting his fourteen-year-old sister-in-law, the testimony regarding his sexual abuse of his former stepchild, who was fourteen years old at the time of trial, was admissible. *Munson v. State*, 331 Ark. 41, 959 S.W.2d 391 (1998).

The pedophile exception only requires that the victims have lived in the same household as the defendant; the exception does not require that the victims live together in the same household. *Munson v. State*, 331 Ark. 41, 959 S.W.2d 391 (1998).

Evidence of a subsequent act of sexual misconduct with a child other than the minor victim of the alleged rape held admissible even though there was a passage of two years between the time of the abuse of the victim and the abuse of the visiting witness, where both acts occurred in defendant's home. *Hernandez v. State*, 331 Ark. 301, 962 S.W.2d 756 (1998).

In a prosecution for sexual abuse of 2 minor girls, evidence of the abuse of each girl was independently admissible with regard to the other. *Dillard v. State*, 333 Ark. 418, 971 S.W.2d 764 (1998).

In the prosecution of the defendant for the rape of his daughter, testimony of his children and stepchildren that he had also abused them was admissible under the pedophile exception to the rule. *Taylor v. State*, 334 Ark. 339, 974 S.W.2d 454 (1998).

In a prosecution of the defendant for raping his 13-year-old daughter, the daughter was properly permitted, pursuant to the pedophile exception, to testify to prior acts of sexual abuse by the defendant which occurred up to two and one-half years prior to the charged offense. *Hyatt v. State*, 63 Ark. App. 114, 975 S.W.2d 443 (1998).

In a prosecution of the defendant for the rape of two of his stepgranddaughters, it was not error for the court to allow each victim to testify about their experiences, notwithstanding the assertion that it was improper for the jury to use this testimony as to the other's count of rape, as the evidence involved similar crimes against children who were in the defendant's care or household at the time that the incidents occurred. *Brewer v. State*, 68 Ark. App. 216, 6 S.W.3d 124 (1999).

In a prosecution for rape of a five year old boy, two other boys were properly allowed to testify that the defendant had sexually abused them, even though they did not live in the same household; there were numerous similarities between the earlier instances of sexual abuse and the rape at issue and, therefore, the testimony of the two boys was relevant to show the defendant's proclivity toward sexual acts with children, as well as his motive, intent, or plan. *Berger v. State*, 343 Ark. 413, 36 S.W.3d 286 (2001).

Where the rape counts that were the subject of the appeal involved one victim and the violation-of-a-minor charges involved two other girls, the trial court properly allowed the testimony of the two other girls under the so-called "pedophile exception" to subsection (b) of this rule to show motive, intent, or plan and to help prove the depraved sexual instinct of the accused. *Butler v. State*, 349 Ark. 252, 82 S.W.3d 152 (2002).

The testimony of a student witness who alleged that defendant teacher made sexual advances toward her was admissible under

the pedophile exception, subsection (b) of this rule, which permitted evidence of defendant's sexual acts with other children because it was helpful in showing a proclivity toward a specific act with a person or class of persons with whom the accused had an intimate relationship, and applied in classroom situations. *Garner v. State*, 81 Ark. App. 309, 101 S.W.3d 857 (2003).

In a sexual abuse case, the state properly presented evidence of the "game" defendant played with his family in which he twisted the nipples of members of his family; the victim's testimony that she suffered an injury as a result of the "game" and sought medical treatment was consistent with other testimony that defendant inappropriately touched the victims. *Hathcock v. State*, 357 Ark. 563, 182 S.W.3d 152 (2004).

Defendant's daughter's statements about father's abuse were admissible under subsection (b) of this rule where, although the specific acts complained of by daughter and victim were not identical, the victim and daughter were similar in age when the abuse happened, both girls were living with defendant and looked on him as a father figure at the time of the abuse and, in each case, defendant attempted to rationalize his behavior in some way; thus, the daughter's testimony was relevant and not too remote in time from the abuse of the victim. *Flanery v. State*, 362 Ark. 311, 208 S.W.3d 187 (2005).

Although subdivision (b) of this rule generally prohibits the use of other crimes as character evidence, the so-called "pedophile exception" to this rule allows such evidence in child abuse and incest cases because it helps to prove the depraved sexual instinct of the accused; this evidence is particularly probative when it involves the same victim and the same course of conduct. *Davidson v. State*, 363 Ark. 86, 210 S.W.3d 887 (2005).

Trial court properly admitted an appellant's prior conviction for sexually abusing his stepgranddaughter under the pedophile exception to subsection (b) of this rule where he failed to include in the record either a petition to seal, order to seal, or notice of expungement, as required by § 16-90-902, or a court order of expungement, as required by former § 16-93-303(b)(1) (amended 1995). *Davidson v. State*, 363 Ark. 86, 210 S.W.3d 887 (2005).

Trial court did not err in admitting defendant's prior convictions of rape and sexual assault of his step-daughter and her friend as it went to the depraved sexual instinct of the accused. *Anderson v. State*, 93 Ark. App. 454, 220 S.W.3d 225 (2005).

Trial court did not abuse its discretion by admitting a witness's testimony that she observed defendant lying on his back with an unidentified little girl straddling his pelvic area under the pedophile exception where (1)



there were similarities between defendant's actions toward the victim and the little girl; (2) what the witness saw could have been interpreted as a rubbing against the body of another to attain sexual gratification; and (3) defendant's conduct in frequently inviting young girls to his home while he was there alone, and his conduct at the church lock-in, was evidence that defendant was attracted to the physical characteristics of young girls; the witness's testimony was also relevant to show defendant's plan to meet children at church, to invite them back to his home, to keep them returning by offering them treats and entertainment, and then molest them. *Hamm v. State*, 365 Ark. 647, 232 S.W.3d 463 (2006).

Trial court properly admitted evidence of defendant having an erection during supervised visitation with the victims, his young daughters, during his rape trial because the evidence fell under the pedophile exception as: (1) evidence of defendant's arousal while watching the victims perform a dance routine demonstrated a "particular proclivity" toward young girls, particularly the victims, thereby establishing the "intimate relationship" between the perpetrator and the victim; (2) the fact that defendant got an erection demonstrated an unnatural sexual attraction towards his daughters and, therefore, there was a "sufficient degree of similarity" between defendant's arousal at seeing the victims and his sexual conduct of having intercourse with them; and (3) the evidence was relevant under Ark. R. Evid. 403 because it demonstrated why visitation with the victims stopped shortly thereafter. *White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006).

In a rape trial, evidence of other sexual contact between defendant and a child was permitted under subsection (b) of this rule; the child testified that she was having sex with defendant several times per week in 2004. *White v. State*, 370 Ark. 284, 259 S.W.3d 410 (2007).

In defendant's rape case, the court properly allowed evidence of a prior sexual incident between defendant and the child victim because the prior conduct and the conduct leading to the charged offense were similar; on both occasions, defendant had the victim touch his penis. The fact that during the later incident defendant had his pants down and the victim performed oral sex on him was a distinction without a difference. *Bell v. State*, 371 Ark. 375, 266 S.W.3d 696 (2007).

In a child rape case, a court properly allowed evidence of defendant's prior sexual acts with children because in both cases, defendant occupied a caregiver role for the victims, the sexual act alleged, oral sex, was identical, and the evidence of defendant's prior sexual acts with his daughters tended to show his depraved sexual instinct. The simi-

larities between defendant's admitted abuse of his daughters and the alleged rape of the victim, tended to show defendant's intent to commit the charged offense, and the evidence that defendant forced his daughter to perform oral sex on him tended to corroborate the victim's testimony that he forced her to perform oral sex. *Lamb v. State*, 372 Ark. 277, 275 S.W.3d 144 (2008).

In defendant's rape case, the court properly admitted evidence that defendant had touched them in a sexual manner because the relationship between defendant and his daughter, the witness, was clearly an intimate one, and the conduct about which she testified was sufficiently similar to the charged conduct to warrant application of the exception. Both girls were under defendant's care at the time of the abuse, the victim viewed defendant as her father, and both girls were between the ages of six and nine at the time of the start of the abuse. *Strong v. State*, 372 Ark. 404, 277 S.W.3d 159 (2008).

In defendant's trial for raping and abusing his minor stepdaughter, the testimony of defendant's daughter that her father had similarly abused her when she was a young girl was admissible under the pedophile exception to subsection (b) of this rule because the evidence was helpful in showing defendant's proclivity toward specific acts with a person or class of persons with whom defendant had an intimate relationship, because the daughter's testimony helped prove defendant's depraved sexual instinct, and because the probative value of the daughter's testimony outweighed its prejudice. *Rohrbach v. State*, 374 Ark. 271, 287 S.W.3d 590 (2008).

Under subsection (b) of this rule, a convicted pedophile was properly permitted to testify at defendant's trial on charges of raping and sexually assaulting four of his minor step-grandchildren that defendant had molested him when he was a boy even though the witness was not a member of defendant's family or household because the state successfully established the existence of an intimate relationship between defendant and the witness where the witness testified that he viewed defendant as a role model, that they referred to each other as father and son, and that defendant purchased things for him, took him out to eat, and gave him special attention. *Allen v. State*, 374 Ark. 309, 287 S.W.3d 579 (2008).

Trial court did not abuse its discretion in permitting a 30-year-old witness to testify at defendant's trial regarding the sexual abuse committed against him by defendant when he was between the ages of 13 and 18 under the pedophile exception to subsection (b) of this rule despite the passage of years because testimony regarding defendant's prior sexual conduct was permissible even when a

significant time gap existed. *Allen v. State*, 374 Ark. 309, 287 S.W.3d 579 (2008).

Trial court did not abuse its discretion in permitting a witness who was a convicted pedophile to testify at defendant's trial regarding the sexual abuse committed against him when he was a child by defendant under the pedophile exception to subsection (b) of this rule even though the abuse was never substantiated and defendant was never charged for that conduct because subsection (b) made no distinction between substantiated and unsubstantiated conduct or between charged and uncharged conduct. *Allen v. State*, 374 Ark. 309, 287 S.W.3d 579 (2008).

In a child rape case, defendant's half-brother's testimony regarding possibly consensual oral sex that occurred 17 years previously should have been excluded under subsection (b) of this rule as too dissimilar in character and temporally removed from the crimes charged, which involved repeated anal sex with a girl from ages four to eight. The pedophile exception did not apply. *Efird v. State*, 102 Ark. App. 110, 282 S.W.3d 282 (2008).

Evidence that a victim, who was a 14-year-old student of defendant, touched defendant on her breast was admissible in defendant's trial for first-degree sexual assault under § 5-14-124 because it was independently relevant and fell within the pedophile exception to this rule; the incidents corroborated the victim's testimony and established that defendant had a proclivity to engage in sexual acts with minors with whom she had an intimate relationship. *Bobo v. State*, 102 Ark. App. 329, 285 S.W.3d 270 (2008).

During defendant's trial for the rape of his nine-year-old stepdaughter, the trial court correctly applied the pedophile exception to subsection (b) of this rule when admitting testimony from another young woman, who testified that she had been molested by digital penetration by defendant when she was a child, because the similarities were significant and probative on the issue of defendant's deviate sexual impulses; the probative value of the evidence was not substantially outweighed by any danger of unfair prejudice. *Eubanks v. State*, 2009 Ark. 170, 303 S.W.3d 450 (2009).

During defendant's trial for child rape, the circuit court did not err by admitting the testimony from an adult witness who was allegedly raped by defendant as a child to prove defendant's propensity to engage in deviate sexual activity with children; the testimony was properly admitted under the "pedophile exception" to subsection (b) of this rule. The witness' testimony established a sufficient degree of similarity between the acts he alleged and the conduct with which

defendant was charged in the present case. *Kelley v. State*, 2009 Ark. 389, 327 S.W.3d 373 (2009).

During defendant's trial for child rape, the circuit court abused its discretion by admitting the documentary evidence showing defendant's two prior convictions for indecency with a child; there was no evidence that would have allowed the circuit court to conduct a pedophile-exception analysis. However, the admission of this evidence in violation of this rule was harmless because the evidence against defendant was overwhelming and the testimony of the child rape victim was sufficient to sustain his conviction. *Kelley v. State*, 2009 Ark. 389, 327 S.W.3d 373 (2009).

Evidence, including victim's testimony of acts committed by defendant, testimony from victim's sister under pedophile exception to subsection (b) of this rule, and defendant's confession to law enforcement, was sufficient to convict defendant of two counts of rape under § 5-14-103(a)(3)(A). *Sparacio v. State*, 2009 Ark. App. 350, — S.W.3d —, 2009 Ark. App. LEXIS 257 (2009).

Admitting all twelve photographs into evidence was not an abuse of discretion where the individual pictures dispelled any notion that defendant photographed innocent activity and the testimony of the other victims was admissible under the pedophile exception of subsection (b) of this rule. *Mason v. State*, — Ark. App. —, 330 S.W.3d 445, 2009 Ark. App. LEXIS 740 (2009).

Circuit court did not err in allowing a prior victim and his mother to testify as the testimony was admissible under the pedophile exception; both witnesses testified that the prior victim spent a lot of time with appellant while his wife served as babysitter and that the prior victim often slept over at appellant's home. The prior victim's testimony regarding the sexual abuse was similar in nature to the testimony of the victim, both victims were young boys at the time of the abuse, both testified that appellant was often intoxicated at the time of the abuse, and both were subjected to sexual abuse while staying in appellant's home. *Bryant v. State*, 2010 Ark. 7, — S.W.3d —, 2010 Ark. LEXIS 22 (Jan. 14, 2010).

Defendant's convictions for rape as a habitual offender were appropriate because the testimony of a 26-year-old female (witness) whose mother was married to defendant when the witness was a child was permissible under subsection (b) of this rule since the testimony was probative of defendant's depraved sexual instinct toward young girls living in his home. The witness testified that the abuse stopped when she was 12 or 13, which was approximately 13 or 14 years prior to trial, and there was no error in the finding that defendant's acts committed against the



witness were not too remote in time. *Price v. State*, 2010 Ark. App. 111, — S.W.3d —, 2010 Ark. App. LEXIS 105 (Feb. 3, 2010).

Evidence of defendant's prior conviction for violation of a minor in the first degree and the victim's testimony was properly admitted under the pedophile exception to subsection (b) of this rule in defendant's trial on two counts of rape of a nine-year-old girl because the relationship between the victim of the prior conviction, defendant's biological daughter, and defendant was an intimate relationship, both victims alleged identical sexual acts committed by defendant, both victims were under defendant's care at the time of the abuse, and both victims were adolescent girls when the abuse occurred. *Butler v. State*, 2010 Ark. 259, — S.W.3d —, 2010 Ark. LEXIS 303 (May 27, 2010).

During defendant's trial for rape of a minor and sexual assault of a minor, the court did not err under the "pedophile exception" to subsection (b) of this rule in allowing the testimony of a woman who stated that he raped her 42 years earlier because the similarity requirement had been met; both victims were around five years of age when the abuse began. *Morrison v. State*, 2011 Ark. App. 290, — S.W.3d —, 2011 Ark. App. LEXIS 313 (Apr. 20, 2011).

Babysitting a victim satisfies the "intimate relationship" criterion for the "pedophile exception" to subsection (b) of this rule. *Morrison v. State*, 2011 Ark. App. 290, — S.W.3d —, 2011 Ark. App. LEXIS 313 (Apr. 20, 2011).

Another juvenile's testimony about a similar long-term pattern of defendant's inappropriate touching of the juvenile was admissible during defendant's trial on sexual assault charges, as the pedophile exception to subsection (b) of this rule allowed admission of evidence of similar acts with the same or other children to show a proclivity for a specific act. *Hendrix v. State*, 2011 Ark. 122, — S.W.3d —, 2011 Ark. LEXIS 107 (Mar. 31, 2011).

Testimony of defendant's 12- or 13-year-old daughter that defendant asked her to show him her breasts was properly excluded as: (1) the 12-year-old victim alleged that defendant touched her breasts, buttocks, and vagina; (2) the daughter's testimony was sufficiently similar to fall within the pedophile exception to subsection (b) of this rule as it signified defendant's sexual interest in the bodies of young teen or pre-teen girls; and (3) the testimony had independent relevance for Ark. R. Evid. 403 purposes. *Stewart v. State*, 2011 Ark. App. 658, — S.W.3d —, 2011 Ark. App. LEXIS 698 (Nov. 2, 2011).

Defendant failed to show that the trial court erred in allowing the state to introduce evidence of uncharged conduct under subsection (b) of this rule, because with the excep-

tion of the complainant's testimony about being afraid to tell anyone about defendant's sexual advances since defendant had been abusive toward her mother, which did not fall under the pedophile exception, all of the other evidence of which defendant complained fit squarely within the pedophile exception—other sexual acts with the complainant or her sister, who both were living with defendant at the time the conduct occurred. *Elliott v. State*, 2012 Ark. App. 126, — S.W.3d —, 2012 Ark. App. LEXIS 226 (Feb. 8, 2012).

Because the Arkansas Supreme Court recognized a "pedophile exception" to subsection (b) of this rule, defendant's counsel was not ineffective for failing to make a constitutional challenge to the use of the pedophile exception during defendant's rape trial. *Eubanks v. State*, 2012 Ark. 142, — S.W.3d —, 2012 Ark. LEXIS 162 (Apr. 5, 2012).

Defendant's rape conviction was proper because the victim's testimony fell squarely under the pedophile exception to subsection (b) of this rule. The relationship between the victim and her father was clearly an intimate one and the similar acts she described were exactly of the same nature as the acts that occurred in the time frame listed in the information; it was an ongoing sexual relationship and the evidence was not more prejudicial than probative. *Chunestudy v. State*, 2012 Ark. 222, — S.W.3d —, 2012 Ark. LEXIS 246 (May 24, 2012).

### **Prejudicial.**

In an action against an attorney for breach of contract in his representation of his client in a divorce matter, the client was properly precluded from presenting evidence about the attorney's dealings with another client since there was a very real danger that the proffered testimony would prejudice the jury with an assertion that the attorney had tried to cheat an elderly lady and almost certainly confuse the issue under litigation. *Potter v. Magee*, 61 Ark. App. 112, 964 S.W.2d 412 (1998).

Circuit court abused its discretion in admitting evidence of checks, drivers' licenses, and Social Security cards belonging to others which were found in defendant's home because it related to uncharged conduct and had no independent relevance to the charges against him. *Holman v. State*, 372 Ark. 2, 269 S.W.3d 815 (2007).

### **Preservation for Review.**

It was reversible error to allow the introduction of defendant's prior conviction for drug paraphernalia possession and an arrest for shoplifting under subsection (b) of this rule in defendant's trial for conviction for manufacturing methamphetamine in violation of § 5-64-401(a) because (1) defendant's prior possession conviction and shoplifting arrest were

not relevant to the issues of whether the materials found in defendant's van could be used to manufacture methamphetamine and whether those materials belonged to defendant; and (2) the bad acts were introduced for no reason other than to show that defendant showed a propensity toward manufacturing methamphetamine. The error was not harmless because when excising the prior conviction and arrest from the case, the only evidence remaining was the fact that the methamphetamine lab was found in defendant's vehicle. *Saul v. State*, 92 Ark. App. 49, 211 S.W.3d 1 (2005).

Where a trial court made a preliminary ruling regarding the admissibility of a videotape during a rape trial, but defense counsel then failed to object under subsection (b) of this rule when the state sought to introduce such at trial, the error was not preserved for review. A similar error relating to the introduction of pornographic photographs during the sentencing phase of the trial was not also not preserved for review for the same reason. *Ward v. State*, 370 Ark. 398, 260 S.W.3d 292 (2007).

In a case involving child support, a father's claim that evidence of his failure to pay support in another unrelated case was not admissible under subsection (b) of this rule was not heard on appellate review because he advanced a different argument before the trial court relating to relevancy; on appeal he conceded that the evidence in question was relevant. *Norman v. Cooper*, 101 Ark. App. 446, 278 S.W.3d 569 (2008).

Defendant failed to preserve any claim regarding the admission of the testimony of a victim's cousin under subsection (b) of this rule as defendant did not object at trial, and in fact, stipulated to its admissibility for subsection (b) purposes; defendant was bound by defendant's stipulation. *Strickland v. State*, 2010 Ark. App. 599, — S.W.3d —, 2010 Ark. App. LEXIS 644 (Sept. 15, 2010).

Defendant's claim of error in the trial court's refusal to allow defendant to cross-examine the victim about her prior drug conviction or a pending misdemeanor for criminal impersonation based on relevancy was speculative, as defendant did not make a proffer of the evidence to be admitted or how the evidence of only a single misdemeanor charge would have shown a pertinent trait of character; defendant did not raise the argument under subdivision (a)(2) of this rule below. *Williams v. State*, 2011 Ark. App. 675, — S.W.3d —, 2011 Ark. App. LEXIS 736 (Nov. 9, 2011).

Defendant failed to preserve for review his assertion that the trial court erred in allowing the state to introduce evidence of uncharged conduct under subsection (b) of this rule, because although defendant's objections in

the trial court were generally based upon relevancy, none of the objections to the evidence were specifically based on subsection (b) as he argued before the appellate court. *Elliott v. State*, 2012 Ark. App. 126, — S.W.3d —, 2012 Ark. App. LEXIS 226 (Feb. 8, 2012).

Defendant's contention that the trial court erred by allowing the portion of his custodial statement to be played for the jury in which he referenced another person calling him a child molester and trying to get his children taken away was not preserved for appellate review because the only reference to subsection (b) of this rule was in defendant's pretrial motion for the state to disclose such evidence prior to trial; defense counsel never made a specific objection that the child molester reference was improper character evidence under subsection (b) and the trial court never ruled on the basis of subsection (b). In addition, defendant never made a specific relevancy objection under Ark. R. Evid. 402 but only urged that the portion of the statement including the comment had nothing to do with the case and no evidentiary purpose. *Leach v. State*, 2012 Ark. 179, — S.W.3d —, 2012 Ark. LEXIS 200 (Apr. 26, 2012).

### **Prior Convictions.**

Trial court did not err in refusing to declare a mistrial because the testimony of defendant's probation officer tended to show defendant had been convicted of a crime, where the purpose of this testimony was to show that the vehicle used in robbery was one under the control of defendant; it was properly within the discretion of the circuit judge to admit this relevant evidence by balancing the probative value of the submitted testimony against its possible prejudicial effect. *Mitchell v. State*, 281 Ark. 112, 661 S.W.2d 390 (1983).

Where, in a prosecution for burglary, the state had direct as well as circumstantial evidence from which the jury could have inferred that the defendant intended to commit theft in the building in which he was caught, the trial court erred in allowing the state to prove the defendant's intent by introducing evidence of the defendant's three prior convictions for burglary. *Golden v. State*, 10 Ark. App. 362, 664 S.W.2d 496 (1984), questioned *Bullock v. State*, 353 Ark. 577, 111 S.W.3d 380 (2003), overruled *Bledsoe v. State*, 344 Ark. 86, 39 S.W.3d 760 (2001).

Where, in a capital murder prosecution, much of the evidence consisted of testimony of prison inmates as well as one guard relating admissions made by the defendant, the court did not err in allowing the introduction of evidence that the defendant was serving a prison sentence. *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986).

Since the state's evidence would have amply supported the defendant's conviction, evidence of the defendant's prior convictions



should not have been admitted, as the probative value of evidence of a 14-year-old conviction was slight, if present at all, and the probability of unfair prejudice was great. *Smith v. State*, 19 Ark. App. 188, 718 S.W.2d 475 (1986), questioned *Bullock v. State*, 353 Ark. 577, 111 S.W.3d 380 (2003). But see *Brown v. State*, 63 Ark. App. 38, 972 S.W.2d 956 (1998).

Where the defendant made no sweeping denial of any prior wrongdoing, and he only testified concerning his work record and service record, the defendant's prior conviction for burglary 14 years ago was not admitted to rebut any particular character trait, and the trial court erred in admitting the evidence. *Smith v. State*, 19 Ark. App. 188, 718 S.W.2d 475 (1986), questioned *Bullock v. State*, 353 Ark. 577, 111 S.W.3d 380 (2003). But see *Brown v. State*, 63 Ark. App. 38, 972 S.W.2d 956 (1998).

Prosecution is limited to proof of one prior felony conviction in its case in chief where a felony conviction is an element of the offense, the proceedings are bifurcated, and the validity of the conviction is not in dispute. *Tatum v. State*, 21 Ark. App. 237, 731 S.W.2d 227 (1987).

Prior convictions cannot be introduced for the purpose of showing that the accused is a bad person. *Tatum v. State*, 21 Ark. App. 237, 731 S.W.2d 227 (1987).

Where character witness said defendant was innocent concerning a prior conviction, the trial court had the discretion to prevent a digression for the case before it to retry the prior case, since the issue was one of relevancy. *Lee v. State*, 297 Ark. 421, 762 S.W.2d 790 (1989).

Where prior conviction for first degree sexual abuse occurred within two months of the trial it was probative of intent, motive, or plan. *George v. State*, 306 Ark. 360, 813 S.W.2d 792, amended 306 Ark. 374A, 818 S.W.2d 951 (1991), questioned *Vann v. State*, 309 Ark. 303, 831 S.W.2d 126 (1992).

Where, without the defendant's prior theft and burglary convictions the state had no evidence showing defendant's reason for unlawfully entering the victim's house, the probative value of these convictions became paramount in the state's obligation to show defendant's entry was for the purpose of committing a felony, and allowing defendant's convictions into evidence was not an abuse of the trial court's discretion. *Rudd v. State*, 308 Ark. 401, 825 S.W.2d 565 (1992).

Testimony that defendant was "not that type of guy" opened the door for the state to inquire of witness' knowledge, or lack of knowledge, regarding defendant's prior convictions, and such inquiries and testimony provided a means by which the jury could determine what weight and credibility it

should give witness' opinion of defendant. *Gooden v. State*, 321 Ark. 340, 902 S.W.2d 226 (1995).

Similarity between the circumstances of 1988 crimes and predicate offenses of the present crime was sufficient to support admission under subsection (b) of this rule as independently relevant proof of defendant's intent to commit the predicate offenses. *Sasser v. State*, 321 Ark. 438, 902 S.W.2d 773 (1995).

Trial judge properly allowed testimony regarding an earlier crime where the evidence was being used to prove opportunity, motive, plan, preparation, mode of operation, or lack of mistake, rather than because it was being introduced to demonstrate that defendant was a person of bad character. *Kennedy v. State*, 49 Ark. App. 20, 894 S.W.2d 952 (1995).

Although there were similarities between defendant's prior crime and the most recent in that both involved the nighttime robbery of an elderly woman who lived alone, the similarities of the two crimes did not rise to the level of *modus operandi*; thus, the trial judge erred in allowing the state to introduce the prior conviction as evidence to show *modus operandi*, however, the prior conviction was admissible under the exception to subsection (b) of this rule because it was independently relevant proof of defendant's intent. *Medlock v. State*, 79 Ark. App. 447, 89 S.W.3d 357 (2002).

In a drug case, the court erred by admitting evidence that the witness was defendant's parole officer for his prior drug convictions because there was clearly no probative value in introducing that fact and the prejudice was manifest; allowing defendant's parole officer to so testify was tantamount to making defendant appear in the court room in shackles or prison garb. *Cluck v. State*, 91 Ark. App. 220, 209 S.W.3d 428 (2005).

Conviction for manufacturing methamphetamine was reversed on appeal as the trial court improperly admitted evidence of a prior drug conviction and a prior shoplifting conviction; both were improperly used to show that defendant had a propensity for manufacturing methamphetamine. *Saul v. State*, 92 Ark. App. 49, 211 S.W.3d 1 (2005).

Prior convictions were improperly admitted where, although defendant's 1987 offenses involved possession and delivery of methamphetamine, the 2002 charges were related to possession of pseudoephedrine and possession of paraphernalia with intent to manufacture; the 2002 offenses were different in nature as they were related to the actual manufacture, further lessening the probative value of the earlier convictions. *Nelson v. State*, 92 Ark. App. 275, 212 S.W.3d 31 (2005).

Codefendant's 2002 misdemeanor conviction for domestic battery could not be used to prove a similar act because codefendant's

guilt was not the issue in defendant's trial; although defendant and codefendant were together on the night of the murder, defendant never claimed that codefendant was the perpetrator. *Price v. State*, 365 Ark. 25, 223 S.W.3d 817 (2006).

During defendant's trial for failure to register as a sex offender, the admission under subsection (b) of this rule of a judgment and commitment order from a 2004 conviction on a charge of failure to register as a sex offender was neither prejudicial nor probative because the offense was a strict-liability offense; at worst, the evidence could be viewed as irrelevant or cumulative. *Reed v. State*, 2012 Ark. App. 225, — S.W.3d —, 2012 Ark. App. LEXIS 342 (Apr. 4, 2012).

### **Proof of Identity.**

Where defendant committed rape in the process of robbing a liquor store, it was not error to admit, under this rule, testimony concerning the rape in trial for robbery in order to establish the identity of the defendant, since the additional time involved, the nature of the incident and the increased opportunity to see and hear the perpetrator and form lasting impressions would certainly enhance the robbery victim's ability to identify the individual. *Thomas v. State*, 273 Ark. 50, 615 S.W.2d 361 (1981).

Trial court did not err in permitting a police officer to testify that, upon apprehension, defendant identified himself using an alias, and admission of this evidence did not violate subsection (b) of this rule. *Kidd v. State*, 24 Ark. App. 55, 748 S.W.2d 38 (1988).

Defendant's convictions for capital murder and kidnapping were appropriate because the police officers' testimony linking defendant to a maroon vehicle did not violate subsection (b) of this rule since it was not offered for the purpose of showing that he was a bad character, nor was it offered to show a pattern of behavior; rather, it was offered to demonstrate defendant's identity as the driver of a vehicle that was seen near both crime scenes. The evidence was relevant and not too remote in time from the commission of the crimes. *Gilcrease v. State*, 2009 Ark. 298, 318 S.W.3d 70 (2009).

Defendant's convictions for capital murder and kidnapping were appropriate because evidence that defendant possessed a gun similar to that used in the murder was independently relevant proof on the issue of defendant's identity, under subsection (b) of this rule. Moreover, its probative value was not substantially outweighed by the danger of unfair prejudice. *Gilcrease v. State*, 2009 Ark. 298, 318 S.W.3d 70 (2009).

### **Proof of Motive or Intent.**

In a prosecution for obtaining food stamps by false pretense, testimony of a witness who

had obtained food stamps from defendant, concerning remarks made to the witness by the defendant after an investigation of questionable food stamp cases had started, was relevant to prove intent, knowledge or absence of mistake. *Poole v. State*, 262 Ark. 4, 552 S.W.2d 647 (1977).

The court should have permitted the state to prove that an associate of defendant apparently tried to kill the victim about two weeks before defendant first sought to engage a professional killer, inasmuch as the earlier attempt was admissible to show motive and ill will. *Williamson v. State*, 267 Ark. 46, 590 S.W.2d 847 (1979).

Where defendant was convicted of theft of an automobile, evidence tending to show other offenses was admissible to show intent or motive of defendant (which issue was raised by his denial of commission of the crime and his explanation as to why he was at the scene of the crime) where such evidence was corroborated by other evidence putting the defendant at the scene of the crime early in the day the crime was committed and at the time of the commission of the crime. *Price v. State*, 267 Ark. 1172, 599 S.W.2d 394 (Ct. App. 1980).

Where defendant was tried on charge of fraud by deception in connection with contracting with several churches to deliver pictorial directories of members without intending to uphold his part of the contract, the trial court properly admitted evidence of other alleged criminal acts of obtaining money from other churches for unfilled promises, since such evidence showed motive and intent under this rule, was properly limited by instruction and was not admitted to show bad character as alleged by defendant. *Hixson v. Housewright*, 642 F.2d 242 (8th Cir. 1981).

Where there was no proof that defendant was at the scene of robbery, but evidence found in his vehicle definitely tended to show that the person or persons who committed the robbery were in defendant's car shortly after the robbery and this evidence was ruled to be relevant in regard to defendant and companion having a motive to kill police officer when he pulled them over, the motive being fear of discovery of the robbery evidence, such evidence was properly admitted in prosecution for acting as accomplice in capital murder. *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, cert. denied 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983).

In murder prosecution of father who killed his son-in-law, daughter's testimony about her sexual relationship with her father was admissible, under subsection (b) of this rule, to show motive and intent; absent such testimony, the jury might have attributed the killing solely to father's mental condition rather than to his strong hostility to his



daughter's marriage. *Wood v. State*, 280 Ark. 248, 657 S.W.2d 528 (1983).

The trial court, in a murder prosecution, did not err in admitting evidence of an incident that took place shortly after the shooting when the defendant took a hostage in order to flee the scene, as the evidence was properly admitted under subsection (b) of this rule to show intent — the defendant's capability of acting in a criminal manner and comprehending it as such, and to show his ability to premeditate and deliberate. *Love v. State*, 281 Ark. 379, 664 S.W.2d 457 (1984).

In a prosecution for capital felony murder where the bodies of the victim's parents were found in a car with their baby, evidence that the defendant attempted to shoot the baby was properly admitted as an integral part of the criminal scheme and tended to show motive and intent. *Henderson v. State*, 284 Ark. 493, 684 S.W.2d 231 (1985).

Where the issue was whether a fire was set deliberately to claim insurance, the existence of other fires, if not too remote in time or dissimilar in circumstances, may have been admissible without showing the same or substantially similar circumstances; such evidence had relevance to show motive, intent, absence of mistake or accident. Where the issue involved a claim of negligence, proof of similar occurrences required evidence of the same or substantially similar conditions. *Johnson v. Truck Ins. Exch.*, 285 Ark. 470, 688 S.W.2d 728 (1985).

Where defendant was on trial for the battery of one child and a photograph of another injured child was shown, the admission was proper because the jury could conclude that the photographed child had been severely beaten, and this fact was highly probative of the issue of defendant's intent and lack of mistake or accident. *Van Sickle v. State*, 16 Ark. App. 143, 698 S.W.2d 308 (1985).

Testimony concerning defendant's relationship to militaristic organization, the involvement with weapons, and the methods of operation was held relevant to show motive, etc., in larger plan to obtain money for organization in trial for robbery and murder of pawnbroker. *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986), cert. denied 484 U.S. 872, 108 S. Ct. 202, 98 L. Ed. 2d 153 (1987).

Questions relating to a conviction for growing marijuana and the quantity involved are permissible under subsection (b) of this rule to show knowledge, motive, and intent. *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987).

In a murder prosecution in which defendant had been charged with the death of his wife, testimony by a former wife that defendant had threatened her when they were married, had tried to kill her, and had told her he would kill her, cut her body to pieces, and

scatter the pieces so that no one would ever find her, was admissible to show defendant's intent, plan and identity due to the similarity of the circumstances defendant's wife's death and the specific threats made by defendant to his ex-wife, although they were made several years earlier. *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993), appeal dismissed 316 Ark. 249, 871 S.W.2d 372 (1994).

Testimony which referred to previous purchase of drugs from defendant charged with delivery of a controlled substance, was admissible to show his intent. *Scroggins v. State*, 312 Ark. 106, 848 S.W.2d 400 (1993).

Where the issue of whether a fire was set deliberately in order to claim insurance is material, the existence of other fires, if not too remote in time or dissimilar in circumstances, may be admissible as relevant to show motive or intent. *Armstrong v. State*, 45 Ark. App. 72, 871 S.W.2d 420 (1994).

Because defendant claimed he shot his wife accidentally, detective's testimony concerning domestic violence call 39 days prior to the shooting was relevant to show lack of mistake or accident on defendant's part; at the very least, detective's testimony showed, by fair inference, that defendant and his loaded shotgun necessitated a call and an investigation by the police. *Russey v. State*, 322 Ark. 786, 912 S.W.2d 420 (1995).

In a prosecution for capital murder where the underlying felony was aggravated robbery, testimony regarding the defendant's drug problems was admissible to show motive, that he robbed and murdered the victim to obtain property to purchase drugs. *Martin v. State*, 328 Ark. 420, 944 S.W.2d 512, overruled *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

Girlfriend's testimony about earlier threats and beatings by defendant was probative of his motive, intent, or plan to harm her and was admissible regardless of whether she had sought or obtained a protection order. Evidence of the order itself was merely cumulative because the protection order was based upon admissible evidence of prior threats and beatings. *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000).

In an action arising from a motor vehicle accident, evidence regarding the defendant's fraudulent out-of-state driver's license was not admissible as relevant to state of mind, credibility, motive, and intent, since all defendants have a pecuniary interest in avoiding having an insurance claim filed on them and whether or not the defendant had a fraudulent license did not make it more or less probable that he negligently left a piece of plexiglass on his truck camper. *Barker v. Clark*, 69 Ark. App. 375, 13 S.W.3d 190 (2000), rev'd 343 Ark. 8, 33 S.W.3d 476 (2000).

In a prosecution for theft by deception, it

was not error for the court to allow the introduction of evidence of the defendant's use of crack cocaine since such evidence was relevant to prove motive for the theft and that checks cashed by the defendant were unauthorized. *Donovan v. State*, 71 Ark. App. 226, 32 S.W.3d 1 (2000).

In a murder prosecution, evidence of the defendant's prior threats to kill the victim, her husband, which were made over the preceding three years, were properly introduced into evidence in order to show motive and intent. *Dyer v. State*, 343 Ark. 422, 36 S.W.3d 724 (2001).

In a prosecution for murder, evidence that appellant previously abducted and robbed another person was admissible under the intent exception to prior crimes evidence. *Williams v. State*, 343 Ark. 591, 36 S.W.3d 324 (2001).

Degree of similarity between crime of capital felony murder and prior bad acts were sufficient to admit proof of the former crimes as probative of the defendant's intent to commit the underlying felony of aggravated robbery. *Cook v. State*, 345 Ark. 264, 45 S.W.3d 820 (2001).

The testimony of a student witness who alleged that defendant teacher made sexual advances toward her showed plan and modus operandi by demonstrating that defendant had gone through a similar sequence with all of the girls, involving compliments of a sexual nature, staring at them, and attempting to get them alone, that preceded the actual assaults, and showed defendant's depraved sexual instinct and proclivity for sexual predation upon young girls under his care and was admissible under subsection (b) of this rule. *Garner v. State*, 81 Ark. App. 309, 101 S.W.3d 857 (2003).

In a prosecution of defendant on four counts of violation of a minor in the first degree, the testimony of defendant's adult daughter, who testified that defendant sexually violated her when she was a child 30 years before, was admissible both to show motive and plan; the probative value of the daughter's testimony outweighed the danger of unfair prejudice. *Tull v. State*, 82 Ark. App. 159, 119 S.W.3d 523 (2003).

In a drug case, the court did not err in refusing to admit a certified copy of co-defendant's judgment and disposition order showing he pleaded guilty to manufacturing methamphetamine where, contrary to defendant's assertion, the order itself did not provide any information as to motive, opportunity, or intent. *Lueken v. State*, 88 Ark. App. 323, 198 S.W.3d 547 (2004).

Pursuant to subsection (b) of this rule, the alleged prior theft of victim's money by defendant was not only relevant but constituted proof of defendant's motive, opportunity, and knowledge; the testimony also revealed that

defendant had a potential motive for attacking and strangling the victim in retaliation for her actions in calling the police to report the previous theft, such that the evidence was independently relevant, and the prior alleged theft demonstrated irrefutably that defendant had knowledge of the apartment complex. *Henderson v. State*, 360 Ark. 356, 201 S.W.3d 401 (2005).

During defendant's rape trial, it was not an abuse of discretion to deny defendant's motion to exclude the testimony of a witness who had also been allegedly raped by defendant; while the testimony might not have been admissible as modus operandi evidence, it could have been admitted under subsection (b) of this rule to show proof of motive, intent, or plan. *Fells v. State*, 362 Ark. 77, 207 S.W.3d 498 (2005).

In defendant's murder trial, victim's prior statement to police officer, that defendant assaulted her, was admissible under the catch-all exception of Ark. R. Evid. 804(b)(5) with respect to her unavailability and state of mind; as to whether the statement was admissible as a prior bad act, defendant's confession alone overwhelmingly established the elements of murder in the first degree and, thus, any error as to admitting the hearsay statement was harmless. *Wooten v. State*, 93 Ark. App. 178, 217 S.W.3d 124 (2005).

Defendant's capital-murder convictions were proper where evidence of an acrimonious divorce and evidence that defendant owed the victim, his estranged wife, back child support could have provided a motive for the killing; thus, the admission of that evidence was not erroneous. *Armstrong v. State*, 366 Ark. 105, 233 S.W.3d 627 (2006).

Trial court did not err in permitting the state to introduce testimony and items found in defendant's home on the ground that they should have been excluded as prior bad acts under subsection (b) of this rule because the evidence was relevant to defendant's intent, motive, and planning in killing the instant victim, who was a friend of defendant's ex-wife. The evidence included: (1) the fact that defendant had contacted another friend of his ex-wife to discourage a relationship with her; (2) the fact that defendant had traveled to Florida, where the friend lived; and (3) that defendant possessed rope and a knife in a brief case with a map of the Southeastern United States. *Smith v. State*, 367 Ark. 274, 239 S.W.3d 494 (2006).

In a rape case, evidence of defendant's prior rape was properly admitted where both victims were close in age and similar in appearance, both were pulled into an area with low visibility and were asked to perform oral sex, and defendant asked both victims similar questions, such as their age, name and where they lived; in addition, the evidence was not



more prejudicial than probative as the similarities between the crimes were sufficient to make the evidence probative on the issue of defendant's motive, intent, preparation, plan and scheme. *Morris v. State*, 367 Ark. 406, 240 S.W.3d 593 (2006).

Circuit court did not abuse its discretion in admitting testimony regarding two aggravated robberies committed after the charged drive-by murder as relevant and admissible under subsection (b) of this rule, because the robberies provided context for defendant's statements to his co-conspirator that he killed the victim and was intending to kill another. *Smith v. State*, 2010 Ark. 75, 364 S.W.3d 443 (2010).

In a family doctor's trial on two counts of second-degree sexual abuse, violations of § 5-14-125, the testimony of several other patients was admissible under subsection (b) of this rule to prove motive, opportunity, intent, and plan, and was independently relevant to rebut the doctor's arguments that no inappropriate conduct occurred during medical exams and that the victims fabricated their stories because they wanted to sue the doctor for money damages. *Arendall v. State*, 2010 Ark. App. 358, — S.W.3d —, 2010 Ark. App. LEXIS 381 (Apr. 28, 2010).

Trial court did not abuse its discretion in denying defendant's motion in limine to exclude testimony concerning alleged incidents of unwanted physical touching from his trial for rape. The evidence was admissible under subsection (b) of this rule to show defendant's intent and to rebut defendant's defense of consent as each incident shared several material similarities. *Solomon v. State*, 2010 Ark. App. 559, — S.W.3d —, 2010 Ark. App. LEXIS 615 (Sept. 1, 2010).

Evidence that defendant violated her employer's policy by rummaging in a stockroom where the designer purses she stole were kept was properly admitted under subsection (b) of this rule to demonstrate her plan, motive, opportunity, and intent, as her prior conduct was relevant to show that she knew where the purses were, how to get to them, and which ones she wanted. *Howard v. State*, 2011 Ark. App. 573, — S.W.3d —, 2011 Ark. App. LEXIS 618 (Sept. 28, 2011).

#### **Proof of Scheme or Plan.**

In a prosecution for several criminal counts related to three sexual encounters involving the use of the drug Rohypnol with two women, testimony regarding and a videotape depicting three sexual encounters involving the defendant and three different apparently unconscious women, including one of the victims, was properly introduced into evidence to show *modus operandi*, scheme, or plan, from the initial courting of each of these women to the manner in which he ended each of the sexual episodes on the videotape with a sim-

ilar degrading sex act. *Sera v. State*, 341 Ark. 415, 17 S.W.3d 61 (2000), cert. denied 531 U.S. 998, 121 S. Ct. 495, 148 L. Ed. 2d 466 (2000).

In a criminal prosecution for murder arising from a shooting death, evidence of another shooting and a burglary committed by defendant and the presence of ammunition and guns at defendant's home was probative of a plan and intent to steal guns for use in killing someone; the introduction of the prior shooting and burglary during the guilt phase of the trial was necessary for the state to meet its burden of proving defendant's premeditated and deliberate intent to kill the victim. *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004).

In a sexual assault case, a court properly denied defendant's motion to sever offenses because both victims' testimony was admissible in the trial of the other to show defendant's intent, motive, common scheme, or plan. *Parish v. State*, 357 Ark. 260, 163 S.W.3d 843 (2004).

In defendant's trial as an accomplice to aggravated robbery and theft of property, a trial court did not abuse its discretion in denying defendant's motion in limine to exclude evidence involving her codefendant and defendant's bail bond because evidence surrounding the codefendant's inquiry as to whether defendant was going to get charged was highly probative and independently relevant to show defendant's connection to her codefendant. *Ramsey v. State*, 2010 Ark. App. 836, — S.W.3d —, 2010 Ark. App. LEXIS 892 (Dec. 15, 2010).

#### **Prosecutor's Comments.**

Where, in a capital murder prosecution, evidence that indirectly showed that the defendant was in the penitentiary was admissible, it was not error for the prosecutor to have mentioned it in his opening statement. *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986).

Where jury was instructed that the remarks of counsel were not evidence and that the prior convictions testified to were to be considered for credibility and not guilt or innocence, those instructions, given by the court immediately before closing arguments of counsel began, were sufficient to cure any impropriety on the part of the prosecutor referring to defendant as a habitual criminal. *Thompson v. State*, 21 Ark. App. 53, 727 S.W.2d 865 (1987).

#### **Rebuttal.**

Defendant's relevancy objection overruled where the testimony of a state witness rebutted that of a defense witness. *Wright v. State*, 327 Ark. 558, 940 S.W.2d 432 (1997).

Where a defense character witness testified not only that the defendant was a nonviolent

person, but also that she knew of no occasion in which the defendant was violent toward her roommate, the court properly permitted rebuttal testimony by the roommate regarding violent incidents involving the defendant. *Smith v. State*, 334 Ark. 190, 974 S.W.2d 427 (1998).

### Standard of Review.

The admission or rejection of evidence under subsection (b) of this rule is left to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *Jarrett v. State*, 310 Ark. 358, 833 S.W.2d 779 (1992).

### State of Mind.

Testimony by the alleged victim which included not only the events which led to the defendant's charges of rape, kidnapping and assault, but also other acts she said were committed against her by the defendant within the two-month period preceding the abduction, was admissible, not to show that defendant was a bad person and that he acted in conformity with his bad character, but to show his state of mind. *Womack v. State*, 36 Ark. App. 133, 819 S.W.2d 306 (1991).

Prior battery charge in capital murder case involving death of a child was properly admitted as evidence to show absence of mistake or accident, not method of operation. *Davis v. State*, 325 Ark. 96, 925 S.W.2d 768 (1996).

Where evidence of prior lawsuit between the parties was not introduced to show that defendant had stolen from plaintiff car dealership in the past, but was introduced to show dealership service director's state of mind at the time he decided to pursue criminal charges against defendant, and the trial court gave a limiting instruction to this effect, and where such evidence was highly probative as to whether dealership service director acted with malicious intent, this evidence was probative of his motive for bringing the charges, and the trial court did not abuse its discretion in finding that this evidence was not precluded by this rule. *Sonny v. Balch Motor Co.*, 52 Ark. App. 233, 917 S.W.2d 173 (1996), *aff'd* 328 Ark. 321, 944 S.W.2d 87 (1997).

The evidence of defendant's prior shoplifting conviction was relevant to show a unique method of operation as well as the defendant's intent, preparation, plan, and absence of mistake or accident in committing the theft. *Christian v. State*, 54 Ark. App. 191, 925 S.W.2d 428 (1996).

The state's evidence that defendant was on his way to obtain drugs shortly after the time of the murder was relevant to explain a possible motive for the killing — that he planned to use part of the money he took from the victim to purchase drugs — and to illustrate his state of mind. *Lee v. State*, 327 Ark. 692,

942 S.W.2d 231 (1997), cert. denied 522 U.S. 1002, 118 S. Ct. 572, 139 L. Ed 2d 412 (1997).

Evidence of a prior lawsuit introduced to show state of mind held relevant and admissible. *Sonny v. Balch Motor Co.*, 328 Ark. 321, 944 S.W.2d 87 (1997), overruled *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998).

In a capital murder trial, the circuit court properly granted the state's motion in limine seeking the admissibility of certain testimony regarding appellant's prior use of alcohol, subsequent use of marijuana, and the fact that appellant was under the influence of methamphetamine on the day prior to the murder; the evidence was admissible to show appellant's mental state in connection with the murder. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003).

### Subsequent Acts.

Evidence of subsequent bad acts towards victim held admissible against defendant accused of rape, where the acts followed in close proximity and showed motive, intent, plan, or knowledge by defendant. *Turner v. State*, 59 Ark. App. 249, 956 S.W.2d 870 (1997).

Plain language of § 16-97-103 indicates that, while evidence introduced during the sentencing phase may include evidence described in that section, the list is not exhaustive; thus, evidence of subsequent drug manufacturing was admissible in the sentencing phase of the trial despite the fact that it was inadmissible in the guilt phase under this rule. *Crawford v. State*, 362 Ark. 301, 208 S.W.3d 146 (2005).

### Testimony Improper.

Testimony of a police officer relating to earlier unconnected case was improper. *Patterson v. State*, 267 Ark. 436, 591 S.W.2d 356 (1979), cert. denied 447 U.S. 923, 100 S. Ct. 3014, 65 L. Ed. 2d 1115 (1980).

Testimony was prejudicial and of little or no probative value in determining defendant's guilt, the trial court committed reversible error in admitting the testimony. *McCoy v. State*, 270 Ark. 145, 603 S.W.2d 418 (1980).

Where in a prosecution for rape and burglary the defendant's mother testified that he worshipped his former wife and child, such testimony was likely collateral, but regardless of whether the statement by the mother was collateral, the trial court erred when it permitted the state, on rebuttal, to disprove the mother's general statement by calling the defendant's former wife to tell the jury of specific acts of misconduct by the defendant directed at her. *Kellensworth v. State*, 275 Ark. 252, 631 S.W.2d 1 (1982).

Testimony held to be inadmissible character evidence. *Free v. State*, 293 Ark. 65, 732 S.W.2d 452 (1987).

Trial court did not abuse its discretion in excluding, for purposes of character evidence,



the testimony of defendant doctor that he never charted anything unfavorable about himself. *National Bank of Commerce v. Quirk*, 323 Ark. 769, 918 S.W.2d 138 (1996), amended, 325 Ark. 31, 922 S.W.2d 717 (1996), overruled in part on other grounds, *Ark. HHS v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006).

Court reversed defendant's drug-related convictions and remanded for a new trial where the trial court erred in allowing the testimony of two police officers from another state regarding defendant's previous arrest for possession of items of drug paraphernalia; the evidence was highly prejudicial and had no independent relevance. *Holt v. State*, 85 Ark. App. 308, 151 S.W.3d 1 (2004).

In a drug case, the court erred by admitting evidence from an undisclosed "rebuttal witness" regarding items that were seized from defendant's house in a prior, unrelated search because the so-called rebuttal testimony did not "merely" respond to defendant's contention that the alleged contraband had legitimate uses, but delved into the details of a prior crime; further, the testimony went well beyond the mere existence of a drug manufacturing conviction. *Cluck v. State*, 91 Ark. App. 220, 209 S.W.3d 428 (2005).

In defendant's capital murder case, the court erred by denying a motion for a mistrial where it allowed a witness to testify that she was afraid for her brother, the victim, to be around defendant because her nephew died mysteriously after stealing defendant's marijuana plants; the testimony was not relevant to the murder charge and was very prejudicial. *Green v. State*, 365 Ark. 478, 231 S.W.3d 638 (2006).

Witness's testimony regarding the witness's purpose for calling defendant to obtain drugs was not independently relevant under subsection (b) of this rule to prove a material point related to defendant's first-degree murder charge. Hence, the testimony was improperly admitted. *Stephens v. State*, 98 Ark. App. 196, 254 S.W.3d 1 (2007).

#### **Testimony on Transaction.**

Where a narcotics agent testified as to a conversation he had with the defendant at the time of the delivery transaction, and when he asked defendant about the quality of the PCP, two packets of white powder, the defendant assured him it was "pretty good," and he had already sold 30 hits that same night, and where following the agent's testimony, the court admonished the jury that the testimony was admitted for the limited purpose of establishing the "entire transaction of the night in question," and not for determining the defendant's guilt or innocence with regard to the offense with which he was being tried, the court did not err in admitting the questioned

testimony. *Young v. State*, 269 Ark. 12, 598 S.W.2d 74 (1980).

All of the acts of a contemporaneous criminal transaction are admissible into evidence. *Horne v. State*, 12 Ark. App. 301, 677 S.W.2d 856 (1984).

Where there were no witnesses, the murder weapon was never located, and the defendant was evasive in his answers, statements made by the defendant three weeks earlier which bore a close relation to the facts surrounding the murder were held admissible under this rule. *Rankin v. State*, 57 Ark. App. 125, 942 S.W.2d 867 (1997).

During defendant's criminal trial for rape and tampering, evidence of defendant's marijuana use was admissible as *res gestae* under subsection (b) of this rule because it was part of the entire transaction surrounding the alleged rape. *Payton v. State*, 2009 Ark. App. 690, — S.W.3d —, 2009 Ark. App. LEXIS 837 (2009).

#### **Victim's Character.**

Although a defendant may impeach his own witnesses, even character witnesses, he cannot make one his witness, after he has cross-examined him, and impeach the witness's adverse testimony by asking about specific instances of conduct except he may inquire about the victim's reputation or traits of character on matters relating solely to violence. *Peals v. State*, 266 Ark. 410, 584 S.W.2d 1 (1979).

In those cases in which the specific acts of violence by the victim were directed at the defendant or were within his knowledge before the crime, they are admissible as being probative of what he reasonably believed and therefore directly relevant to his plea of self-defense; testimony of specific acts not shown to have been within the knowledge of the defendant are not directly probative of defendant's beliefs. *Britt v. State*, 7 Ark. App. 156, 645 S.W.2d 699 (1983).

In battery prosecution, trial court did not err in excluding testimony purporting to prove a violent character trait of the victim by a specific instance of prior violent conduct which was not shown to have been within the knowledge of the defendant; trial court properly admitted reputation evidence tending to show victim's trait for violence as probative of the issue of who was the aggressor. *Britt v. State*, 7 Ark. App. 156, 645 S.W.2d 699 (1983).

Questions by the state focused on character did not violate this rule where defendant failed to demonstrate how his own character was put in issue by questions involving others. *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987).

The trial judge did not err in holding that the evidence of rape victim's past homosexual activity was more prejudicial than probative. *Logan v. Lockhart*, 994 F.2d 1324 (8th Cir.

1993), cert. denied 510 U.S. 1057, 114 S. Ct. 722, 126 L. Ed 2d 686 (1994).

The trial court properly excluded evidence of incidents of rape victim's public masturbation and of his vasectomy; both matters had little if any relevance to the question of whether defendant committed rape, but had a strong tendency to disparage the victim's character. *Logan v. Lockhart*, 994 F.2d 1324 (8th Cir. 1993), cert. denied 510 U.S. 1057, 114 S. Ct. 722, 126 L. Ed 2d 686 (1994).

Proffered evidence of the victim's character, by testimony of specific instances of her prior violent conduct toward defendant, was not erroneously excluded; the proffered cross-examination testimony was not admissible under Evid. Rule 405, and was beyond the scope of cross-examination under Evid. Rule 611. *Solomon v. State*, 323 Ark. 178, 913 S.W.2d 288 (1996).

Where the defendant in a murder prosecution wished to prove the violent character of the victim by the fact that the victim was a gang member known to have sold drugs, the court properly ruled that it would allow such evidence but that it would permit the State to rebut such evidence with its own proof that the defendant had previously engaged in buying drugs from the victim. *Henderson v. State*, 335 Ark. 346, 980 S.W.2d 266 (1998).

In a family doctor's trial on two counts of second-degree sexual abuse, violations of § 14-125, there was no prejudice in disallowing evidence of one of the victims' hot-check charges because the evidence was merely speculative without a conviction. *Arendall v. State*, 2010 Ark. App. 358, — S.W.3d —, 2010 Ark. App. LEXIS 381 (Apr. 28, 2010).

**Cited:** *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978); *Marshall v. State*, 264 Ark. 210, 570 S.W.2d 261 (1978); *Jones v. Mabry*, 476 F. Supp. 311 (E.D. Ark. 1979), aff'd without opinion 620 F.2d 307 (8th Cir. 1980); *Hixson v. State*, 266 Ark. 778, 587 S.W.2d 70 (1979), cert. denied 444 U.S. 1079, 100 S. Ct. 1030, 62 L. Ed 2d 762 (1980); *Hays v. State*, 268 Ark. 701, 597 S.W.2d 821 (Ct. App. 1980); *Spillers v. State*, 272 Ark. 212, 613 S.W.2d 387 (1981); *Killman v. State*, 274 Ark. 422, 625 S.W.2d 489 (1981); *Lair v. State*, 283 Ark. 237, 675 S.W.2d 361 (1984); *Coston v. State*, 284 Ark. 144, 680 S.W.2d 107 (1984); *Wiyott v. State*, 284 Ark. 399, 683 S.W.2d 220 (1985); *Mosier v. State*, 285 Ark. 67, 684 S.W.2d 810 (1985); *Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985), cert. denied 475 U.S. 1036, 106 S. Ct. 1245, 89 L. Ed 2d 354 (1986); *Smith v. State*, 15 Ark. App. 266, 692 S.W.2d 622 (1985); *Wilburn v. State*, 289 Ark. 224, 711 S.W.2d 760 (1986); *Holloway v. State*, 293 Ark. 438, 738 S.W.2d 796 (Ed 2d 1987); *David v. State*, 295 Ark. 131, 748 S.W.2d 117 (1988); *Ronning v. State*, 295 Ark. 228, 748 S.W.2d 633 (1988), cert. denied 489 U.S. 1020, 109 S. Ct. 1141,

103 L. Ed. 2d 201 (1989); *Bussard v. State*, 296 Ark. 556, 759 S.W.2d 24 (1988); *Shamlin v. State*, 23 Ark. App. 39, 743 S.W.2d 1 (1988), cert. denied 488 U.S. 863, 109 S. Ct. 163, 102 L. Ed. 2d 133 (1988); *Golston v. State*, 26 Ark. App. 176, 762 S.W.2d 398 (1988); *Ruiz v. State*, 299 Ark. 144, 772 S.W.2d 297 (1989); *Shaw v. State*, 299 Ark. 474, 773 S.W.2d 827 (1989); *Morris v. State*, 300 Ark. 340, 779 S.W.2d 526 (1989); *Parker v. State*, 300 Ark. 360, 779 S.W.2d 156 (1989), cert. denied 498 U.S. 883, 111 S. Ct. 218, 112 L. Ed. 2d 186 (1990); *McCullough v. Lessenberry*, 300 Ark. 426, 780 S.W.2d 9 (1989); *Lee v. State*, 27 Ark. App. 198, 770 S.W.2d 148 (1989), cert. denied 493 U.S. 847, 110 S. Ct. 142, 107 L. Ed. 2d 101 (1989); *Huls v. State*, 27 Ark. App. 242, 770 S.W.2d 160 (1989); *Irvin v. State*, 28 Ark. App. 6, 771 S.W.2d 26 (1989); *Parette v. State*, 301 Ark. 607, 786 S.W.2d 817 (1990); *Johnson v. State*, 303 Ark. 12, 792 S.W.2d 863 (1990); *Towe v. State*, 304 Ark. 239, 801 S.W.2d 42 (1990); *Beard v. State*, 306 Ark. 546, 816 S.W.2d 860 (1991); *Easter v. State*, 306 Ark. 615, 816 S.W.2d 602 (1991); *Griffin v. State*, 307 Ark. 537, 823 S.W.2d 446 (1992); *Mitchael v. State*, 309 Ark. 151, 828 S.W.2d 351 (1992); *Anderson v. State*, 312 Ark. 606, 852 S.W.2d 309 (1993); *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993), cert. denied 510 U.S. 1197, 114 S. Ct. 1306, 127 L. Ed. 2d 657 (1994); *Richardson v. State*, 314 Ark. 512, 863 S.W.2d 572 (1993); *Rathbun v. Ward*, 315 Ark. 264, 866 S.W.2d 403 (1993); *Hall v. State*, 315 Ark. 385, 868 S.W.2d 453 (1993); *Parker v. Norris*, 859 F. Supp. 1203 (E.D. Ark. 1994), rev'd 64 F.3d 1178 (8th Cir. Ark. 1995); *Tolbert v. State*, 316 Ark. 671, 874 S.W.2d 371 (1994); *Watson v. State*, 318 Ark. 603, 887 S.W.2d 518 (1994); *Hardrick v. State*, 47 Ark. App. 105, 885 S.W.2d 910 (1994); *Simpson v. Pulaski County Circuit Court*, 320 Ark. 468, 899 S.W.2d 50 (1995); *Wallace v. State*, 326 Ark. 376, 931 S.W.2d 113 (1996); *Pennington v. Harvest Foods, Inc.*, 326 Ark. 704, 934 S.W.2d 485 (1996); *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997); *Stone v. Steed*, 54 Ark. App. 11, 923 S.W.2d 282 (1996); *Rawls v. State*, 327 Ark. 34, 937 S.W.2d 637 (1997); *Burton v. State*, 327 Ark. 65, 937 S.W.2d 634 (1997); *Kidd v. State*, 330 Ark. 479, 955 S.W.2d 505 (1997); *Ashlock v. State*, 64 Ark. App. 253, 983 S.W.2d 448 (1998); *Sasser v. State*, 338 Ark. 375, 993 S.W.2d 901 (1999); *Allstate Ins. Co. v. Voyles*, 76 Ark. App. 334, 65 S.W.3d 457 (2002); *Sera v. Norris*, 312 F. Supp. 2d 1100 (E.D. Ark. 2004), rev'd 400 F.3d 538 (8th Cir. Ark. 2005); *Wyles v. State*, 357 Ark. 530, 182 S.W.3d 142 (2004); *Jackson v. State*, 359 Ark. 297, 197 S.W.3d 468 (2004), cert. denied 544 U.S. 1039, 125 S. Ct. 2266, 161 L. Ed. 2d 1070 (2005); *MacKool v. State*, 365 Ark. 416, 231 S.W.3d



676 (2006); *Flanagan v. State*, 368 Ark. 143, 243 S.W.3d 866 (2006); *Dimas-Martinez v. State*, 2011 Ark. 515, — S.W.3d —, 2011 Ark.

LEXIS 593 (Dec. 8, 2011); *Laswell v. State*, 2012 Ark. 201, — S.W.3d —, 2012 Ark. LEXIS 230 (May 10, 2012).

## Rule 405. Methods of proving character.

(a) *Reputation or Opinion*. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific Instances of Conduct*. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

### RESEARCH REFERENCES

**Ark. L. Rev.** Gitchel, Charting a Course Through Character Evidence, 41 Ark. L. Rev. 585.

**U. Ark. Little Rock L.J.** Impeachment of One's Own Witness by Prior Inconsistent

Statements Under the Federal and Arkansas Rules of Evidence, Perroni, 1 U. Ark. Little Rock L.J. 277.

Derden, Survey of Arkansas Law: Evidence, 2 U. Ark. Little Rock L.J. 232.

### CASE NOTES

#### ANALYSIS

Construction.

Purpose.

Claim of self-defense.

Defendant's state of mind.

Essential element.

Gang activity.

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Prior aggression by deceased.

Prior convictions.

Scope of cross-examination.

#### Construction.

Once the admissibility of character evidence is established under Evid. Rule 404, this rule establishes the methods of proof which may be utilized. *Rank v. State*, 318 Ark. 109, 883 S.W.2d 843 (1994).

#### Purpose.

The purpose of the cross-examination of a character witness with respect to a prior offense is to ascertain the witness' knowledge of facts which should have some bearing on the accused's reputation. *Reel v. State*, 288 Ark. 189, 702 S.W.2d 809 (1986).

#### Claim of Self-Defense.

Where the defendant in a murder prosecution raised the defense of self-defense, the trial court erred in prohibiting the defendant from putting on testimony as to his reputation for being a peaceful and law-abiding citizen, and his conviction was therefore reversed, since the traits of being peaceful and law-abiding were pertinent to both the crime

with which he was charged and the defense upon which he relied, and such character evidence should have been admitted. *Finnie v. State*, 267 Ark. 638, 593 S.W.2d 32 (1980).

As an essential element of defendant's self-defense claim, defendant clearly had the right to introduce specific instances of the victim's violent character that were directed at her or within her knowledge. *Thompson v. State*, 306 Ark. 193, 813 S.W.2d 249 (1991).

Where defendant related violent acts of physical and sexual abuse by the victim in support of a self-defense claim, but proffered no testimony of specific acts that extended over the entire period of the relationship with the victim, the trial court did not abuse its discretion in limiting such evidence as to one year before the shooting. *Thompson v. State*, 306 Ark. 193, 813 S.W.2d 249 (1991).

The defense of justification is conditioned on a reasonable belief on the part of the actor that unlawful physical force is about to be inflicted on him. *Bargery v. State*, 37 Ark. App. 118, 825 S.W.2d 831 (1992).

For prior specific acts of violence to be relevant to the issue of whether an actor reasonably believes unlawful force is about to be inflicted upon him, he must not only be aware of those prior violent acts, but also be aware that his present assailant is the person who committed them. *Bargery v. State*, 37 Ark. App. 118, 825 S.W.2d 831 (1992).

Witness' conversation with homicide victim, who informed him that he and the defendant had had an argument, and that the victim was planning to attack defendant, was not

hearsay under Evid. Rule 801(c) in that it was not offered for the truth of the matter asserted; the testimony was admissible under subsection (b) of this rule as an essential element of defendant's claim of self-defense. *Simpkins v. State*, 48 Ark. App. 14, 889 S.W.2d 37 (1994).

#### **Defendant's State of Mind.**

Trial court did not err during defendant's trial for aggravated robbery in granting the state's motion in limine restricting evidence of a subsequent murder in support of defendant's affirmative defense of duress because even if evidence of the murder was relevant, and therefore potentially admissible, subsection (b) of this rule would have kept it out because the specific instance of conduct was not relevant to the defense; a murder by another person that occurred three hours after the robberies could not have affected defendant's state of mind during the preceding robberies. *Bell v. State*, 2010 Ark. App. 814, — S.W.3d —, 2010 Ark. App. LEXIS 864 (Dec. 8, 2010).

#### **Essential Element.**

To be an "essential element," within the meaning of subsection (b) of this rule "[t]he trait of character must be an operative fact which under substantive law determines the rights and liabilities of the parties." *West v. State*, 265 Ark. 52, 576 S.W.2d 718 (1979).

The peaceful nature of the defendant is not an essential element or a direct substantive issue. *West v. State*, 265 Ark. 52, 576 S.W.2d 718 (1979).

Where defendant was accused, in first-degree murder trial, of shooting decedent after decedent threatened him with a bed slat in a dispute over loud music being played by defendant, the trial court properly excluded the proffered testimony of defendant's mother that decedent had choked her two days prior to the shooting and that defendant was aware of this incident, since the decedent's character was not an essential element of the defendant's defense of self-defense and thus not admissible under subsection (b) of this rule and since there was no evidence in the record that he was attempting to defend his mother when the shooting occurred or that he was testifying as to his knowledge of prior acts. *Jones v. State*, 1 Ark. App. 318, 615 S.W.2d 388 (1981).

In an assault and battery action, the trial court properly prohibited the plaintiff from introducing rapes, for which the defendant had been arrested but not convicted, as evidence of the defendant's violent character. *Boren v. Qualls*, 284 Ark. 65, 680 S.W.2d 82 (1984).

Evidence of victim's violent character held not admissible where it was not an essential element of the murder charge or of defen-

dant's defense of accident; had defendant's defense been self-defense, the result might have been otherwise. *Solomon v. State*, 323 Ark. 178, 913 S.W.2d 288 (1996).

#### **Gang Activity.**

To use expert testimony on gang conduct in general in order to establish, inferentially, the violent character of an individual in particular, is a method of proving character not contemplated by this rule. *Johninson v. State*, 317 Ark. 431, 878 S.W.2d 727 (1994).

The defendant was not entitled under the rule to use expert testimony on gang conduct in general in order to establish, inferentially, the violent character of the victim. *Henderson v. State*, 335 Ark. 346, 980 S.W.2d 266 (1998).

#### **Improper Testimony of Specific Acts.**

Where in a prosecution for rape and burglary the defendant's mother testified that he worshipped his former wife and child, such testimony was likely collateral, but regardless of whether the statement by the mother was collateral, the trial court erred when it permitted the state on rebuttal to disprove the mother's general statement by calling the defendant's former wife to tell the jury of specific acts of misconduct by the defendant directed at her. *Kellensworth v. State*, 275 Ark. 252, 631 S.W.2d 1 (1982).

#### **Opinion Testimony.**

The trial court was right to exclude proof of character through specific instances of conduct on direct examination, but should have admitted opinion evidence of a "pertinent trait;" evidence that defendant was not a discipline problem, that he had an aversion to violence, and that he was immature and of limited intelligence should have been admitted in the capital murder trial. *Shelton v. State*, 287 Ark. 322, 699 S.W.2d 728 (1985).

#### **Prior Aggression by Deceased.**

Since the aggressive character of the deceased is not an essential element of the plea of self-defense, evidence of prior aggression by the deceased against the defendant is inadmissible. *McClellan v. State*, 264 Ark. 223, 570 S.W.2d 278 (1978).

In those cases in which the specific acts of violence by the victim were directed at the defendant or were within his knowledge before the crime, they are admissible as being probative of what he reasonably believed and therefore directly relevant to his plea of self-defense; testimony of specific acts not shown to have been within the knowledge of the defendant are not directly probative of defendant's beliefs. *Britt v. State*, 7 Ark. App. 156, 645 S.W.2d 699 (1983).

In battery prosecution, trial court did not err in excluding testimony purporting to prove a violent character trait of the victim by a specific instance of prior violent conduct



which was not shown to have been within the knowledge of the defendant; trial court properly admitted reputation evidence tending to show victim's trait for violence as probative of the issue of who was the aggressor. *Britt v. State*, 7 Ark. App. 156, 645 S.W.2d 699 (1983).

When self-defense is clearly not applicable, excluding evidence of the victim's prior acts of violence is not an abuse of the trial court's discretion, and ARE 404(b) and subsection (b) of this rule do not apply. *Heinze v. State*, 309 Ark. 162, 827 S.W.2d 658 (1992).

Because the decedent's character was not an essential element of a self-defense for first-degree murder, the trial court did not abuse its discretion in ruling that proffered testimony regarding the decedent's specific instances of violent conduct was not admissible under subsection (b) of this rule. *Anderson v. State*, 354 Ark. 102, 118 S.W.3d 574 (2003).

### **Prior Convictions.**

Where character witness said defendant was innocent concerning a prior conviction, the trial court had the discretion to prevent a digression from the case before it to retry the prior case, since the issue was one of relevancy. *Lee v. State*, 297 Ark. 421, 762 S.W.2d 790 (1989).

Where witness testified on direct examination that defendant was not a current drug user, but was asked on cross-examination whether he was aware that defendant had a previous conviction for possession of cocaine, that evidence of his prior drug conviction had no independent relevance, and the court should have declared a mistrial. *Value v. State*, 48 Ark. App. 70, 891 S.W.2d 798 (1994).

Testimony that defendant was "not that type of guy" opened the door for the state to inquire of witness' knowledge, or lack of knowledge, regarding defendant's prior convictions, and such inquiries and testimony provided a means by which the jury could determine what weight and credibility it should give witness' opinion of defendant. *Gooden v. State*, 321 Ark. 340, 902 S.W.2d 226 (1995).

The court did not abuse its discretion when it allowed the State to question a defense character witness regarding her knowledge of a prior conviction of the defendant for which she was incarcerated more than 10 years earlier. *Smith v. State*, 334 Ark. 190, 974 S.W.2d 427 (1998).

Character evidence, which included defendant's prior convictions in another state, was admissible under Ark. R. Evid. 404 and this rule because defendant opened the door to the admission of such evidence when he questioned his wife about her opinion of his character. *Frye v. State*, 2009 Ark. 110, 313 S.W.3d 10 (2009).

### **Scope of Cross-Examination.**

Where, in a prosecution for rape, the defendant produced five character witnesses to prove his reputation for truthfulness, the trial court properly allowed the prosecutor to cross-examine the witnesses by asking whether their opinions as to the defendant's reputation would be altered by knowing of the defendant's prior conviction of sexual abuse since such conviction had been brought out on direct examination of the defendant by his defense counsel. *Caldwell v. State*, 267 Ark. 1053, 594 S.W.2d 24 (1980).

The trial court did not err in refusing to grant a mistrial when the prosecutor questioned one of the defendant's witnesses concerning a prior conviction of the defendant, where the character witness had stated the defendant's reputation for truth and honesty was good, and on cross-examination, the prosecutor asked the witness if he was aware of the defendant's prior conviction for obtaining controlled substances by fraud and if this would change his opinion of the defendant. *Meador v. State*, 10 Ark. App. 325, 664 S.W.2d 878 (1984).

An earlier misdemeanor conviction of the defendant can be mentioned by the state in cross-examination of a character witness presented by the defendant. *Reel v. State*, 288 Ark. 189, 702 S.W.2d 809 (1986).

If the accused has presented a witness to testify as to his good character, cross examination may inquire into relevant specific instances of conduct; this rule places no limit, other than relevancy, on the kind of instances of misconduct with respect to which cross-examination may occur. *Reel v. State*, 288 Ark. 189, 702 S.W.2d 809 (1986).

Pursuant to subsection (a) of this rule, a character witness may be asked on cross-examination about relevant specific instances of conduct. If a witness does not know about a specific instance her credibility suffers; if she knows but disregards it, that may go to the weight to be given the character witness's opinion of the accused. *Wilburn v. State*, 289 Ark. 224, 711 S.W.2d 760 (1986).

Cross-examination of witness concerning prior convictions of defendant held proper where witness testified as to defendant's character on direct examination. *Barker v. State*, 21 Ark. App. 56, 728 S.W.2d 204 (1987).

The purpose of cross-examination of a character witness is not to attack the character or credibility of the accused, but to ascertain the witness's awareness of things having a bearing on the reputation for which the witness has vouched. The only limitation this rule places on cross-examination is that the facts inquired into be relevant to the issue of character. *Lee v. State*, 27 Ark. App. 198, 770 S.W.2d 148 (1989), cert. denied 493 U.S. 847, 110 S. Ct. 142, 107 L. Ed. 2d 101 (1989).

When an accused offers character evidence in his own behalf, the character witness is subject to cross-examination as to his or her knowledge of relevant specific instances of conduct by the accused; when that occurs, cross-examination as to specific instances of conduct is allowed irrespective of prejudice. *Smith v. State*, 316 Ark. 407, 872 S.W.2d 843 (1994).

This rule places no limit, other than relevancy, on the kind of instances of misconduct with respect to which cross-examination may occur. *Rank v. State*, 318 Ark. 109, 883 S.W.2d 843 (1994).

This rule clearly provides that in cross-examining a defendant's character witness, it is permissible to inquire into the witness' knowledge of specific instances of conduct; such cross-examination tests the witness's knowledge of the defendant's reputation and that, in turn, may go to the weight to be given his opinion. *Rank v. State*, 318 Ark. 109, 883 S.W.2d 843 (1994).

Proffered evidence of the victim's character, by testimony of specific instances of her prior violent conduct toward defendant, was not erroneously excluded; the proffered cross-examination testimony was not admissible under this rule, and was beyond the scope of cross-examination under Evid. Rule 611. *Solomon v. State*, 323 Ark. 178, 913 S.W.2d 288 (1996).

**Cited:** *Killman v. State*, 274 Ark. 422, 625 S.W.2d 489 (1981); *Morris v. State*, 300 Ark. 340, 779 S.W.2d 526 (1989); *Parette v. State*, 301 Ark. 607, 786 S.W.2d 817 (1990); *Anderson v. State*, 312 Ark. 606, 852 S.W.2d 309 (1993); *Stewart v. State*, 316 Ark. 153, 870 S.W.2d 752 (1994); *Smith v. State*, 316 Ark. 407, 872 S.W.2d 843 (1994); *McElroy v. State*, 2011 Ark. App. 533, — S.W.3d —, 2011 Ark. App. LEXIS 582 (Sept. 14, 2011).

## Rule 406. Habit — Routine practice.

(a) *Admissibility.* Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(b) *Method of Proof.* Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

### CASE NOTES

#### ANALYSIS

Construction.

Applicability.

Evidence not improper.

Habits of victim.

Insufficient proof of habit.

Mailing confirmations.

Routine practice.

Warning of right to revoke consent.

#### Construction.

Habit, as used in this section is an acquired or developed mode of behavior or function that has become nearly or completely involuntary; it is a regular response to a repeated specific situation which may become semi-automatic. *Henry v. Cline*, 275 Ark. 44, 626 S.W.2d 958 (1982).

#### Applicability.

Even though this rule may have permitted some of the evidence that was excluded at an arbitration hearing to have been considered in a court of law or equity, the exclusion of this evidence in an arbitration proceeding is not a

statutory ground for vacating the arbitration award. *Dean Witter Reynolds, Inc. v. Deislinger*, 289 Ark. 248, 711 S.W.2d 771 (1986).

#### Evidence Not Improper.

It was not improper for a trial court to deny proffered testimony that decedent driver of an automobile had a "habit" of weaving his car back and forth across the center line while delivering newspapers or reaching for chewing tobacco because he only had one arm, since there was nothing to show that at the time of the accident when he was allegedly weaving across the line, he was either reaching for tobacco or delivering newspapers. *Ritchey v. Murray*, 274 Ark. 388, 625 S.W.2d 476 (1981).

#### Habits of Victim.

Where a capital murder was alleged to have occurred, but the victim's body was never found, evidence that the victim had not been heard from in the three years prior to the trial, that he was very dependable in his



routine and kept a fairly rigid schedule, plus the fact that he had a good samaritan's tendency to stop and help people in need, including hitchhikers, which, under other evidence could have included defendant, was properly admitted on the issue of habit pursuant to this Rule, since the trial judge admonished the jury several times that he was not admitting the evidence as character evidence. *Derring v. State*, 273 Ark. 347, 619 S.W.2d 644 (1981).

#### **Insufficient Proof of Habit.**

In an action for injuries sustained in an automobile accident, the trial court properly excluded proffered testimony by plaintiff's witness that she had seen defendant drive on the road in question a dozen times and that he was speeding half those times, because such testimony was insufficient to establish defendant's habit of driving fast as a mode of behavior that had become nearly or completely involuntary. *Henry v. Cline*, 275 Ark. 44, 626 S.W.2d 958 (1982).

In prosecution for theft by receiving, the fact that a witness was known to have indulged in smoking marijuana was not relevant to any issue in the case or admissible under the Uniform Rules of Evidence for the purpose of impeachment where there was nothing to show that the instances of marijuana use were sufficient in number to warrant a finding that the habit existed or that the practice was so routine as to become semiautomatic or completely involuntary so as to bring it within the exceptions of this rule. *Gregory v. State*, 9 Ark. App. 242, 657 S.W.2d 570 (1983).

#### **Mailing Confirmations.**

Where the routine for mailing confirmations of security transactions included run-

ning the envelopes containing the confirmations through a machine that insured that the proper postage was placed on the envelope, and where one party received at least two confirmations mailed to it through this process, the evidence was sufficient to have presented a jury question on delivery and receipt of the confirmation. *Swink & Co. v. Carroll McEntee & McGinley, Inc.*, 266 Ark. 279, 584 S.W.2d 393 (1979).

#### **Routine Practice.**

In an action for negligence resulting in a slip and fall, evidence that the defendant airport was relying on a cleaning company to clean up dust and that the cleaning company routinely failed to rid the concourse of dust and dirt raised a fact question as to whether the tile was swept and vacuumed on the date of the accident, thereby precluding summary judgment. *Kelley v. National Union Fire Ins. Co.*, 327 Ark. 329, 937 S.W.2d 660 (1997).

#### **Warning of Right to Revoke Consent.**

Where, when cross-examined on his recollection about advising defendant that he had a right to revoke the consent, an officer said that he was sure that "we did because we always do. I don't just say that I vividly remember it, I can't say that," this statement fell short of establishing the lack of any basis for this officer's statement that he did advise defendant that he had a right to revoke the consent, and evidence of the habit of this officer or routine practice of the sheriff's officers in this regard was relevant on the question. *Pace v. State*, 265 Ark. 712, 580 S.W.2d 689 (1979).

**Cited:** *Jones v. Coker*, 90 Ark. App. 151, 204 S.W.3d 554 (2005).

### **Rule 407. Subsequent remedial measures.**

Whenever, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures if offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

#### **RESEARCH REFERENCES**

**Ark. L. Rev.** Plaintiffs' Attorneys v. Common Sense: Applicability of Arkansas Rule of

Evidence 407 in Strict Liability, 61 Ark. L. Rev. 91.

## CASE NOTES

## ANALYSIS

Applicability.  
Inadmissible evidence.  
Party taking measure.  
Photographs.  
Probative value.  
Proof of control.  
Proof of ownership.  
Similar evidence.

**Applicability.**

Shut-off of sprinkler system which damaged inventory after pipes froze was not evidence of a subsequent remedial measure to be excluded under this rule where it was clear from the testimony that the system was previously ruptured in several places and could not be turned back on; the system obviously was still broken and the situation had not been "remedied" at all. *Westark Specialties, Inc. v. Stouffer Family Ltd. Partnership*, 310 Ark. 225, 836 S.W.2d 354 (1992).

**Inadmissible Evidence.**

Evidence held not to fall within a recognized exception to this rule. *Dena Constr. Co. v. Burlington N.R.R.*, 297 Ark. 547, 764 S.W.2d 419 (1989).

A question relating to the status of the sign on the door after the date of the accident was an improper question for the purpose of proving appellant's negligence at the time of the accident. *Jacuzzi Bros. v. Todd*, 316 Ark. 785, 875 S.W.2d 67 (1994).

A mistrial was not the only appropriate remedy where the trial court had previously sustained appellant's objections pursuant to this rule and was very careful to maintain strict control over the evidence in this regard. *Jacuzzi Bros. v. Todd*, 316 Ark. 785, 875 S.W.2d 67 (1994).

In a products liability action arising from an airplane accident, it was error for the court to permit the introduction into evidence of a service bulletin issued by the defendant after the accident which required a wing spar inspection to detect cracks in the lower spar of wing assemblies that could result in wing separation from the aircraft since there was no purpose for such evidence other than to show culpability on the part of the defendant and there was no indication in the record that the bulletin was issued by a third party other than the defendant. *Lawhon v. Ayres Corp.*, 67 Ark. App. 66, 992 S.W.2d 162 (1999).

**Party Taking Measure.**

Testimony that plaintiff's employer had changed defendant's allegedly defective product was admissible because it was a subsequent remedial measure by a third party rather than a defendant. *Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 894 S.W.2d 897 (1995).

In action against manufacturer alleging negligent design of a saw which injured plaintiff while at work, subsequent remedial measures taken by plaintiff's employer supported the jury's finding of negligence. *Buchanna v. Diehl Machine, Inc.*, 98 F.3d 366 (8th Cir. 1996).

**Photographs.**

Pictures that reflected remedial measures taken by the defendant held inadmissible. *Carton v. Missouri Pac. R.R.*, 315 Ark. 5, 865 S.W.2d 635 (1993).

Under this rule, pictures which could not be admitted as evidence of negligence might be admitted for the purpose of impeachment; however, a trial court may prohibit their use for impeachment if it deems the evidence irrelevant under Evid. Rule 401, or prejudicial under Evid. Rule 403. *Carton v. Missouri Pac. R.R.*, 315 Ark. 5, 865 S.W.2d 635 (1993).

**Probative Value.**

When evidence of a subsequent remedial measure is not barred by this rule, its probative value should outweigh any dangers associated by its admission. *Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 894 S.W.2d 897 (1995).

**Proof of Control.**

Where plaintiff, in personal injury suit for fall suffered on steep gravel path at defendant's marina, sought to introduce photographs of stairway which was constructed in place of the path following the accident, such photographs were not admissible under this rule, since they could only be admitted for purposes of proving ownership, control or the feasibility of precautionary measures, if controverted, or for impeachment, and the defendant had admitted in deposition and cross-examination that the stairway had been planned for months before the accident, that the corps of engineers owned the property and leased it to defendant, and defendant had admitted all of the provisions allowing proof of feasibility of precautionary measures; accordingly, since there was no real controversy of the issues, the photographs were properly excluded. *Gist v. Meredith Marine Sales & Serv., Inc.*, 272 Ark. 489, 615 S.W.2d 365 (1981).

**Proof of Ownership.**

While repair of a field's fence may be relevant to negligence in its maintenance, this rule makes it inadmissible for that purpose; repair the day after an accident does not tend to show ownership of the cow involved in the accident, which would constitute an exception pursuant to the rule. *Miller v. Nix*, 315 Ark. 569, 868 S.W.2d 498 (1994).



**Similar Evidence.**

Admission of evidence was not prejudicial and did not constitute error where similar evidence had been previously admitted without objection. *HCA Health Servs. of Midwest, Inc. v. National Bank*, 294 Ark. 525, 745 S.W.2d 120 (1988).

**Cited:** *Haynes v. AMC*, 691 F.2d 1268 (8th Cir. 1982); *Bailey v. Rose Care Ctr.*, 307 Ark. 14, 817 S.W.2d 412 (1991), questioned *Wyatt v. St. Paul Fire & Marine Ins. Co.*, 315 Ark. 547, 868 S.W.2d 505 (1994); *Columbia Nat'l Ins. Co. v. Freeman*, 347 Ark. 423, 64 S.W.3d 720 (2002).

**Rule 408. Compromise and offers to compromise.**

Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

**RESEARCH REFERENCES**

**Ark. L. Rev. Note**, To Seal or Not to Seal? That is Still the Question: *Arkansas Best Corp. v. General Electric Capital Corp.*, 49 Ark. L. Rev. 325.

**CASE NOTES****ANALYSIS**

In general.  
Construction.  
Purpose.  
Answers to interrogatories.  
Bias or prejudice of witness.  
Condemnation proceedings.  
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Evidence of effort to satisfy claim.  
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Evidence to contradict testimony.  
Improper reference to compromise.  
Letter from attorney.  
Offer to compromise.  
Party's credibility.  
Property agreements.  
Resolution of debt.

**In General.**

This rule is not a blanket prohibition against the admission of all evidence concerning offers to compromise. The rule prohibits the introduction of such evidence when the evidence is offered to prove "liability for, invalidity of, or amount of the claim or any other claim"; it does not prohibit such evidence when introduced for any other reason. *McKenzie v. Tom Gibson Ford, Inc.*, 295 Ark. 326, 749 S.W.2d 653 (1988); *Ozark Auto Transp., Inc. v. Starkey*, 327 Ark. 227, 937 S.W.2d 175 (1997); *Sexton Law Firm v. Milligan*, 329 Ark.

285, 948 S.W.2d 388 (1997), writ denied sub nom. 331 Ark. 439, 959 S.W.2d 747 (1998).

Where evidence is offered for a purpose other than those prohibited, this rule does not bar its introduction. That does not mean that the evidence is automatically admissible; relevance must still be determined under Evid. Rule 401 and admissibility under Evid. Rules 402 and 403. *McKenzie v. Tom Gibson Ford, Inc.*, 295 Ark. 326, 749 S.W.2d 653 (1988).

This rule requires the exclusion of statements made in compromise negotiations of a defendant with a third party; offers to compromise or settle a disputed claim should be excluded from evidence even if no litigation has been commenced at the time of the compromise. *Wal-Mart Stores, Inc. v. Londagin*, 344 Ark. 26, 37 S.W.3d 620 (2001).

**Construction.**

The Arkansas Supreme Court has strictly applied this rule; offers are inadmissible to prove a party's liability on the underlying claim. *Wal-Mart Stores, Inc. v. Londagin*, 344 Ark. 26, 37 S.W.3d 620 (2001).

**Purpose.**

The purpose of this rule is to promote complete candor between the parties to the settlement negotiations but not to protect false representations. *Missouri Pac. R.R. v. Arkansas Sheriff's Boys' Ranch*, 280 Ark. 53,

655 S.W.2d 389 (1983).

The rationale for this rule is based upon the grounds of promotion of the public policy favoring the compromise and settlement of disputes; the purpose of this rule is to promote complete candor between the parties to the settlement negotiations. *Wal-Mart Stores, Inc. v. Londagin*, 344 Ark. 26, 37 S.W.3d 620 (2001).

#### **Answers to Interrogatories.**

The defendant could use the plaintiff's answers to interrogatories to impeach her testimony where the answers to interrogatories pertained to an effort to settle her claim with the defendant. *J. E. Merit Constructors, Inc. v. Cooper*, 345 Ark. 136, 44 S.W.3d 336 (2001).

#### **Bias or Prejudice of Witness.**

Where the defendant's attorney asked the prosecuting witness about a \$1,000,000 civil suit which the prosecuting witness had filed against the defendant arising from the alleged battery, and the attorney implied by one of his questions that, had the defendant paid the prosecuting witness \$18,000, the criminal charges would have been dismissed, the trial court was in error in granting a mistrial. If the cross-examination had been allowed, the jury would have been informed that the prosecuting witness may have been biased due to a financial interest. On the other hand, the jury may have thought that the civil complaint and damages sought were well-founded, and that the evidence supported the prosecuting witness's testimony. *Wilson v. State*, 289 Ark. 141, 712 S.W.2d 654 (1986).

#### **Condemnation Proceedings.**

A statement of just compensation as required by § 27-67-312 is not a negotiation or settlement figure excluded by this rule. *Arkansas State Hwy. Comm'n v. Johnson*, 300 Ark. 454, 780 S.W.2d 326 (1989).

#### **Elements of Exclusion.**

To invoke the exclusion under this rule, the following elements are required: (1) there must be a claim; (2) the purpose of offering the evidence must be to prove liability for, invalidity of, or amount of the claim; (3) valuable consideration must be furnished or offered to be furnished, or promised to be furnished, or valuable consideration must be accepted, offered, or promised to be accepted in an effort to compromise or attempt to compromise a claim; and (4) the claim must be disputed as to either validity or amount; to invoke the exclusionary rule, an actual dispute must exist, preferably some negotiations, and at least an apparent difference of view between the parties as to the validity or amount of the claim; an offer to pay an admitted claim is not privileged since there is no policy of encouraging compromises of undisputed claims, which should be paid in full.

*Wal-Mart Stores, Inc. v. Londagin*, 344 Ark. 26, 37 S.W.3d 620 (2001).

#### **Evidence of Effort to Satisfy Claim.**

Where there was no dispute as to either the validity or the amount of the claim, the trial court did not abuse its discretion in allowing the plaintiff to introduce evidence of defendant's efforts to satisfy appellee's claim. *Wal-Mart Stores, Inc. v. Londagin*, 344 Ark. 26, 37 S.W.3d 620 (2001).

#### **Evidence of Negotiation Not Proper.**

Where the court allowed the introduction of a repair estimate on plaintiff's vehicle, over objection, to be introduced, and the estimate was made out to defendant but the court refused to allow defendant to explain she had made the offer to settle for the purpose of protecting her license to drive a vehicle rather than because she felt she was at fault, this evidence of negotiation was not proper. *Cantlin v. Pavlovich*, 265 Ark. 654, 580 S.W.2d 190 (1979).

Letter which offered to settle without litigation for the sum of \$145,000 was an offer of compromise, as it clearly stated there was no final damage estimate and that it was an offer predicated on not going to court, and therefore was correctly excluded from the evidence. *Westark Specialties, Inc. v. Stouffer Family Ltd. Partnership*, 310 Ark. 225, 836 S.W.2d 354 (1992).

Letter from the trustee to counsel for beneficiaries written on behalf of other beneficiaries of trust, offering \$84,000 to the beneficiaries as "full and final settlement with them for their interest in the assets of this trust" was inadmissible under this rule which prohibits evidence of offers of compromise when there is a claim which was disputed as to validity or amount. *Hickman v. Trust of Heath, House & Boyles*, 310 Ark. 333, 835 S.W.2d 880 (1992).

#### **Evidence to Contradict Testimony.**

In action against builder for damages allegedly resulting from failure to build house properly, testimony that builder made an offer to plaintiff to purchase the property from the plaintiff for the same price that he had paid for it several months after his purchase was admissible not as evidence of an offer to compromise but as tending to contradict plaintiff's testimony as to the value of the house and going to his credibility since he had paid \$32,000 for the house but always contended that it was worth not more than \$21,000. *Enterprise Sales Co. v. Barham*, 270 Ark. 544, 605 S.W.2d 458 (1980).

When a party has made a statement at trial which is inconsistent with a statement made during settlement negotiations, the inference is that one of the statements is knowingly false; in such a situation, the mandate in Rule 102 to interpret the rules so as to foster the values of "fairness" and "truth" requires the



state to hold that prior inconsistent statements made in the course of settlement negotiations should be admitted for impeachment purposes. *Missouri Pac. R.R. v. Arkansas Sheriff's Boys' Ranch*, 280 Ark. 53, 655 S.W.2d 389 (1983).

Although a statement made by railroad claims agent during settlement negotiations between one landowner and railroad was inadmissible in the plaintiff's case-in-chief in action brought by other landowners against the railroad, the statement would be admissible in a specific situation — if offered to impeach the direct testimony of the railroad. *Missouri Pac. R.R. v. Arkansas Sheriff's Boys' Ranch*, 280 Ark. 53, 655 S.W.2d 389 (1983).

Where evidence relating to accident victim's second accident and settlement with another insurer was introduced by insurer for a purpose other than proving liability for, invalidity of, or amount of the claim, the circuit court did not abuse its discretion in admitting it as the insurer was entitled to introduce the evidence to impeach the victim's testimony and credibility. *Gailey v. Allstate Ins. Co.*, 362 Ark. 568, 210 S.W.3d 40 (2005).

#### **Improper Reference to Compromise.**

Where in an action by the plaintiff driver of an automobile that was struck by defendant's truck at an intersection, the defense attorney, while questioning a witness who was a passenger in the plaintiff's car during the accident, said, "I believe you settled your case for \$2,000," the remark was uncalled for and undoubtedly prejudiced the plaintiff's case, and the trial court should have granted plaintiff's motion for a mistrial since no admonition of the jury by the court would have been sufficient to eliminate any possible prejudice which might have resulted to plaintiff by the statement referring to the offer of settlement. *Elrod v. G & R Constr. Co.*, 275 Ark. 151, 628 S.W.2d 17 (1982).

In a tort action for inter alia, assault and battery, the court did not err in refusing to allow the introduction of evidence of an alleged prior settlement negotiation in which the plaintiff allegedly stated that he would make both the tort action and a criminal action against the defendant go away for a certain sum of money since there was no proffer that the plaintiff personally made the offer and since the plaintiff's attorney contested the defendant's attorney's version of the offer. *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998).

#### **Letter from Attorney.**

Where the plaintiff mother brought an action against the defendant, her son, for allegedly wrongfully withdrawing \$12,000 from their joint savings account, and the son's attorney wrote a letter to the plaintiff prior to the trial seeking to settle the dispute, such

letter was in the nature of an offer to compromise and was therefore inadmissible. *Haseman v. Union Bank*, 268 Ark. 318, 597 S.W.2d 67 (1980).

Where injured truck driver had described his injuries from a 1999 accident by stating they were insubstantial, but the 2000 demand letter stemming from that accident indicated that he had suffered substantial injuries similar to those he sustained in the 2001 accident, the 2000 demand letter was admissible for impeachment purposes at the damages trial for the 2001 accident; it was also reasonable for the 2004 jury to know the extent of truck driver's claims of injuries from the 1999 accident. *House v. Volunteer Transp., Inc.*, 365 Ark. 11, 223 S.W.3d 798 (2006).

#### **Offer to Compromise.**

A document which stated that a payment would be in consideration of the release of "all claims, demands and causes of action that releasors ever had" was an offer of compromise or an offer to settle all claims and therefore should not have been admitted pursuant to this rule. *Swindle v. Lumbermens Mut. Cas. Co.*, 315 Ark. 415, 869 S.W.2d 681 (1993).

Appellate court rejected the contention that the circuit court abused its discretion by considering the documents about settlement, because appellees did not offer the documents on issues related to liability, and the issue at the hearing was whether the parties had agreed to settle and all the documents were competent proof on that issue. *Roberts v. Green Bay Packaging, Inc.*, 101 Ark. App. 160, 272 S.W.3d 125 (2008).

In a breach of contract action, the trial court did not err in denying a contractor's request to enter into evidence a client's statements about compromise contained in two letters; the client's statements were not inconsistent with the client's testimony and their introduction would have served little purpose other than to show a willingness to settle the claims. *Acker Constr., LLC v. Tran*, 2012 Ark. App. 214, — S.W.3d —, 2012 Ark. App. LEXIS 318 (Mar. 14, 2012).

#### **Party's Credibility.**

Trial court properly admitted correspondence that allegedly occurred during the course of settlement negotiations, where it was relevant to the credibility of the party who wrote it. *Sexton Law Firm v. Milligan*, 329 Ark. 285, 948 S.W.2d 388 (1997), writ denied sub nom. 331 Ark. 439, 959 S.W.2d 747 (1998).

#### **Property Agreements.**

Trial court erred when it excluded two partial stipulated property agreements on remand of a divorce because the partial stipulations were contracts executed in settlement of a portion of the parties' property division

and, in fact, they were incorporated into the original divorce decree and accepted by the chancellor as a partial division of property; they were offered so that the trial court could enforce them and not for the purpose of proving liability for, invalidity of, or amount of the claim. *Rogers v. Rogers*, 90 Ark. App. 321, 205 S.W.3d 856 (2005).

#### **Resolution of Debt.**

Vote of a city council to resolve an employment termination dispute with a city employee, followed by approval by signature of the city's mayor, was a resolution of a debt rather than a negotiation of a settlement, and evidence of the vote and approval thus was

admissible despite this rule, which barred evidence of a settlement. *Weaver v. Collins*, 2010 Ark. App. 707, — S.W.3d —, 2010 Ark. App. LEXIS 746 (Oct. 27, 2010).

**Cited:** *City of Helena v. Chrestman*, 17 Ark. App. 235, 707 S.W.2d 338 (1986); *In re Estate of O'Donnell*, 304 Ark. 460, 803 S.W.2d 530 (1991), overruled in part, *Edmundson v. Estate of Fountain*, 358 Ark. 302, 189 S.W.3d 427 (2004), overruled in part, *Edmundson v. Estate of Fountain*, 358 Ark. 302, 189 S.W.3d 427 (2004), overruled, *Minton v. Minton*, 2010 Ark. App. 310, (2010); *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992); *Gause v. Shelter Gen. Ins. Co.*, 81 Ark. App. 133, 98 S.W.3d 854 (2003).

### **Rule 409. Payment of medical and similar expenses.**

Evidence of furnishing, offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

#### **CASE NOTES**

##### **ANALYSIS**

Intent of rule.

Reversible error.

Voluntary payments.

#### **Intent of Rule.**

A very good reason for this rule is that it is to the best interest of society and in keeping with the mores of the community that humanitarian and benevolent instincts not be hobbled by the hazard that assistance to an injured person be taken as an admission of liability in a personal injury action, when even lawyers and judges experience great difficulty in agreeing on such questions. *Ferguson v. Graddy*, 263 Ark. 413, 565 S.W.2d 600 (1978), questioned *Saber Mfg. Co. v. Thompson*, 286 Ark. 150, 689 S.W.2d 567 (1985).

#### **Reversible Error.**

Where plaintiffs were injured when a guardrail on defendant county's bridge gave way, plunging them into the creek bed below, as a result of which they sued the county and its insurance carrier, evidence introduced by one plaintiff of a conversation between himself and the county judge of the defendant county in which the county judge told him that the defendant insurance company would pay all his medical bills should have been excluded under this rule, and the trial court

committed reversible error in permitting such testimony. *Home Ins. Co. v. Spears*, 267 Ark. 704, 590 S.W.2d 71 (1979).

#### **Voluntary Payments.**

In action for recovery for personal injuries suffered when plaintiff was struck by defendant's auto, the court did not err in excluding from the jury evidence of payments made to the plaintiff on behalf of defendant where such payments were not made in response to any demand by plaintiff but were purely voluntary, where there was no evidence that there had been any admission of liability proffered at the trial, where at in camera hearing plaintiff testified that defendant's insurance agent told her that defendant had been completely at fault but there was no evidence that such agent was authorized to make admissions on behalf of defendant and where defendant testified that she understood the recitations in the receipts she signed that these payments were to be credited to the total amount of any final judgment or settlement in her favor and, thus, there was no real issue of fact as to the amount of payments or the stipulation as to the condition under which they were paid. *Ferguson v. Graddy*, 263 Ark. 413, 565 S.W.2d 600 (1978), questioned *Saber Mfg. Co. v. Thompson*, 286 Ark. 150, 689 S.W.2d 567 (1985).

### **Rule 410. Pleas and offers.**

Evidence of a plea of *nolo contendere*, whether or not later withdrawn, and of a plea, later withdrawn, of guilty or admission to the charge, or of an offer to plead to the crime charged or any other crime, or of statements made



in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer. (Amended November 18, 1996, effective March 1, 1997.)

### CASE NOTES

#### ANALYSIS

In general.

Purpose.

Improper testimony of specific acts.

Nolo contendere.

Perjury.

Sentencing.

Witnesses.

#### In General.

This rule is essentially the same in purpose and effect as ARCrP 25.4. *Gooden v. State*, 295 Ark. 385, 749 S.W.2d 657 (1988).

#### Purpose.

The evil to be avoided by this rule is the use of a plea offer against defendant as an admission against interest. *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996).

#### Improper Testimony of Specific Acts.

The trial court did not err in refusing to declare a mistrial following an inadvertent statement by one of the state's witnesses concerning an offer by the defendant to enter a plea agreement, since the purpose of this rule was to prevent such references by the prosecutor and the trial court. *Young v. State*, 283 Ark. 435, 678 S.W.2d 329 (1984).

#### Nolo Contendere.

Motion in limine was proper to prohibit introduction of evidence in wrongful death action brought after one passenger died in automobile accident; the evidence was that both drivers pleaded nolo contendere to the charge of negligent homicide under §§ 27-50-307 and 27-50-804. *Patterson v. Odell*, 322 Ark. 394, 909 S.W.2d 648 (1995).

#### Perjury.

This rule is intended to protect an accused who has been permitted to withdraw a plea of guilty in accordance with ARCrP 26 from having the guilty plea used against him or her

as an admission against interest when the accused is tried on those same charges; it did not render the defendants' guilty pleas privileged from a prosecution for perjury where the defendants later filed motions to withdraw their guilty pleas and testified that they had lied at the hearing on their guilty pleas. *Brown v. State*, 288 Ark. 517, 707 S.W.2d 313 (1986).

This rule and Ark. R. Crim. P. 25.4(b) did not apply to prevent a state trial court from admitting the transcript of a federal plea hearing in defendant's perjury trial because those rules only applied when a guilty plea had been withdrawn or set aside, and the rules were not intended to bar perjury charges. *Stewart v. State*, 2010 Ark. App. 323, — S.W.3d —, 2010 Ark. App. LEXIS 340 (Apr. 14, 2010).

#### Sentencing.

Prosecutor's reference to plea offer in his closing argument during the sentencing phase did not require mistrial; defendant who had already been convicted was not so prejudiced as to be entitled to a mistrial. *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996).

#### Witnesses.

Where a letter to the prosecution from the attorney for a witness charged with a crime suggested little more than effort to explore the potential for a negotiated plea, the trial court correctly ruled that the letter did not rise to the level of an agreement, and it was properly excluded, where defendant's attorney attempted to impeach the witness after she testified that she had no deal with the state. *Sutton v. State*, 311 Ark. 435, 844 S.W.2d 350 (1993).

**Cited:** *Nelke v. State*, 19 Ark. App. 292, 720 S.W.2d 719 (1986); *Sparacio v. State*, 2009 Ark. App. 350, — S.W.3d —, 2009 Ark. App. LEXIS 257 (2009).

## ARTICLE V. PRIVILEGES

### Rule 501. Privileges recognized only as provided.

Except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme Court of this State, no person has a privilege to:

- (1) refuse to be a witness;
- (2) refuse to disclose any matter;
- (3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

#### RESEARCH REFERENCES

**Ark. L. Notes.** Gitelman and Watkins, No Requiem for Ricarte: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

**U. Ark. Little Rock L.J.** Watkins, The Journalist's Privilege in Arkansas, 7 U. Ark. Little Rock L.J. 473.

#### CASE NOTES

##### ANALYSIS

Federal privileges.

Preventing another from being witness.

##### Federal Privileges.

The reference to privilege in subsection (a) of this rule includes the Fifth Amendment privilege. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

##### Preventing Another from Being Witness.

In murder trial wife was a competent witness against defendant husband since the statutes prohibiting testimony of a wife against her husband in effect when the murder was committed had been repealed by § 2 of Acts 1975, No. 1143 which adopted the Uniform Rules of Evidence, this rule of which

provides that no person has the privilege to prevent another from being a witness and Rule 504 of which limits the husband and wife privilege to confidential communications which were not involved. *Huckaby v. State*, 262 Ark. 413, 557 S.W.2d 875 (1977).

In a murder case, the trial court did not err by refusing to allow defendant to call a witness because the witness's attorney informed the court that the witness would exercise her right to remain silent throughout the course of the trial. *Flanagan v. State*, 368 Ark. 143, 243 S.W.3d 866 (2006).

**Cited:** *Metcalf v. State*, 284 Ark. 223, 681 S.W.2d 344 (1984); *Prater ex rel. Estate of Prater v. St. Paul Ins. Co.*, 293 Ark. 547, 739 S.W.2d 676 (1987); *Ross v. Moore*, 30 Ark. App. 207, 785 S.W.2d 243 (1990).

#### Rule 502. Lawyer-client privilege.

(a) *Definitions.* As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A [""] representative of the client [""] is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) *General Rule of Privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications [communications] made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a



matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) *Exceptions.* There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) Joint clients. As to a communication relevant to a matter of common interest between or among two [2] or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients; or

(6) Public officer or agency. As to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

(e) *Inadvertent disclosure.* A disclosure of a communication or information covered by the attorney-client privilege or the work-product doctrine does not operate as a waiver if the disclosing party follows the procedure specified in Rule 26(b)(5) of the Arkansas Rules of Civil Procedure and, in the event of a challenge by a receiving party, the circuit court finds in accordance with Rule 26(b)(5)(D) that there was no waiver.

(f) *Selective waiver.* Disclosure of a communication or information covered by the attorney-client privilege or the work-product doctrine to a governmental office or agency in the exercise of its regulatory, investigative, or enforcement authority does not operate as a waiver of the privilege or protection in favor of nongovernmental persons or entities. (Amended January 10, 2008.)

**Publisher's Notes.** The bracketed quotes in subdivision (a)(2) and the bracketed word "communications" in subsection (b) were inserted by the publisher.

**Explanatory Note:** New subdivision (e) cross-references the 2007 amendment to Rule

of Civil Procedure 26(b), which governs inadvertent disclosures of privileged or otherwise protected material during discovery.

Under new subdivision (f), disclosure of information covered by the attorney-client privilege or the work-product doctrine to a

government agency conducting an investigation of the client does not constitute a general waiver of the information disclosed. In short, this provision adopts a rule of “selective waiver” consistent with the Eighth Circuit’s view that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. *E.g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

This is the minority view among the federal circuits. Most have held that waiver of privileged or protected information to a government agency constitutes a waiver for all pur-

poses. *E.g., In re Quest Communications Intern, Inc.*, 450 F.3d 1179 (10th Cir. 2006). Others have recognized selective waiver only if the disclosure was made subject to a confidentiality agreement with the government agency. *E.g., Teachers Insurance & Annuity Ass’n v. Shamrock Broadcasting Co.*, 521 F.Supp 638 (S.D.N.Y. 1981).

Subdivision (f) adopts the Eighth Circuit’s position, which is also reflected in a draft that the Federal Advisory Committee on Evidence has published for public comment. See [http://www.uscourts.gov/rules/Excerpt\[EV\]Report\[Pub\].pdf#page=4](http://www.uscourts.gov/rules/Excerpt[EV]Report[Pub].pdf#page=4).

## RESEARCH REFERENCES

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Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Other Attorneys, Coparties, and Their Staff. 64 ALR 6th 655.

**Ark. L. Notes.** Watkins, Recent Developments under the Arkansas Freedom of Information Act, 1987 Ark. L. Notes 59.

**Ark. L. Rev.** On the Road to Recognition: Extending the Attorney-Client Privilege in Arkansas to Insured-Insurer Communications, 60 Ark. L. Rev. 407.

**U. Ark. Little Rock L.J.** Taylor, Attorney-Client Privilege: A Guide for Corporations, 7 U. Ark. Little Rock L.J. 115.

Watkins, The Journalist’s Privilege in Arkansas, 7 U. Ark. Little Rock L.J. 473.

## CASE NOTES

### ANALYSIS

Breach of duty.  
Claim of privilege.  
Defendant’s actions.  
Freedom of information act.  
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### Breach of Duty.

Inasmuch as an attorney is not bound by an obligation of secrecy when he is accused of a breach of duty to his client, the testimony of an attorney who was accused of being a part of a scheme to deprive a client of her property was admissible in an action to set aside a deed. *Corzine v. Forsythe*, 263 Ark. 161, 563 S.W.2d 439 (1978).

### Claim of Privilege.

The client is the one who is given the privilege of refusing to disclose confidential communications, and while the lawyer may claim the privilege, he can only do so on behalf of the client. *Sikes v. Segers*, 266 Ark. 654, 587 S.W.2d 554 (1979).

Law firm’s motion to quash a subpoena, which sought copies of its invoices for legal services rendered to three corporations, was

denied: (1) although the law firm could assert the attorney-privilege, pursuant to subsection (c) of this rule it could do so only on behalf of its clients; (2) the party that was seeking the records was a 50 % shareholder of two of the corporations, he was a director of all three corporations, and he was clearly not asserting privilege, on the corporations’ behalf, as a bar to his review of the records; and (3) a similarly situated shareholder/director also had not asserted attorney-client privilege on the corporations’ behalf and had agreed that the records could be produced for the subpoenaing party’s examination. *Sobba v. Elmen*, — F.Supp. 2d —, 2007 U.S. Dist. LEXIS 29172 (E.D. Ark. Apr. 19, 2007).

### Defendant’s Actions.

Whether or not a defendant’s refusal to communicate with his attorney has any bearing on his unavailability for trial as described in ARCrP 28.3, testimony by the attorney or his staff regarding possibly excludable periods held inadmissible under subsection (b) of this rule. *Byrd v. State*, 326 Ark. 10, 929 S.W.2d 151 (1996).

### Freedom of Information Act.

This rule does not create an exception to the Freedom of Information Act, § 25-19-101 et seq., based on attorney-client privilege. *Scott v. Smith*, 292 Ark. 174, 728 S.W.2d 515 (1987).



**Joint Clients.**

Attorney-client privilege from disclosure on the issue of the reasonableness of the executor's fee was inapplicable where executor, in consulting with attorney before will was offered for probate, was necessarily acting for both himself as executor and for beneficiaries under the will. *Estate of Torian v. Smith*, 263 Ark. 304, 564 S.W.2d 521, cert. denied 439 U.S. 883, 99 S. Ct. 223, 58 L. Ed. 2 195 (1978).

**Permitted Testimony.**

Attorney permitted to testify regarding her observations of her client's treatment of client's children and the conditions in the home while attorney was a guest there. *Nance v. Arkansas Dep't of Human Servs.*, 316 Ark. 43, 870 S.W.2d 721 (1994).

**Prohibited Testimony.**

Whether or not a defendant's refusal to communicate with his attorney has any bearing on his unavailability for trial as described in ARCrP 28.3, testimony by the attorney or his staff regarding possibly excludable periods held inadmissible under subsection (b) of this rule. *Byrd v. State*, 326 Ark. 10, 929 S.W.2d 151 (1996).

**Representative of Lawyer.**

Communications between defendant and investigator, who was not employed by defendant's attorneys to render professional legal services, were not protected. *Parkman v. State*, 294 Ark. 339, 742 S.W.2d 927 (1988).

Paternity report concerning deceased client from National Paternity Laboratories to attorney was not a communication protected by the attorney-client privilege where blood tests were ordered by the county court and clearly National Paternity Laboratories did not qualify as a "representative of the lawyer." *Ross v. Moore*, 30 Ark. App. 207, 785 S.W.2d 243 (1990).

**Scope of Privilege.**

The attorney-client privilege is limited to, and has no application outside of court proceedings; thus, it cannot create an exception to a substantive act such as the disclosure of information which has become part of the public record. *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989), criticized *Arkansas Gazette Co. v. Goodwin*, 304 Ark. 204, 801 S.W.2d 284 (1990).

Statements made by employees at the request of their employer's attorney to inform their own attorney and their employer's attorney to facilitate the rendition of legal advice to both were absolutely privileged. *Courteau v. St. Paul Fire & Marine Ins. Co.*, 307 Ark. 513, 821 S.W.2d 45 (1991).

The attorney-client privilege only applies to confidential communications, not to those uttered in public or intended for disclosure to

others or in fact disclosed by the client to others. *Shankle v. State*, 309 Ark. 40, 827 S.W.2d 642 (1992).

An attorney is incompetent to testify concerning any communication made to him by his clients, or his advice thereon, without his client's consent, and the rule as to privileged communications between attorney and client extends to statements of each to the other. *Kinthead v. Union Nat'l Bank*, 51 Ark. App. 4, 907 S.W.2d 154 (1995).

Where an accident reconstructionist was hired by an attorney representing a driver who was involved in a car accident, the accident reconstruction report and testimony of the accident reconstructionist's employee were confidential, privileged communications that could not be subpoenaed. *Holt v. McCastlain*, 357 Ark. 455, 182 S.W.3d 112 (2004).

Following an accident, auto company was not entitled to discover a statement made by driver to her insurer because the court believed that it was protected by attorney-client privilege; the driver was entitled to expect that her insurer would engage a lawyer to represent her, which meant that she was entitled to view her insurer as her representative for purposes of obtaining legal services. *Schipp v. GMC*, 457 F. Supp. 2d 917 (E.D. Ark. 2006).

Attorney-client privilege under Fed. R. Evid. 501 and subdivisions (a)(5), (b) and (d)(6) of this rule applied to communications between an attorney for defendants, a city, its mayor, city council, and two other individuals, and his clients at a meeting to discuss the pending litigation against defendants because those at the meeting attended in their capacities as city officials to assist in the litigation as representatives of the city, but the attorney-client privilege did not apply to communications between the attorney and defendants at a second meeting because (1) the city defendants failed to cite any precedent in support of their claim that the privilege applied to communications between the lawyer and the public client, even though the communications were made at a public meeting with non-parties present; (2) it was questionable whether the communications could be considered confidential when it was clear that no party intended them to remain undisclosed; and (3) even if the communications could be considered "confidential," the disclosure would not seriously impair the ability of the public officer or agency to conduct the litigation in the public interest. *Club Props. v. City of Sherwood*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 10090 (E.D. Ark. Jan. 30, 2008).

**Waiver.**

The attorney-client privilege belongs to the client, and the privilege may be waived; however, in the prosecution of defendant for the

rape and incest of his children, the mother did not waive the attorney-client privilege by simply answering a question about whether she had been approached by anyone about visitation. *Poyner v. State*, 288 Ark. 402, 705 S.W.2d 882 (1986).

Trial court did not err by permitting an attorney to testify about a statement defendant made regarding the location of the victim's body because defendant waived the attorney-client privilege by consenting to the attorney's calling the police concerning a body on property belonging to defendant's family. *Vidos v. State*, 367 Ark. 296, 239 S.W.3d 467 (2006).

**Cited:** *Farm Serv. Coop. v. Cummings*, 262 Ark. 810, 561 S.W.2d 317 (1978); *Lewis v. State*, 265 Ark. 132, 577 S.W.2d 415 (1979); *Ward v. State*, 293 Ark. 88, 733 S.W.2d 728 (1987), overruled *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998), criticized *Colbert v. State*, 304 Ark. 250, 801 S.W.2d 643 (1990), questioned *MacKintrush v. State*, 60 Ark. App. 42, 959 S.W.2d 404 (1997); *McCrory v. Johnson*, 296 Ark. 231, 755 S.W.2d 566 (1988); *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990).

### **Rule 503. Physician and psychotherapist-patient privilege.**

(a) *Definitions.* As used in this rule:

(1) A "patient" is a person who consults or is examined or interviewed by a physician or psychotherapist.

(2) A "physician" is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) A "psychotherapist" is (i) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or, (ii) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(4) A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(5) A "medical record" is any writing, document or electronically stored information pertaining to or created as a result of treatment, diagnosis or examination of a patient.

(b) *General Rule of Privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing his medical records or confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) *Exceptions:*

(1) *Proceedings for hospitalization.* There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.



(2) *Examination by order of court.* If the court orders an examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) *Condition and element of claim or defense.*

A. There is no privilege under this rule as to medical records or communications relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he or she relies upon the condition as an element of his or her claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his or her claim or defense.

B. Any informal, ex parte contact or communication with the patient's physician or psychotherapist is prohibited, unless the patient expressly consents. The patient shall not be required, by order of court or otherwise, to authorize any communication with the physician or psychotherapist other than (i) the furnishing of medical records, and (ii) communications in the context of formal discovery procedures. (Amended May 13, 1991, effective July 1, 1991; amended January 22, 1998.)

### RESEARCH REFERENCES

**Ark. L. Notes.** Gitelman and Watkins, No Requiem for Ricarte: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

**Ark. L. Rev. Note.** Baker v. State: The Arkansas Physician-Patient Privilege Re-examined, 36 Ark. L. Rev. 658.

**U. Ark. Little Rock L.J.** Adams, Misrepresentation in Procurement of Insurance: The Arkansas Law, 4 U. Ark. Little Rock L.J. 17.

Survey of Arkansas Law: Evidence, 4 U. Ark. Little Rock L.J. 203.

Survey of Arkansas Law: Evidence, 6 U. Ark. Little Rock L.J. 149.

Watkins, The Journalist's Privilege in Arkansas, 7 U. Ark. Little Rock L.J. 473.

Survey, Evidence, 14 U. Ark. Little Rock L.J. 365.

Note, Constitutional Law — Confrontation Clause — Arkansas Child Hearsay Exception Regarding Sexual Offenses, Abuse, Or Incest Is Unconstitutional. George v. State, 306 Ark. 360, 813 S.W.2d 792 (1991), 14 U. Ark. Little Rock L.J. 579.

Survey of Legislation, Evidence, 14 U. Ark. Little Rock L.J. 793.

### CASE NOTES

#### ANALYSIS

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#### In General.

The enactment of the Uniform Rules of Evidence in 1976 significantly changed Arkansas law regarding physician/patient privilege. While the former law protected "any

information," the new rule grants the privilege only to confidential communications. Oxford v. Hamilton, 297 Ark. 512, 763 S.W.2d 83 (1989).

#### Construction.

Court's deference to legislation involving rules of evidence and procedure will be given only to the extent the legislation is compatible with established rules, and when conflicts arise which compromise these rules, the rules remain supreme; thus, rules regarding the admissibility of evidence such as that covered by § 12-12-511, prevail. State v. Sypult, 304 Ark. 5, 800 S.W.2d 402 (1990).

The legislature designed § 16-46-304 to be in accord with the other "physician privilege" statute, i.e., this rule, by limiting the privilege to confidential communications. McVay v. State, 312 Ark. 73, 847 S.W.2d 28 (1993).

The psychotherapist-patient privilege pre-

empts the need to discover all admissible evidence. *Johnson v. State*, 342 Ark. 186, 27 S.W.3d 405 (2000), cert. denied 532 U.S. 944, 121 S. Ct. 1408, 149 L. Ed 2d 350 (2001).

Victim was not a party to a criminal prosecution; thus, a minor victim and the minor's mother were not parties to a delinquency proceeding for purposes of the exception to physician-patient privilege outlined in subdivision (d)(3)(A) of this rule. *State v. K.B.*, 2010 Ark. 228, — S.W.3d —, 2010 Ark. LEXIS 273 (May 13, 2010).

#### **Purpose.**

The policy behind the physician-patient privilege is to encourage patients to communicate openly with their physicians and to prevent the physicians from revealing the infirmities of the patient. *Finney v. State*, 3 Ark. App. 180, 623 S.W.2d 847 (1981).

#### **Applicability.**

This rule not only applies to criminal cases but civil as well. *Baker v. State*, 276 Ark. 193, 637 S.W.2d 522 (1982); *Oxford v. Hamilton*, 297 Ark. 512, 763 S.W.2d 83 (1989).

The psychotherapist-patient privilege applies in both criminal and civil cases and is inapplicable only when proceedings are initiated to hospitalize the patient for mental illness, when a mental examination is ordered by the court, or when the patient relies on his or her physical, mental, or emotional condition as an element of his or her claim or defense. *Johnson v. State*, 342 Ark. 186, 27 S.W.3d 405 (2000), cert. denied 532 U.S. 944, 121 S. Ct. 1408, 149 L. Ed 2d 350 (2001).

Subdivision (d)(3)(A) of this rule clearly anticipates that the privilege is inapplicable only as to a party to a proceeding who brings his or her own physical, mental, or emotional condition into issue; the subsection does not apply to a witness. *Johnson v. State*, 342 Ark. 186, 27 S.W.3d 405 (2000), cert. denied 532 U.S. 944, 121 S. Ct. 1408, 149 L. Ed 2d 350 (2001).

State inmate, who was convicted of capital murder, was not entitled to federal habeas relief based on the trial court's denial of the inmate's request for access to a witness's psychotherapy records, which the inmate wished to use for impeachment purposes. The inmate did not establish that the enforcement of the psychotherapist-patient privilege under this rule violated the inmate's Sixth Amendment right to confrontation or the Fourteenth Amendment Due Process Clause; there was no specific rule of federal law requiring the privilege to yield to an accused's desire to use confidential information in defense of a criminal case. *Johnson v. Norris*, 537 F.3d 840 (8th Cir. 2008), cert. denied — U.S. —, 129 S. Ct. 1334, 173 L. Ed. 2d 605 (2009).

#### **Blood Test.**

The result of a blood test is not a confidential communication and is properly admitted into evidence. *Oxford v. Hamilton*, 297 Ark. 512, 763 S.W.2d 83 (1989); *McVay v. State*, 312 Ark. 73, 847 S.W.2d 28 (1993).

#### **Communications Not Privileged.**

Where, in a prosecution for obtaining a controlled substance from a pharmacy by forgery, the evidence indicated that in the course of being treated by her physician, the defendant had obtained several blank prescriptions from his office and falsely obtained drugs in addition to those schedule II drugs he had prescribed for her, the physician's testimony concerning his contact with her was not excluded under this rule because of the physician-patient privilege. *Finney v. State*, 3 Ark. App. 180, 623 S.W.2d 847 (1981).

This rule, which replaced the much stricter privilege statute, § 28-607 (repealed), does not grant a privilege to "any information" as was granted under the former statute, but only to "communications" between the patient and doctor, and confidential ones at that; therefore, the trial court did not err when it admitted evidence of the fact that the defendant in an aggravated robbery and rape prosecution had been treated for venereal disease while in jail awaiting trial. *Baker v. State*, 276 Ark. 193, 637 S.W.2d 522 (1982).

The psychotherapist-patient privilege of this rule is limited to protecting only confidential communications between doctor and patient; this rule does not prohibit testimony identifying a patient's medical treatment. *Horne v. State*, 12 Ark. App. 301, 677 S.W.2d 856 (1984).

Communications made to a psychiatrist during a court ordered examination were not privileged where the forensic report was used for the limited purpose of impeaching the appellant's clearly contradictory statements made at the state hospital. *Randleman v. State*, 310 Ark. 411, 837 S.W.2d 449 (1992), cert. denied 507 U.S. 985, 113 S. Ct. 1582, 123 L. Ed 2d 149 (1993).

Appellant's Fifth Amendment right against self-incrimination and her Fourteenth Amendment due process rights were not violated by the use of the psychiatric forensic report to impeach her testimony. *Randleman v. State*, 310 Ark. 411, 837 S.W.2d 449 (1992), cert. denied 507 U.S. 985, 113 S. Ct. 1582, 123 L. Ed 2d 149 (1993).

Defendant's communications to doctor in rape case were not privileged where doctor explained to defendant that he would report his findings to the prosecuting attorney's office and the Department of Human Services. *Hinzman v. State*, 53 Ark. App. 256, 922 S.W.2d 725 (1996).



**Communications Privileged.**

A patient has a privilege to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his mental or emotional condition among himself, psychotherapist and persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including the patient's family. *Gruzen v. State*, 267 Ark. 380, 591 S.W.2d 342 (1979), cert. denied 449 U.S. 852, 101 S. Ct. 144, 66 L. Ed. 2d 64 (1980).

Trial court did not err by ruling that a therapist's testimony was barred by privilege because: (1) one victim admitted on cross-examination what she told the therapist after the state played a video of her conversation with the therapist; (2) defendant's argument that the second victim's statements to the therapist were not privileged, as they were part of a forensic investigation, was misplaced because on direct examination the therapist testified that the DHS worker or foster parents were involved in the family sessions she conducted; and (3) under Ark. R. Evid. 511 the privilege was not defeated by disclosure to the prosecutor. *White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006).

**Communications With Physician.**

Subdivision (d)(3)(B) of this rule by its plain language forbids ex parte communication with a patient's physician in the absence of the patient's consent and, therefore, a circuit court erred when it ordered that the defendants in a medical malpractice case could call as an expert witness one of the plaintiff's treating physicians. *Kraemer v. Patterson*, 342 Ark. 481, 29 S.W.3d 684 (2000).

In a medical malpractice and wrongful death action, the trial court should have disqualified opposing counsel based on his communications with a mother's doctor under subdivision (d)(3)(B) of this rule or Ark. R. Civ. P. 35(c)(2) because opposing counsel's advice to and communication with a second doctor were in service to the second doctor. *Bulsara v. Watkins*, 2009 Ark. App. 409, 319 S.W.3d 274 (2009).

**Hearing.**

This rule does not mandate that a hearing be initially closed; consequently, the trial court erred in holding that the mere existence of the physician patient privilege mandated a closed hearing. *Arkansas State Medical Bd. v. Leonard*, 267 Ark. 61, 590 S.W.2d 849 (1979).

**Intoxication.**

Where defendant's defense to a driving while intoxicated (DWI) charge would be that he smelled of alcohol because beer cans in the car had ruptured and spilled over him at the time of the collision, defendant waived his privilege under subdivision (d)(3) of this rule.

*McVay v. State*, 312 Ark. 73, 847 S.W.2d 28 (1993).

Even if communications are privileged, they are admissible under the exception under subsection (d) of this rule if the defendant asserts the defense of involuntary intoxication, since by doing so, he places his mental condition in issue and thereby waives the privilege. *Cavin v. State*, 313 Ark. 238, 855 S.W.2d 285 (1993).

**Motion to Quash.**

Writ of certiorari was proper, because the court erred in denying the husband's motion to quash several subpoenas concerning his medical records, when the husband was not a party to the underlying custody dispute, the husband did nothing to bring his medical condition into issue, and the husband's mental health was examined through other admissible evidence; a nonparty's medical records could not be subpoenaed under the circumstances presented in the instant case. *McKenzie v. Pierce*, 2012 Ark. 190, — S.W.3d —, 2012 Ark. LEXIS 212 (May 3, 2012).

**Nurses.**

While a confidential communication with a nurse can fall within this rule's privilege, subsection (b) of this rule does not grant a privilege to all information or communication between the patient and the health provider. *Cavin v. State*, 313 Ark. 238, 855 S.W.2d 285 (1993).

Where defendant called two mental health facilities, and spoke to two nurses on the telephone about his participation in a murder, even though defendant had previously been a psychiatric patient at both facilities, when he made these phone calls, no confidential relationship had been established; defendant's statements were not made to the nurses in their professional capacity, nor made for the purpose of treatment, and as such, these were not confidential communications. *Cavin v. State*, 313 Ark. 238, 855 S.W.2d 285 (1993).

**Waiver.**

If a statement to a psychotherapist is not made for the purpose of diagnosis or treatment, it is not privileged. If it is made for either of those purposes, it is privileged, but the privilege can be waived by claiming mental disease or defect as a defense to a criminal prosecution. *Davasher v. State*, 308 Ark. 154, 823 S.W.2d 863, cert. denied 504 U.S. 976, 112 S. Ct. 2948, 119 L. Ed 2d 571 (1992).

The waiver of the psychotherapist-patient privilege by a witness at the first trial does not require that it be deemed waived at a subsequent retrial. *Johnson v. State*, 342 Ark. 186, 27 S.W.3d 405 (2000), cert. denied 532 U.S. 944, 121 S. Ct. 1408, 149 L. Ed 2d 350 (2001).

**Cited:** *Barker v. State*, 21 Ark. App. 56, 728 S.W.2d 204 (1987); *Robertson v. State*, 298

Ark. 131, 765 S.W.2d 936 (1989); Johnson v. State, 298 Ark. 617, 770 S.W.2d 128 (1989); Duncan v. Cole, 302 Ark. 60, 786 S.W.2d 587 (1990); Beard v. State, 306 Ark. 546, 816 S.W.2d 860 (1991).

### Rule 504. Husband-wife privilege.

(a) *Definition.* A communication is confidential if it is made privately by any person to his or her spouse and is not intended for disclosure to any other person.

(b) *General Rule of Privilege.* An accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the accused or by the spouse on behalf of the accused. The authority of the spouse to do so is presumed.

(d) *Exceptions.* There is no privilege under this rule in a proceeding in which one [1] spouse is charged with a crime against the person or property of (1) the other, (2) a child of either, (3) a person residing in the household of either, or (4) a third person committed in the course of committing a crime against any of them.

### RESEARCH REFERENCES

**ALR.** Competency of one spouse to testify against other in prosecution for offense against child of both or either or neither. 119 ALR 5th 275.

**U. Ark. Little Rock L.J.** Watkins, The Journalist's Privilege in Arkansas, 7 U. Ark. Little Rock L.J. 473.

### CASE NOTES

#### ANALYSIS

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#### Applicability.

Subsection (b) of this rule did not apply where former wife did not testify at trial about any confidential communications made by defendant. Kidd v. State, 330 Ark. 479, 955 S.W.2d 505 (1997).

#### Authority of Court.

Change in law by this rule was an evidentiary matter, not one of substantive law, and as such, was within the court's rule-making authority. Parette v. State, 301 Ark. 607, 786 S.W.2d 817 (1990).

#### Communication Not Privileged.

In trial of husband for capital murder committed by his wife in stealing car to aid her husband in escaping from jail, it was proper for the state to impeach the wife's testimony

by using testimony from her trial concerning the escape plan since the conversations between the wife and husband which occurred while he was in jail, were conducted through the jail window and were overheard by at least one other prisoner, so that they were not privileged confidential husband-wife conversations. Sumlin v. State, 273 Ark. 185, 617 S.W.2d 372 (1981).

The trial court in a murder prosecution properly allowed the defendant's wife to testify that after the defendant shot the victim, the defendant told her to tell the police that the victim had attacked her and that the defendant killed the victim in an effort to rescue her. Subsection (a) of this rule provides that a spousal communication is privileged only if it is not intended to be disclosed to any other person; here the fabricated story was intended to be disclosed to the police and therefore was not privileged. David v. State, 286 Ark. 205, 691 S.W.2d 133 (1985).

Where criminal proceedings had not begun when wife reported defendant's statement and she did not testify at trial, communication was not privileged. Halfacre v. State, 292 Ark. 331, 731 S.W.2d 179 (1987).

Where, following defendant's arrest, his



wife visited him at the county jail and he told her “to dispose of some shells in their apartment or call his sister and get her to do something with them”, the court held the statement was not confidential since it was intended for disclosure to defendant’s sister. *Findley v. State*, 307 Ark. 53, 818 S.W.2d 242 (1991).

Letters written by defendant to his wife were not excluded from evidence on the basis of the marital privilege; the letters were admissible because defendant was charged with committing a crime against a person who resided in the couple’s home. *Munson v. State*, 331 Ark. 41, 959 S.W.2d 391 (1998).

Statements made by appellant to his wife in letters were not confidential because the statements were intended for his wife to fabricate a story, to continue the fabrication, or to establish an alibi; these directions were intended for disclosure to a third party and, therefore, were not privileged communications. *Ridling v. State*, 360 Ark. 424, 203 S.W.3d 63 (2005).

In a murder trial, the court properly allowed defendant’s wife to testify against him where defendant’s communication to his wife about how she should act and what she should not disclose to the police was exempt from the privilege; further, by making statements to the police, defendant waived his privilege as he disclosed a significant part of the privileged matter. *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006).

Court did not err by allowing defendant’s spouse to testify over defendant’s marital privilege objections where one statement was made by defendant to his son, rather than his spouse, and other family members heard defendant say to his spouse that he had to go help his son, who was a suspect in the murders, thus, those statements were not confidential and did not constitute protected communications; further, one statement was an attempt to have the spouse fabricate a story as to defendant’s and his son’s whereabouts and were intended for the spouse to establish an alibi. *Green v. State*, 365 Ark. 478, 231 S.W.3d 638 (2006).

#### **Confidential Communication.**

In murder trial wife was a competent witness against defendant husband since the statutes prohibiting testimony of a wife against her husband in effect when the murder was committed had been repealed by § 2 of Acts 1975, No. 1143 which adopted the Uniform Rules of Evidence, Rule 501 of which provides that no person has the privilege to prevent another from being a witness and this rule which limits the husband and wife privilege to confidential communications which were not involved. *Huckaby v. State*, 262 Ark. 413, 557 S.W.2d 875 (1977).

In a prosecution for murder, the defendant’s

wife can be required to testify for the state where she is not asked to disclose any confidential communications. *Metcalf v. State*, 284 Ark. 223, 681 S.W.2d 344 (1984).

In a criminal trial for murder, the trial court erred by allowing defendant’s wife to testify that defendant told her that he was going to “kill the other guy” as the statement was a privileged interspousal communication; however, the error was harmless in light of the overwhelming evidence of defendant’s guilt. *Walker v. State*, 91 Ark. App. 300, 210 S.W.3d 157 (2005).

#### **Invoking Privilege.**

A trial court erred in invoking the husband-wife privilege for a prosecuting witness since such a privilege can only be exercised by the defendant in a criminal case. *Scott v. State*, 263 Ark. 669, 566 S.W.2d 737 (1978).

Because defendant and his wife were permanently separated without any semblance of a marital relationship at the time of the communication of information about a robbery, defendant was not entitled to invoke the privilege. *United States v. Jackson*, 939 F.2d 625 (8th Cir. 1991).

#### **Residing in the Household.**

Minor victim who was visiting her sister and brother-in-law for a week was “residing in the household” for the purposes of subdivision (d)(3) of this rule; the victim’s temporary residence with the couple presented the same opportunity to the defendant brother-in-law that he would have had if the victim had intended to remain in the household indefinitely. *Munson v. State*, 331 Ark. 41, 959 S.W.2d 391 (1998).

#### **Reversal of Conviction.**

Where the invalidity of the statute adopting the Rules of Evidence was properly raised at the trial, the defendant’s wife should not have been allowed to testify for the state under subsection (b) of this rule, as the earlier rule prohibiting a spouse from testifying against the other spouse should have been applied; therefore, the defendant’s conviction was reversed. *Ricarte v. State*, 290 Ark. 100, 717 S.W.2d 488 (1986).

Where the issue in the trial court was limited to whether the wife’s testimony was a confidential communication within the meaning of this rule, the petitioner was not entitled to a reversal of his conviction because his wife was permitted to testify against him at trial; *Ricarte v. State*, 290 Ark. 100, 717 S.W.2d 488 (1986), which held that the Rules of Evidence were not validly adopted by the Legislature, provides a remedy only when the issue of the validity of the uniform rules was raised in the trial court. *Halfacre v. State*, 290 Ark. 312, 718 S.W.2d 945 (1986).

**Waiver.**

Wife voluntarily waived the adverse testimony privilege where she was questioned outside the jury's presence to determine whether marital privilege protected her testimony and she stated that she and the defendant had nothing resembling a marital relationship after their separation, but they might still be legally married, and she then agreed to testify for the government. *United States v. Jackson*, 939 F.2d 625 (8th Cir. 1991).

In a capital murder trial, the spousal communication privilege did not prevent defendant's wife from testifying that she overheard him confess to a third party that he acciden-

tally shot the victim; defendant waived the privilege by disclosing the matter to someone other than his spouse. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003).

Under Ark. R. Evid. 510, defendant waived any spousal privilege available because he testified extensively about what he said to his wife on the night of the shooting for which defendant was on trial; further, defendant could not use an initial ruling to exclude marital communications as a means to commit perjury by way of a defense. *Ross v. State*, 96 Ark. App. 385, 242 S.W.3d 298 (2006).

**Cited:** *Wilburn v. State*, 292 Ark. 416, 730 S.W.2d 491 (1987).

**Rule 505. Religious privilege.**

(a) *Definitions.* As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) *General Rule of Privilege.* A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

**RESEARCH REFERENCES**

**ALR.** Who are "clergy" or like within privilege attaching to communications to clergy members or spiritual advisers. 101 ALR 5th 619.

**U. Ark. Little Rock L.J.** Watkins, The Journalist's Privilege in Arkansas, 7 U. Ark. Little Rock L.J. 473.

**CASE NOTES****ANALYSIS**

Communication not privileged.  
Waiver.

**Communication Not Privileged.**

Where the clergyman sought out the defendant to confront him with the allegations of sexual abuse conveyed to him by the parents of two of the victims, although the clergyman had counseled with the defendant on previous occasions, the clergyman did not consider it to be a counseling session, but disciplinary in nature, evidence supported the trial court's decision that it was not spiritual counseling, precluding the defendant from excluding the clergyman's testimony at trial. *Magar v.*

*State*, 308 Ark. 380, 826 S.W.2d 221 (1992).

Where witness was defendant's employer, brother-in-law, and friend, and there was no evidence of ongoing counseling between witness and defendant which witness agreed to keep confidential, the communication was not made to witness in his capacity as a spiritual advisor. *Bonds v. State*, 310 Ark. 541, 837 S.W.2d 881 (1992).

Any error in the finding that communications between defendant and his pastor were not privileged was harmless because defendant himself testified about what he said to the pastor, the pastor was also defendant's friend, and there was no evidence that defen-



dant had expected that the communication would be kept confidential. *Ross v. State*, 96 Ark. App. 385, 242 S.W.3d 298 (2006).

waived his right to have confession to minister remain privileged. *Perry v. State*, 280 Ark. 36, 655 S.W.2d 380 (1983).

**Waiver.**

Where defendant confessed murder to numerous other people as well as to minister, he

**Rule 506. Political vote.**

(a) *General Rule of Privilege.* Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot.

(b) *Exceptions.* This privilege does not apply if the court finds that the vote was cast illegally or determines that the disclosure should be compelled pursuant to the election laws of the State.

**Rule 507. Trade secrets.**

A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. If disclosure is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties and the interests of justice require.

**Rule 508. Secrets of state and other official information — Governmental privileges.**

(a) If the law of the United States creates a governmental privilege that the courts of this State must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.

(b) No other governmental privilege is recognized except as created by the Constitution or statutes of this State.

(c) *Effect of sustaining claim.* If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue as to which the evidence is relevant, or dismissing the action.

**Rule 509. Identity of informer.**

(a) *Rule of Privilege.* The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) *Who May Claim.* The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

(c) *Exceptions.*

(1) *Voluntary disclosure; informer a witness.* No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to

resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the government.

(2) *Testimony on relevant issue.* If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case or to a fair determination of a material issue on the merits in a civil case to which a public entity is a party, and the informed public entity invokes the privilege, the court shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose his identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one or more of the following: requiring the prosecuting attorney to comply, granting the defendant additional time or a continuance, relieving the defendant from making disclosures otherwise required of him, prohibiting the prosecuting attorney from introducing specified evidence, and dismissing charges. In civil cases, the court may make any order the interests of justice require. Evidence submitted to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the informed public entity. All counsel and parties are permitted to be present at every stage of proceedings under this subdivision except a showing in camera at which no counsel or party shall be permitted to be present.

#### CASE NOTES

##### **Identity of Informer Privileged.**

Where there was no proof that more than one individual was involved in the robbery, the fact that the informant may have gotten his information shortly after the event was not sufficient to strip away the protection the law gives to informants not otherwise connected with the crime. *Treadway v. State*, 287

Ark. 441, 700 S.W.2d 364 (1985).

**Cited:** *Rowland v. State*, 262 Ark. 783, 561 S.W.2d 304 (1978); *Cason v. State*, 271 Ark. 803, 610 S.W.2d 891 (1981); *Walls v. State*, 8 Ark. App. 315, 652 S.W.2d 37 (1983), *aff'd* 280 Ark. 291, 658 S.W.2d 362 (1983); *Warrior v. State*, 299 Ark. 337, 772 S.W.2d 592 (1989).

#### **Rule 510. Waiver of privilege by voluntary disclosure.**

A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

#### RESEARCH REFERENCES

U. Ark. Little Rock L.J. Watkins, The Journalist's Privilege in Arkansas, 7 U. Ark. Little Rock L.J. 473.



## CASE NOTES

## ANALYSIS

Husband-wife privilege.  
Religious privilege.

**Husband-Wife Privilege.**

The husband-wife privilege was waived by the defendant in a murder prosecution and, therefore, his wife was properly permitted to testify that he told her that he had killed the two victims where another witness testified that, while they were both incarcerated, the defendant told him that he had killed the victims and described the killings to him, notwithstanding that the defendant denied that he had made such statements to the witness. *Dansby v. State*, 338 Ark. 697, 1 S.W.3d 403 (1999).

In a capital murder trial, the spousal communication privilege did not prevent defendant's wife from testifying that she overheard him confess to a third party that he accidentally shot the victim; defendant waived the privilege by disclosing the matter to someone other than his spouse. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003).

In a murder trial, the court properly allowed defendant's wife to testify against him where defendant's communication to his wife about how she should act and what she should not disclose to the police was exempt from the privilege; further, by making statements to the police, defendant waived his privilege as he disclosed a significant part of the privileged matter. *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006).

Court did not err by allowing defendant's spouse to testify over defendant's marital privilege objections where one statement was made by defendant to his son, rather than his spouse, and other family members heard defendant say to his spouse that he had to go help his son, who was a suspect in the murders, thus, those statements were not confidential and did not constitute protected communications; further, one statement was an attempt to have the spouse fabricate a story as to defendant's and his son's whereabouts and were intended for the spouse to establish an alibi. *Green v. State*, 365 Ark. 478, 231 S.W.3d 638 (2006).

Defendant waived any spousal privilege available under Ark. R. Evid. 504(b) because defendant testified extensively about what he said to his wife on the night of the shooting for which defendant was on trial; further, defendant could not use an initial ruling to exclude marital communications as a means to commit perjury by way of a defense. *Ross v. State*, 96 Ark. App. 385, 242 S.W.3d 298 (2006).

**Religious Privilege.**

Where defendant confessed murder to numerous other people as well as to minister, he waived his right to have confession to minister remain privileged. *Perry v. State*, 280 Ark. 36, 655 S.W.2d 380 (1983).

**Cited:** *Halfacre v. State*, 292 Ark. 331, 731 S.W.2d 179 (1987); *Flanagan v. State*, 368 Ark. 143, 243 S.W.3d 866 (2006).

**Rule 511. Privileged matter disclosed under compulsion or without opportunity to claim privilege.**

A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Watkins, The Journalist's Privilege in Arkansas, 7 U. Ark. Little Rock L.J. 473.

## CASE NOTES

**Evidence Properly Excluded.**

Trial court did not err by ruling that a therapist's testimony was barred by privilege under Ark. R. Evid. 503 because: (1) one victim admitted on cross-examination what she told the therapist after the state played a video of her conversation with the therapist; (2) defendant's argument that the second victim's statements to the therapist were not

privileged, as they were part of a forensic investigation, was misplaced because on direct examination the therapist testified that the DHS worker or foster parents were involved in the family sessions she conducted; and (3) under this rule the privilege was not defeated by disclosure to the prosecutor. *White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006).

### **Rule 512. Comment upon or inference from claim of privilege — Instruction.**

(a) *Comment or Inference Not Permitted.* The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) *Claiming Privilege Without Knowledge of Jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) *Jury Instruction.* Upon request, any party against whom the jury might draw an adverse inference from a claim or privilege is entitled to an instruction that no inference may be drawn therefrom.

#### **RESEARCH REFERENCES**

U. Ark. Little Rock L.J. Watkins, The Journalist's Privilege in Arkansas, 7 U. Ark. Little Rock L.J. 473.

#### **CASE NOTES**

##### **ANALYSIS**

Federal privileges.

Prejudice.

Witnesses.

##### **Federal Privileges.**

The reference to privilege in subsection (b) of this rule includes the Fifth Amendment privilege. Echols v. State, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

##### **Prejudice.**

The prejudice this rule seeks to avoid is dissipated when the claim to privilege has not been sustained and the jury can actually hear and evaluate the testimony to which the privilege claim was directed; thus, any prejudice from a remark pertaining only to an unsuccessful attempt to claim a privilege was minimal at best. Johnson v. State, 298 Ark. 617,

770 S.W.2d 128 (1989).

In a tort action for inter alia, assault and battery, the court did not err in refusing to grant a mistrial on the basis of statements referring to the defendant's claim of his right to remain silent and his request for an attorney. Edwards v. Stills, 335 Ark. 470, 984 S.W.2d 366 (1998).

##### **Witnesses.**

A witness should not be compelled to invoke his Fifth Amendment privilege in front of the jury, and if forced to take the stand and invoke the privilege against self-incrimination question by question any probative value would be substantially outweighed by the possibility of confusing the jury. Echols v. State, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

## **ARTICLE VI. WITNESSES**

### **Rule 601. General rule of competency.**

Every person is competent to be a witness except as otherwise provided in these rules.

#### **RESEARCH REFERENCES**

U. Ark. Little Rock L.J. Gitchel, Direct Examination: Some Evidentiary and Practi-

cal Considerations, 9 U. Ark. Little Rock L.J. 255.



## CASE NOTES

## ANALYSIS

In general.

Attorney as witness.

Burden of proof.

Child witness.

Criteria.

Determination of competency.

Discretion of court.

Mental disability.

**In General.**

The trial court must begin with the presumption that every person is competent to be a witness. *Jackson v. State*, 290 Ark. 375, 720 S.W.2d 282 (1986).

**Attorney as Witness.**

An attorney who handled the insured corporation's claim against its insurance carrier arising out of conduct involving the handling of a claim for damages resulting from a fire, and who continued to represent the insured corporation in other suits brought against it, could testify in the retrial of the action against the insurer and also share in the contingent fee agreement provided that he completely withdrew from participation in the case other than as a witness. *Aetna Cas. & Sur. Co. v. Broadway Arms Corp.*, 281 Ark. 128, 664 S.W.2d 463 (1984).

**Burden of Proof.**

The party alleging a witness is incompetent has the burden of persuasion. *King v. State*, 317 Ark. 293, 877 S.W.2d 583 (1994).

**Child Witness.**

Although the seven-year-old victim was hesitant and used child-like, but understandable words, the court could not conclude from her testimony that she did not understand the nature of an oath or the consequences of false swearing, or that she lacked the ability to receive or retain accurate impressions or transmit them to the fact finder; the mere fact that she did not answer some questions put to her and gave some inconsistent responses did not mean that she was not a competent witness. *Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986); *Conley v. State*, 20 Ark. App. 56, 723 S.W.2d 841 (1987).

In a child-rape case, the matter of the competency of the child is primarily for the trial judge to decide, as he is better able than the appellate court to judge the child's intelligence and understanding of the necessity for telling the truth. It is the duty of the trial judge to evaluate the competency of a witness throughout her testimony and not to rely entirely upon preliminary questioning. *Conley v. State*, 20 Ark. App. 56, 723 S.W.2d 841 (1987); *McArdell v. State*, 38 Ark. App. 261, 833 S.W.2d 786 (1992).

Mere inconsistencies or hesitation in testimony may affect the credibility of a child witness, but not her competency. *Conley v. State*, 20 Ark. App. 56, 723 S.W.2d 841 (1987).

Where a 14-year-old rape victim, who professional counselor assessed as having a mental age of six years, told the trial judge that she did not know what it meant "to state you will tell the truth," but said she would be in trouble if she did not tell the truth, the trial judge did not abuse his discretion in finding her competent to testify. *Richardson v. State*, 33 Ark. App. 128, 803 S.W.2d 557 (1991).

The same presumption and standards for determining the competency of a witness apply in deciding the capacity of a child witness to testify. *Holloway v. State*, 312 Ark. 306, 849 S.W.2d 473 (1993).

The trial court did not err in finding a four-year-old and a six-year-old child competent to testify in a sexual abuse case; the variances in testimony did not warrant a finding of incompetence but were for the jury to resolve. *Holloway v. State*, 312 Ark. 306, 849 S.W.2d 473 (1993).

Trial court did not abuse its discretion in finding a seven-year old girl who was sexually assaulted by her father competent to testify after determining that the child understood the need to tell the truth and that the child was capable of recounting the facts surrounding the offense. *Clem v. State*, 351 Ark. 112, 90 S.W.3d 428 (2002).

Where defendant murdered his wife and their children were the only witnesses, it was not necessary that defendant's child, who was five at the time of the murder, understood the nature of an oath, the legal concept of false swearing, or why the child was holding up his hand; at the competency hearing, the child's testimony showed a moral awareness of the obligation to tell the truth, and an ability to observe, remember and relate facts, and the trial court properly exercised its discretion in determining the child was competent. *Modlin v. State*, 353 Ark. 94, 110 S.W.3d 727 (2003).

Child rape victim was competent to testify where she stated that she was going to tell the truth, she remembered the discussion about swearing an oath to tell the truth, and she further indicated that she knew a lie was not telling the truth, that the truth meant to tell what really happened, and that she was required to answer truthfully. *Warner v. State*, 93 Ark. App. 233, 218 S.W.3d 330 (2005).

**Criteria.**

Mere inconsistencies or hesitation in testimony may affect credibility but not the competency of a witness. *Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986).

The criteria for determining whether a wit-

ness is competent are: (1) the ability to understand the obligation of an oath; (2) an understanding of consequences of false swearing; (3) the ability to receive and retain accurate impressions; and (4) the capacity to transmit a reasonable statement of what has been seen, felt, or heard. *Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986); *Conley v. State*, 20 Ark. App. 56, 723 S.W.2d 841 (1987); *Logan v. State*, 299 Ark. 266, 773 S.W.2d 413 (1989).

Under the guideline set forth by the Arkansas Supreme Court for determining the competency of a child witness, the challenging party bears the burden of establishing that the witness lacks at least one of the following: (1) the ability to understand the obligation of an oath and to comprehend the obligation imposed by it; or (2) an understanding of the consequences of false swearing; or (3) the ability to receive accurate impressions and to retain them, to the extent that the capacity exists to transmit to the factfinder a reasonable statement of what was seen, felt, or heard. *Laughlin v. State*, 316 Ark. 489, 872 S.W.2d 848 (1994).

Competency, as referred to in this rule, is note to be confused with reliability; the criteria for determining whether a witness is competent to testify are: (1) the ability to understand the obligation of an oath; (2) an understanding of consequences of false swearing; (3) the ability to receive and retain accurate impressions; and (4) the extent that the capacity exists to transmit to the fact-finder a reasonable statement of what was seen, felt, or heard. *Byndom v. State*, 344 Ark. 391, 39 S.W.3d 781 (2001).

#### **Determination of Competency.**

Where victim stated that she did not know what a lie was, nor what happens to a person when they tell a lie, her overall testimony showed her ability to understand the obligation of an oath and the consequences of false swearing, and judge did not abuse his discretion in refusing to declare the witness incompetent. *Curtis v. State*, 301 Ark. 208, 783 S.W.2d 47 (1990), questioned *State v. Sypult*, 304 Ark. 5, 800 S.W.2d 402 (1990).

A witness' inability to speak does not render her incompetent to testify or violate the defendant's right to cross-examine witnesses so

long as she is able to communicate the facts by other methods and otherwise meets the tests of legal competency; where a witness is able to communicate by other means and is otherwise competent, a defendant's contention that his constitutional right to confront witnesses was violated will be rejected. *Byndom v. State*, 344 Ark. 391, 39 S.W.3d 781 (2001).

#### **Discretion of Court.**

The trial court has broad discretionary powers in determining the competency of a witness and the Supreme Court will not reverse the trial court's ruling in the exercise of that discretion unless there is manifest error or a clear abuse has been demonstrated. *Hamblin v. State*, 268 Ark. 497, 597 S.W.2d 589 (1980).

The question of competency is a matter lying in the sound discretion of the trial court and, in the absence of clear abuse of discretion or manifest error, that exercise will not be disturbed on appeal. *Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986); *Conley v. State*, 20 Ark. App. 56, 723 S.W.2d 841 (1987); *Logan v. State*, 299 Ark. 266, 773 S.W.2d 413 (1989); *McArdell v. State*, 38 Ark. App. 261, 833 S.W.2d 786 (1992).

The trial court has broad discretion in determining the competency of witnesses, particularly young ones, and in eliciting testimony from such witnesses, some latitude in asking leading questions is permitted. *Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986); *Conley v. State*, 20 Ark. App. 56, 723 S.W.2d 841 (1987).

#### **Mental Disability.**

A witness suffering from mental impairment such as retardation is legally competent to testify so long as she has the capacity to observe, recollect, and communicate; the defendant cannot rely merely on the fact that the witness is retarded to challenge her competency. *Byndom v. State*, 344 Ark. 391, 39 S.W.3d 781 (2001).

**Cited:** *Boone v. State*, 282 Ark. 274, 668 S.W.2d 17 (1984); *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); *Mitchell v. Mitchell*, 28 Ark. App. 295, 773 S.W.2d 853 (1989); *Johnson v. State*, 318 Ark. 425, 886 S.W.2d 584 (1994).

### **Rule 602. Lack of personal knowledge.**

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.



## CASE NOTES

## ANALYSIS

Motion to strike testimony.

Opinions.

Personal knowledge.

**Motion to Strike Testimony.**

Where in a prosecution for carnal abuse in the first degree, the trial judge did not abuse his discretion when he denied the defendant's motion to strike the testimony of the owner of the hotel at which the offense allegedly occurred despite the owner's failure to identify the defendant or the motel room number in which the offense allegedly occurred, since the motion to strike came late, having been made after the motel owner had left the stand and had been excused from the trial. *Hamblin v. State*, 268 Ark. 497, 597 S.W.2d 589 (1980).

**Opinions.**

If a witness has the requisite personal knowledge necessary under this rule, any inferences or opinions he expresses must thereafter pass the rational connection and "helpful" tests of Evid. Rule 701. *Carton v. Missouri Pac. R.R.*, 303 Ark. 568, 798 S.W.2d 674 (1990).

Where defendant was charged with murder after beating the victim, a lay witness was permitted to give his opinion testimony under Ark. R. Evid. 701 that he heard the sound of defendant driving a car over a human body; the testimony was admissible under this rule, because it was based on personal knowledge. The opinion testimony was rationally based on the perception of the witness and the

surrounding circumstances. *Marks v. State*, 375 Ark. 265, 289 S.W.3d 923 (2008).

**Personal Knowledge.**

Defendant's conviction for murder in the second degree was proper because the admission of an officer's opinion that defendant would go from controlled to crying, back and forth, through the entire interview, was admissible. Because the officer was testifying not only about defendant's statement to the police but also her demeanor after the crime and the discrepancies that he noticed between her statements and the physical evidence, it was not an abuse of discretion to allow him to testify about his perception of the changes in defendant's demeanor during her statement. *Johnson v. State*, 2010 Ark. App. 153, — S.W.3d —, 2010 Ark. App. LEXIS 167 (2010).

In defendant's trial for possession of ephedrine, pseudoephedrine, or phenylpropylamine with intent to manufacture methamphetamine, in violation of § 5-64-1102(a), the trial judge erred in informing the jury that there was a child in the van when defendant was stopped because under Ark. R. Evid. 602, the judge had no independent personal knowledge of this fact. *Hancock v. State*, 2011 Ark. App. 174, — S.W.3d —, 2011 Ark. App. LEXIS 197 (Mar. 2, 2011).

**Cited:** *Smith v. State*, 286 Ark. 247, 691 S.W.2d 154 (1985); *Mitchell v. Mitchell*, 28 Ark. App. 295, 773 S.W.2d 853 (1989); *Beard v. Ford Motor Credit Co.*, 41 Ark. App. 174, 850 S.W.2d 23 (1993); *Nationsbank, N.A. v. Murray Guard, Inc.*, 343 Ark. 437, 36 S.W.3d 291 (2001).

**Rule 603. Oath or affirmation.**

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

**Rule 604. Interpreters.**

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

**Rule 605. Competency of judge as witness.**

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

## CASE NOTES

**Competency of Judge as Witness.**

In defendant's trial for possession of ephedrine, pseudoephedrine, or phenylpropa-

mine with intent to manufacture methamphetamine, in violation of § 5-64-1102(a), the trial judge erred in informing the jury

that there was a child in the van when defendant was stopped because under this rule, the judge could not have been both a witness and

a judge in one proceeding. *Hancock v. State*, 2011 Ark. App. 174, — S.W.3d —, 2011 Ark. App. LEXIS 197 (Mar. 2, 2011).

### Rule 606. Competency of juror as witness.

(a) *At the Trial.* A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into Validity of Verdict or Indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent [assent] to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

**Publisher's Notes.** The bracketed word "assent" in subdivision (b) was inserted by the publisher.

### RESEARCH REFERENCES

**Ark. L. Rev.** *State v. Cherry: The Lone Juror Forces Arkansas to Confront Pre-Deliberative Juror Misconduct and Rule of Evidence 606(b)*, 54 Ark. L. Rev. 823.

**U. Ark. Little Rock L.J.** *Survey of Arkansas Law, Criminal Law*, 1 U. Ark. Little Rock L.J. 153.

*Derden, Survey of Arkansas Law: Evidence*, 2 U. Ark. Little Rock L.J. 232.

*Survey — Evidence*, 12 U. Ark. Little Rock L.J. 205.

### CASE NOTES

#### ANALYSIS

Constitutionality.

In general.

Purpose.

Applicability.

Affidavit by jurors.

Alternate jurors.

Ex parte conversation with jurors.

File left in room with jurors.

Poll of jury.

Props in room with jurors.

Questioning jurors after their dismissal.

Remark by bailiff.

Remark by juror.

Testimony concerning deliberations.

Unauthorized view of accident scene.

#### Constitutionality.

Subsection (b) of this rule is not unconstitutional and serves the important functions of securing private, frank jury deliberations,

and protecting the finality of judgments. *Miles v. State*, 350 Ark. 243, 85 S.W.3d 907 (2002).

#### In General.

This rule attempts to balance the freedom of secret jury deliberations on one hand with the ability to correct an irregularity in those deliberations on the other; it provides that an irregularity in the jury room which is an internal occurrence may not be investigated, but that an irregularity due to some external event may be investigated. *Borden v. St. Louis S.W. Ry.*, 287 Ark. 316, 698 S.W.2d 795 (1985); *Watkins v. Taylor Seed Farms, Inc.*, 295 Ark. 291, 748 S.W.2d 143 (1988).

Petitioner was not entitled to writ of error coram nobis relief on the basis of his claim that the jury considered an extraneous statement made by a witness during trial; the court refused to delve into the jury's deliberations.



ations in order to determine whether any of them disregarded instructions to not consider the statement. *Echols v. State*, 360 Ark. 332, 201 S.W.3d 890 (2005).

#### **Purpose.**

Subsection (b) of this rule only permits inquiry into whether any external influence or information could have played a part in the jury's verdict; the purpose of this rule is to balance the freedom of secret jury deliberations with the ability to correct an irregularity in those deliberations. *Davis v. State*, 330 Ark. 501, 956 S.W.2d 163 (1997).

#### **Applicability.**

This rule should apply whether a verdict is reached or a mistrial declared. This rule establishes an extraneous information exception which allows jurors to testify that one or more members of the jury brought to a trial specific personal knowledge about the parties or controversy or acquired such knowledge from sources outside the courtroom during the trial or deliberations. *Witherspoon v. State*, 322 Ark. 376, 909 S.W.2d 314 (1995).

Subsection (b) of this rule did not apply to the grant of a new trial where the jurors were not questioned about matters involving their formal deliberations and, instead, the hearing focused on discussions that occurred prior to formal deliberations. *State v. Cherry*, 341 Ark. 924, 20 S.W.3d 354 (2000).

#### **Affidavit by Jurors.**

Where trial court had under consideration a motion for new trial, it was proper for the judge not to read or consider an affidavit of six of the jurors concerning matters which occurred during their deliberations, since such an affidavit is improper under subsection (b) of this rule. *Garner v. Finch*, 272 Ark. 151, 612 S.W.2d 304 (1981).

Although a state trooper mistakenly testified that the reaction time between an automobile driver's sighting danger and hitting the brakes was four and one-half seconds rather than three-fourths of a second, it was improper for two jurors to file affidavits stating that they had based their finding of the plaintiff's non-negligence in an automobile accident on this testimony, since this rule clearly prohibits a juror from testifying as to the effect of anything which influenced his verdict and he cannot submit an affidavit about such matters; moreover, it was improper for the attorney to interview the jurors after the trial in an effort to obtain inadmissible affidavits to impeach their own verdict. *Sanson v. Pullum*, 273 Ark. 325, 619 S.W.2d 641 (1981).

Subsection (b) of this rule and case law prohibited the trial court from considering a juror's affidavit submitted by a party in support of a new trial motion under Ark. R. Civ. P. 59; because the party had not alleged that

some outside influence affected the jury's deliberations, the court could not consider the juror's affidavit or its allegations that the jury was confused when it awarded the party only a certain amount in damages. *Machost v. Simkins*, 86 Ark. App. 47, 158 S.W.3d 726 (2004).

Where a jury awarded punitive damages, but no compensatory damages, and one week after the jury had been discharged the jury foreman filed an affidavit to that effect, the trial court did not err in striking the juror's affidavit and in failing to correct the verdict because the jury had been discharged and there was a strict rule that a jury's verdict could not be corrected after the jury had been discharged; however, the court did err in not granting new trial as no fair-minded juror could have awarded no compensatory damages after having found in favor of appellant on all counts. *Waste Mgmt. of Ark., Inc. v. Roll Off Serv.*, 88 Ark. App. 343, 199 S.W.3d 91 (2004).

Pursuant to subsection (b) of this rule, juror affidavits did not assert that the jury's deliberations were affected by extraneous information or outside influence; rather, the purpose of the affidavits was to explain the amount of damages that the jury intended to award landowners, such that the affidavits should be disregarded. *Bingham v. City of Jonesboro*, 89 Ark. App. 120, 201 S.W.3d 1 (2005).

In a condemnation case, the trial court properly struck juror affidavits as being barred by subsection (b) of this rule and denied appellants' motion for new trial based on jury misconduct; the trial court properly refused to consider the affidavits because they referred to events occurring during the internal deliberations of the jury and, without the juror affidavits, appellants could not prove jury misconduct. *D.B.&J. Holden Farms, Ltd. P'ship v. Ark. State Highway Comm'n*, 93 Ark. App. 202, 218 S.W.3d 355 (2005).

Although a trial court improperly considered parts of affidavits that referred to the internal deliberations of the jury on matters not relating to extraneous information thereby violating this rule, the trial court's order awarding appellee a new trial pursuant to Ark. R. Civ. P. 59(a)(2) in appellant's personal injury action against appellee was affirmed because it was not manifest abuse of discretion for the trial court to conclude that the jury failed to follow its instructions and considered evidence not introduced into evidence. *Campbell v. Hankins*, 2009 Ark. App. 479, 324 S.W.3d 358 (2009).

Circuit court did err in denying appellant's motion for new trial due to jury misconduct because there was no evidence of juror misconduct upon which to grant a new trial; this rule prohibited the circuit court from considering appellant's affidavits because if the un-

named jurors referred to in appellant's affidavits did make the statements attributed to them, they did not violate any court instruction in doing so, and, in fact, could be seen as following the circuit court's instruction to consider all of the evidence in light of their own observations and life experiences. *Blake v. Shellstrom*, 2012 Ark. App. 28, — S.W.3d —, 2012 Ark. App. LEXIS 24 (Jan. 4, 2012).

#### **Alternate Jurors.**

When an alternate juror entered the jury room for 15 minutes after the jury had retired and the defendant moved for a new trial, the testimony of the impaneled jurors which focused on whether improper influence was brought to bear on any of the jurors due to the presence of the alternate was proper. *McDonald v. State*, 37 Ark. App. 61, 824 S.W.2d 396 (1992).

#### **Ex Parte Conversation with Jurors.**

A trial judge, before ruling on a motion to modify the verdict, should not have an ex parte conversation with some of the jurors about anything which caused them to assent to the verdict. To do so is error. *Coran v. Keller*, 295 Ark. 308, 748 S.W.2d 349 (1988).

#### **File Left in Room with Jurors.**

In prosecution for capital murder, where an investigator's file containing considerable information about the charge and with defendant's name on the tab was left in a witness room with the jurors, the trial court should have allowed defense counsel to question the jurors about the file. *Hutcherson v. State*, 262 Ark. 535, 558 S.W.2d 156 (1977).

#### **Poll of Jury.**

A jury can be polled pursuant to § 16-89-128, but the inquiry should be limited to determining that the verdict is that of each juror and "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror"; it would be highly unrealistic to think that jurors do not consider the possibility of parole in arriving at a sentence in a criminal case and the outward expression of that by a juror was not grounds for a new trial where any information jurors had about possibility of parole was independent knowledge which they had prior to trial. *Ashby v. State*, 271 Ark. 239, 607 S.W.2d 675 (1980).

#### **Props in Room with Jurors.**

In an action arising from a motor vehicle collision, there was no reasonable possibility of prejudice resulting from the presence in the jury room of toy cars used by the jury in their deliberations and there was no abuse of discretion in the denial of a new trial motion. *New Prospect Drilling Co. v. First Com. Trust*, 332 Ark. 466, 966 S.W.2d 233 (1998).

#### **Questioning Jurors After Their Dismissal.**

It was improper, under this rule, for plaintiff's attorney to question several jurors who returned to the courtroom, after the verdict was read and the jurors had been dismissed, to determine whether the jurors had attempted to increase or inflate the reward in a personal injury case to allow for what they thought would be only a 75 percent reduction of the \$100,000 award due to the allocation of 75 percent negligence to the plaintiff, so that the final award would be approximately \$25,000 to each plaintiff parent. *Stull v. Ragsdale*, 273 Ark. 277, 620 S.W.2d 264 (1981).

Where the defendant failed in a post-conviction petition, to provide factual support for his allegation that jurors engaged in extrajudicial communications, his prayer for an inquiry of the jury was properly denied. *Pride v. State*, 285 Ark. 89, 684 S.W.2d 819 (1985).

#### **Remark by Bailiff.**

Where a bailiff made a racist remark to a juror, although the juror testified upon questioning that the remark did not influence his deliberations, the possibility of prejudice was so great that a new trial must be granted. *Lewis v. Pearson*, 262 Ark. 350, 556 S.W.2d 661 (1977).

#### **Remark by Juror.**

Where insured homeowners brought an action against their insurer, a statement by one of the jurors during the jury deliberations that "it's lawsuits like this that will make all our insurance premiums go up" was simply an expression of opinion on the merits of the insureds' case, which therefore fell within the proscription of subsection (b) of this rule and could not be considered as the basis for the granting of a new trial on the grounds of jury misconduct. *Farm Bureau Mut. Ins. Co. v. Smith*, 5 Ark. App. 37, 632 S.W.2d 244 (1982).

It was not an indication of unfair prejudice for a juror to comment that she would pray for the accused, especially when she indicated that she would keep an open mind as to defendants' guilt or innocence until after she had heard all the evidence. *Butler v. State*, 303 Ark. 380, 797 S.W.2d 435 (1990).

In a case in which defendant appealed a circuit court's denial of his motion to set aside the verdict and reopen deliberations, the circuit court did not abuse its discretion in denying the motion. It would have been inappropriate for the circuit court to allow the jury foreperson to revisit the evidence admitted at trial and reexamine her vote; under subsection (b) of this rule, the foreperson could not testify as to the effect of anything upon her mind as influencing her to assent to the verdict. *Noble v. State*, 2010 Ark. App. 228, — S.W.3d —, 2010 Ark. App. LEXIS 234 (Mar. 10, 2010).



### Testimony Concerning Deliberations.

An affidavit from one juror stating remarks that allegedly were made by jurors and describing the discussions during the course of jury deliberations plainly violated subsection (b) of this rule and was inadmissible as evidence of jury misconduct. *Waterfield v. Quimby*, 277 Ark. 472, 644 S.W.2d 241 (1982).

Testimony of juror, at a post-trial hearing, that the court's "Allen" charge, upon impanelment of the entire jury, affected her vote during deliberations, was impermissible and clearly violated subsection (b) of this rule. *Tosh v. State*, 278 Ark. 377, 646 S.W.2d 6 (1983).

It was improper for a lawyer to try to impeach a jury verdict by affidavits obtained from members of the jury panel where the so called extraneous prejudicial information went only to the state of mind of a juror while deliberating. *Aetna Cas. & Sur. Co. v. Broadway Arms Corp.*, 281 Ark. 128, 664 S.W.2d 463 (1984).

To show that extraneous matters were brought to the jury's attention, a judge may properly consider the content of the conversations that took place in the jury room. *St. Louis S.W. Ry. v. White*, 302 Ark. 193, 788 S.W.2d 483 (1990).

Exception to rule regarding competency of juror as witness was not applicable where no question was raised as to whether extraneous prejudicial information was improperly brought to the jury's attention or whether outside influence was improperly brought to bear upon any juror. *National Bank of Commerce v. HCA Health Servs.*, 304 Ark. 55, 800 S.W.2d 694 (1990).

It was error for the court to grant a new trial on sentencing based on testimony by two jurors that they had voted for a life sentence based on information they believed to be valid, which they later found to be incorrect. *State v. Osborn*, 337 Ark. 172, 988 S.W.2d 485 (1999).

Where a juror stated during deliberations that he knew defendant had been convicted at his first trial but the convictions were reversed, and where the trial court knew about the statement and its context based on the court's colloquy with the juror, and the court admonished the jury about what it was to consider during deliberations, and was further reassured by the juror's note that juror was following the court's instructions, it could not be said that the trial court abused its discretion in refusing to grant defendant's motion for a mistrial. *Butler v. State*, 349 Ark. 252, 82 S.W.3d 152 (2002).

Juror's statement was essentially a characterization of the jury deliberations and fell squarely within the type of testimony prohibited by subsection (b) of this rule; the statement did not include any allegations that

prejudicial information was given to the jury or that the jury was influenced by outside sources. Because the juror's statement was inadmissible, defendant failed to show that he was entitled to a new trial based on jury confusion. *McBride v. State*, 99 Ark. App. 146, 257 S.W.3d 914 (2007).

In a medical malpractice action, a juror's vocational knowledge of medical records and informed consent did not constitute extraneous prejudicial information under subsection (b) of this rule; the rule therefore prohibited the trial court from considering the patient's affidavits and testimony and, consequently, the trial court had no evidence on which to grant a new trial. *Milner v. Luttrell*, 2011 Ark. App. 297, — S.W.3d —, 2011 Ark. App. LEXIS 315 (Apr. 20, 2011).

Circuit court did abuse its discretion in denying appellant's motion for new trial due to jury misconduct because alleged juror statements about insurance could not have impugned a fact presented by any party concerning insurance coverage since the issue of health insurance was never introduced at trial; even if the alleged juror statements concerning health insurance were assumed to be true and considered to be extraneous, they were insufficient to show a reasonable possibility of prejudice. *Blake v. Shellstrom*, 2012 Ark. App. 28, — S.W.3d —, 2012 Ark. App. LEXIS 24 (Jan. 4, 2012).

Circuit court did err in denying appellant's motion for new trial due to jury misconduct because there was no evidence of juror misconduct upon which to grant a new trial, and if the jury was to be instructed to omit some part of their personal observations and experience from deliberations, the duty was on appellant to request such an instruction; no jury instruction on collateral sources was given in the case, and appellant did not request or proffer such an instruction. *Blake v. Shellstrom*, 2012 Ark. App. 28, — S.W.3d —, 2012 Ark. App. LEXIS 24 (Jan. 4, 2012).

### Unauthorized View of Accident Scene.

Where a juror, who had not been cautioned against visiting the scene of accident, went out to view accident site which was on the public highway and was open to inspection by everyone, there was no extraneous information brought to the jury's attention so as to render admissible the affidavit of another juror concerning such incident. *B. & J. Byers Trucking, Inc. v. Robinson*, 281 Ark. 442, 665 S.W.2d 258 (1984).

Once a juror has contaminated the jury's deliberations with extrinsic evidence, a new trial will be warranted if there is a reasonable possibility of resulting prejudice; a new trial is proper where jurors independently investigated the accident scene. *Borden v. St. Louis S.W. Ry.*, 287 Ark. 316, 698 S.W.2d 795 (1985).

**Cited:** *Veasey v. State*, 276 Ark. 457, 637

S.W.2d 545 (1982); *Franklin v. Estate of Griffith*, 11 Ark. App. 124, 666 S.W.2d 723 (1984); *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987); *Ward v. State*, 20 Ark. App. 172, 726 S.W.2d 289 (1987); *Center v. Johnson*, 295 Ark. 522, 750 S.W.2d 396 (1988); *Gunn v. State*, 296 Ark. 105, 752 S.W.2d 262 (1988); *Duncan v. Mitchell*, 296 Ark. 113, 752 S.W.2d 43 (1988); *Larimore v. State*, 309 Ark. 414,

833 S.W.2d 358 (1992); *Chism v. State*, 312 Ark. 559, 853 S.W.2d 255 (1993); *Spring Creek Living Ctr. v. Sarrett*, 319 Ark. 259, 890 S.W.2d 598 (1995); *Berry v. St. Paul Fire & Marine Ins. Co.*, 328 Ark. 553, 944 S.W.2d 838 (1997); *McIntosh v. State*, 340 Ark. 34, 8 S.W.3d 506 (2000); *Bingham v. City of Jonesboro*, 89 Ark. App. 120, 201 S.W.3d 1 (2005).

## Rule 607. Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling him.

### RESEARCH REFERENCES

**ALR.** Propriety, under Uniform Rule of Evidence 607, of impeachment of party's own witness. 3 ALR 6th 269.

**Ark. L. Rev.** Case Note, *Roberts v. State*: A Limitation on the Impeachment of Witnesses by Extrinsic Evidence of Prior Inconsistent Statements, 37 Ark. L. Rev. 688.

**U. Ark. Little Rock L.J.** Impeachment of One's Own Witness by Prior Inconsistent Statements Under the Federal and Arkansas Rules of Evidence, Perroni, 1 U. Ark. Little Rock L.J. 277.

Survey — Evidence, 11 U. Ark. Little Rock L.J. 205.

### CASE NOTES

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Admission of prior inconsistent statement.

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#### Admission of Prior Conviction by Defendant.

Where defendant took the stand and admitted he had been convicted of a felony, he could not then insist that he had been impeached and that no further questioning as to the number of prior convictions was permissible; to allow either party to head off the testimony of the other in such a manner would not be in keeping with the standard of fairness with which a trial should be conducted and this rule was not intended to allow either party to prevent the other party from testing the credibility of a party or witness in such a manner. *Floyd v. State*, 278 Ark. 342, 645 S.W.2d 690 (1983).

#### Admission of Prior Inconsistent Statement.

Where the state's witness admitted making a prior inconsistent statement, the trial judge correctly ruled that the prior statement was admissible solely for impeachment purposes. *Lewis v. State*, 288 Ark. 595, 709 S.W.2d 56 (1986).

Prior inconsistent statements were properly admissible for impeachment purposes,

and defendant suffered no prejudice where no reference was made to a prior trial itself, but only to prior testimony. *Laymon v. State*, 306 Ark. 377, 814 S.W.2d 901 (1991).

#### Character Witnesses.

Where in a prosecution for rape, the defendant produced five character witnesses to prove his reputation for truthfulness, the trial court properly allowed the prosecutor to cross-examine the character witnesses as to the basis of their opinion, such as whether the witness had heard all the facts about the defendant on which to base his opinion. *Caldwell v. State*, 267 Ark. 1053, 594 S.W.2d 24 (1980).

#### Credibility.

In a condemnation proceeding, an expert witness's knowledge, or lack of knowledge, and his record of accuracy regarding the value of property would go to the credibility to be given to his testimony as an expert witness. *Arkansas State Hwy. Comm'n v. Pulaski Inv. Co.*, 265 Ark. 584, 580 S.W.2d 679 (1979).

#### Cross-Examination of Defendant.

The trial court did not err in allowing the state to question the defendant on cross-examination about details of his prior convictions. *Pruett v. State*, 282 Ark. 304, 669 S.W.2d 186, cert. denied 469 U.S. 963, 105 S. Ct. 362, 83 L. Ed. 2d 298 (1984).

Where defendant filed an answer that generally denied the allegations of plaintiff's complaint, including that defendant was negligent in regard to the traffic accident, the fact



that she did not file a counterclaim was not an assertion of fact and she could not be impeached on that point; consequently, the trial court properly excluded plaintiff's attempted cross-examination on that issue. *Martinez v. Wright*, 94 Ark. App. 1, 223 S.W.3d 71 (2006).

#### **Expert Witnesses.**

The extent to which one can examine one's own expert witness for purposes of impeachment is within the sound discretion of the trial court. *Carton v. Missouri Pac. R.R.*, 303 Ark. 568, 798 S.W.2d 674 (1990).

#### **Impeachment of Own Witness.**

State was properly permitted to impeach its own witness under this rule for comparatively minor matter where the prosecution complied with Rule 613 by showing that the witness had made a prior inconsistent statement, even though the state may have waited too long before adducing the impeachment testimony on rebuttal, since that matter rested in the trial court's sound discretion. *Heard v. State*, 272 Ark. 140, 612 S.W.2d 312 (1981).

Where trial court allowed sheriff and his secretary to narrate statements made by sister of defendant during his investigation of murder case, and those statements had not been signed by her, but she had acknowledged the principal statement, it was error for the court to admit such evidence as recorded recollections under Rule 803 since her statements were not within the rule as reviving present recollection through a contemporaneously made memorandum; however, since the statements could be used to impeach inconsistent out-of-court statements made by defendant's sister under Rule 613, where the state impeaches its own witness under this rule, the ruling of the trial judge was correct for the wrong reasons and thus was not reversed. *Chisum v. State*, 273 Ark. 1, 616 S.W.2d 728 (1981).

A party can impeach his own witness by the use of a prior inconsistent hearsay statement if the probative value on the issue of impeachment outweighs the prejudicial effect arising from the danger that the jury will give substantive effect to the prior inconsistent statement. *Roberts v. State*, 278 Ark. 550, 648 S.W.2d 44 (1983).

There is no general prohibition against im-

peachment of one's own witness. *Pemberton v. State*, 292 Ark. 405, 730 S.W.2d 889 (1987).

Where defendant denied prior bad acts when on the witness stand, and the rebuttal witness called by the state also denied the prior acts occurred, an admonition to the jury, that the scope of the testimony which the state asserted was offered to impeach the rebuttal witness was limited to impeachment purposes, would not have been an adequate safeguard against prejudice, and the prejudicial effect of the testimony offered to impeach the rebuttal witness outweighed its value for impeachment purposes. *Evans v. State*, 38 Ark. App. 42 (1992).

In a negligence action where the dispute involved a mechanic's testimony as to the nature and time of the mechanic's inspections of the brakes on the subject vehicle, counsel replied upon objection that the insurer's attorney was attempting to impeach the insurer's own witness by having the mechanic contradict his own testimony, however, under this rule, attacking the credibility of one's own witness was allowed and the exclusion of the proffered testimony was grounds for reversal. *Southern Farm Bureau Cas. Ins. Co. v. Daggett*, 354 Ark. 112, 118 S.W.3d 525 (2003).

#### **Prior Perjury.**

Where plaintiff filed suit for malicious prosecution after defendant filed suit charging him with theft of property, which suit terminated in his favor, it was proper for plaintiff's attorney on redirect examination to seek to impeach defendant, under Rule 608 and this rule, by asking her questions about whether she had previously committed perjury, since the impeachment questions were asked only after defendant's attorney had fully developed all of her testimony offered in defense and after the trial judge had declared the defendant a hostile witness, without objection, for purposes of cross-examination. *Tucker v. Rasdon*, 272 Ark. 63, 612 S.W.2d 106 (1981).

**Cited:** *Hunter v. McDaniel Constr. Co.*, 274 Ark. 178, 623 S.W.2d 196 (1981); *Gross v. State*, 8 Ark. App. 241, 650 S.W.2d 603 (1983); *Demarest v. State*, 25 Ark. App. 203, 755 S.W.2d 577 (1988); *Parette v. State*, 301 Ark. 607, 786 S.W.2d 817 (1990); *Hughey v. State*, 310 Ark. 721, 840 S.W.2d 183 (1992); *Dansby v. State*, 338 Ark. 697, 1 S.W.3d 403 (1999).

### **Rule 608. Evidence of character and conduct of witness.**

(a) *Opinion and Reputation Evidence of Character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) *Specific Instances of Conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

#### RESEARCH REFERENCES

**Ark. L. Notes.** Guzman, Impeaching the Credibility of a Witness: Issues, Rules, and Suggestions, 1994 Ark. L. Notes 29.

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On The Horns of an Evidentiary Dilemma: The Intersection of Federal Rules of Evidence 806 and 608(b), 56 Ark. L. Rev. 543 (2003).

**U. Ark. Little Rock L.J.** Survey of Arkansas Law: Evidence, 6 U. Ark. Little Rock L.J. 149.

Note — Evidence — Incidents of Shoplifting Not Probative of Truthfulness under Rule 608(b), 6 U. Ark. Little Rock L.J. 321.

Arkansas Law Survey, Smith, Evidence, 9 U. Ark. Little Rock L.J. 165.

Survey — Evidence, 10 U. Ark. Little Rock L.J. 199.

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##### In General.

Neither this rule, Evid. Rules 609, 613, nor 806 permit impeachment by extrinsic evidence on a collateral matter. *Teas v. State*, 23 Ark. App. 154, 744 S.W.2d 739 (1988).

Although defendant argued that a witness's testimony was extrinsic evidence, in violation of subsection (b) of this rule, and improper rebuttal evidence, defendant's argument was void of any mention of prejudice; thus, the trial court's decision to allow the testimony was affirmed. *MacKool v. State*, 363 Ark. 295, 213 S.W.3d 618 (2005).

##### Construction.

Subsection (b) of this rule relates to inquiries into conduct on cross examination that are clearly probative of truthfulness or untruthfulness; the rule does not permit cross examination into specific instances that are merely probative of dishonesty. *Laughlin v. State*, 316 Ark. 489, 872 S.W.2d 848 (1994).

Cross-examination under subsection (b) of this rule is limited to specific instances of misconduct clearly probative of truthfulness or untruthfulness as distinguished from conduct probative of dishonesty. *Green v. State*, 59 Ark. App. 1, 953 S.W.2d 60 (1997).

Subsection (a) of this rule does not allow a state investigator to repeatedly vouch for the victim's credibility by making statements such as, "I don't have a single doubt about her credibility." *Cox v. State*, 93 Ark. App. 419, 220 S.W.3d 231 (2005).

##### Attack on Character.

Since it cannot be said that a defendant's truthfulness has been attacked simply because he takes the witness stand, a defendant who takes the witness stand cannot support his testimony by offering evidence that shows his character for truthfulness among his associates or in the community. *Rios v. State*, 262 Ark. 407, 557 S.W.2d 198 (1977).



The mere fact that a witness has been contradicted by other evidence does not constitute an attack upon the witness's character for truthfulness. *Collins v. State*, 11 Ark. App. 282, 669 S.W.2d 505 (1984).

Questions regarding witness' history of substance abuse held not probative of veracity. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

#### **Discretion of Court.**

Trial judges should be permitted, under this rule, to exercise sound discretion to permit or deny a party the use of character evidence to support veracity. *Collins v. State*, 11 Ark. App. 282, 669 S.W.2d 505 (1984).

The matter of what constitutes an attack on the character of a witness should be left to the trial court's discretion. *Maples v. State*, 16 Ark. App. 175, 698 S.W.2d 807 (1985).

The matter of what constitutes an attack on the character of the witness should be left to the trial court's discretion; this was not a "slashing cross-examination" and the trial court erred in permitting the sheriff to testify as to the reputation of the victim for truthfulness and honesty before her character had been attacked by the defense. *Maples v. State*, 16 Ark. App. 175, 698 S.W.2d 807 (1985).

The court did not abuse its discretion in refusing to allow the defendant to question an officer about an incident in which he left the scene of an accident involving his girlfriend since such incident did not automatically translate into an example of untruthfulness. *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998).

In an action against an attorney for breach of contract in his representation of a client, the court properly excluded testimony that the attorney had previously wrongfully refused to return money to a person with whom he had a fiduciary relationship where the attorney's credibility was not at issue and the evidence was proffered only to justify punitive damages. *Potter v. Magee*, 61 Ark. App. 112, 964 S.W.2d 412 (1998).

#### **Extrinsic Evidence.**

Reference to a transcript of a prior proceeding involving the witness for the purpose of impeaching that same witness in the current trial is not the kind of extrinsic evidence prohibited by subsection (b) of this rule. *Dillon v. State*, 311 Ark. 529, 844 S.W.2d 944 (1993).

If a witness denies the facts claimed to show bias, the attacker has a right to prove those facts by extrinsic evidence; stated differently, the witness must first deny the bias before he or she can be impeached by extrinsic evidence. *Williams v. State*, 338 Ark. 178, 992 S.W.2d 89 (1999).

#### **Failure to Object.**

Denial of appellant's, an inmate's, petition for postconviction relief was improper, in part, because the testimony at issue did not conform to the requirements of this rule, and any objection to that testimony would not necessarily have been without merit. The failure to object to the testimony is a matter to be considered upon remand. *Montgomery v. State*, 2011 Ark. 462, — S.W.3d —, 2011 Ark. LEXIS 549 (Nov. 3, 2011).

#### **Impeachment by Contradiction.**

Subsection (b) of this rule has no application to the issue of impeachment by contradiction, but Rule 403, which permits the court to exclude relevant evidence if its probative value is substantially out-weighted by the danger of unfair prejudice, is applicable. However, the Rule 403 issue must be specifically brought to the attention of the trial court. *Shaver v. State*, 37 Ark. App. 124, 826 S.W.2d 300 (1992).

The Rules of Evidence, and in particular subsection (b) of this rule, have no application to the issue of "impeachment by contradiction." *Kellogg v. State*, 37 Ark. App. 162, 827 S.W.2d 166 (1992).

In an action against an attorney for breach of contract in his representation of his client in a divorce matter, the client was properly precluded from presenting evidence about the attorney's dealings with another client, notwithstanding the contention that such evidence constituted impeachment by contradiction, since the credibility of the attorney was not at issue and the client sought to present such evidence solely to justify punitive damages based on more than one instance of the attorney committing a breach of fiduciary duty. *Potter v. Magee*, 61 Ark. App. 112, 964 S.W.2d 412 (1998).

#### **Misconduct.**

Impeachment related to character for truthfulness or untruthfulness is limited to cross-examination of the witness, and no extrinsic evidence of prior misconduct is admissible. *Hamm v. State*, 301 Ark. 154, 782 S.W.2d 577 (1990).

This rule expressly prohibits the introduction of extrinsic evidence to prove misconduct, even if the witness denies the event. *Urquhart v. State*, 30 Ark. App. 63, 782 S.W.2d 591 (1990).

Limitation of cross-examination where defense counsel sought to cross-examine prosecution witness concerning alleged instances of misconduct pursuant to this rule was improper. *Urquhart v. State*, 30 Ark. App. 63, 782 S.W.2d 591 (1990).

Defendant should have been allowed to cross-examine police detective concerning a false police report the detective filed where the intended questioning was being pursued

in good faith and was related to the witness' veracity. *Hill v. State*, 54 Ark. App. 380, 927 S.W.2d 820 (1996).

While an absence of respect for another's person and property is an undesirable trait, a witness' possible participation in a robbery does not directly indicate an impairment of the trait of truthfulness. *Green v. State*, 59 Ark. App. 1, 953 S.W.2d 60 (1997).

#### **Proffer of Evidence.**

Defendant failed to preserve for appellate review his claim that the trial court erred by not allowing him to question an eyewitness about a specific act for the purpose of attacking his credibility under this rule because he did not proffer what the eyewitness's testimony would have been. *Leach v. State*, 2012 Ark. 179, — S.W.3d —, 2012 Ark. LEXIS 200 (Apr. 26, 2012).

#### **Reputation for Truthfulness.**

The impeaching testimony of a witness should have been allowed where his testimony was proffered showing he was familiar with the reputation of the defendants' witnesses' truthfulness in the community in which they lived and it was not good, and the proffer was that plaintiff's witness had an opinion personally as to their truthfulness and he would not rely on their testimony. *Garis v. Massey*, 270 Ark. 646, 606 S.W.2d 109 (1980).

The trial court, in a prosecution for carnal abuse of an 11-year-old, did not err in admitting evidence of the victim's truthful character, or rebuttal evidence, following the defendant's testimony that she was a liar. *Collins v. State*, 11 Ark. App. 282, 669 S.W.2d 505 (1984).

Where whether defendant-physician was telling the truth as to what he saw and what he did during the operation was made an issue by the plaintiffs, the testimony in response as to defendant-physician's reputation for truthfulness was specifically admissible in accordance with subsection (a) of this rule. *Powell v. Burnett*, 304 Ark. 698, 805 S.W.2d 50 (1991).

Whether witness had previously stolen a gun was not probative of his truthfulness; an absence of respect for the property rights of others, though an undesirable trait, does not directly indicate an impairment of the trait of truthfulness. *Watkins v. State*, 320 Ark. 163, 895 S.W.2d 532 (1995).

Trial judge abused her discretion in refusing to permit appellants to cross-examine appellee about appellee's affidavit in a will contest where appellee's claim in the affidavit that the rental value of the decedent's house was \$100 per day could be shown to be false; because false swearing is probative of truth-

fulness, the evidence should have been admitted. *Farr v. Henson*, 79 Ark. App. 114, 84 S.W.3d 871 (2002).

#### **Specific Instances of Conduct.**

The state could not call witnesses to contradict defendant's testimony on cross-examination with reference to a collateral matter by showing specific acts of infidelity. *Chronister v. State*, 265 Ark. 437, 580 S.W.2d 676 (1979).

Where the connection between a fraudulent conveyance and defendant's possible civil liability had a remote bearing upon a witness' credibility, the court should have disallowed cross-examination about the specific act. *Morrison v. Lowe*, 267 Ark. 361, 590 S.W.2d 299 (1979).

Where the defendant in an aggravated robbery prosecution voluntarily testified as to his prior convictions, not for the purpose of showing the jury that he was not credible, but for the purposes of impressing the jury with his honesty and sincerity and of emphasizing the fact that his eligibility for parole would be postponed on account of these convictions, the defendant was not entitled to an instruction that the jury could not "consider any prior trouble in which the defendant may have been involved for any purpose other than in assessing his credibility as a witness" even if that instruction was a correct statement of the law. *Smith v. State*, 268 Ark. 282, 595 S.W.2d 671 (1980).

Where plaintiff filed suit for malicious prosecution after defendant filed suit charging him with theft of property, which suit terminated in his favor, it was proper for plaintiff's attorney on redirect examination to seek to impeach defendant, under this rule and Rule 607, by asking her questions about whether she had previously committed perjury, since the impeachment questions were asked only after defendant's attorney had fully developed all of her testimony offered in defense and after the trial judge had declared the defendant a hostile witness, without objection, for purposes of cross-examination. *Tucker v. Rasdon*, 272 Ark. 63, 612 S.W.2d 106 (1981).

Where defendant was questioned by his own counsel in rape trial as to whether he had ever been in any trouble before as far as being convicted of a felony, the prosecution could not on cross-examination question defendant as to his involvement in a fatal drug overdose of an unnamed woman, whether he had sold drugs and whether he was involved in a fatal automobile accident, since under this rule, these questions had no relevance to defendant's veracity or his character for truthfulness or untruthfulness, and the fact that these questions were left to the jury to consider constituted reversible error, notwithstanding the fact that defendant answered the questions in the negative. *Cameron v. State*, 272 Ark. 282, 613 S.W.2d 593 (1981).



Where in prosecution for rape, prosecutor questioned defendant about "touching" eight-year-old victim earlier in the day on the date of the incident, but there was no prior evidence about such conduct, such questioning was an improper attempt to impeach the witness under Rule 608, since the questions had no relationship to the truthfulness or untruthfulness of his testimony and the probative value of the answers did not outweigh their prejudicial effect, nor did the questions qualify under Rule 404 as tending to show motive, intent, preparation or plan, since there was no prior evidence of the conduct and Rule 404 cannot apply without evidence. *Harper v. State*, 1 Ark. App. 190, 614 S.W.2d 237 (1981).

Where defendant testified that he had done nothing illegal prior to the date in question, it was proper for the prosecution, under subsection (b) of this rule, to ask defendant if he were guilty of possessing marijuana with intent to deliver on a previous date, since specific instances of the conduct of the witness may be inquired into on cross-examination for the purpose of attacking or supporting his credibility, other than conviction of a crime; however, since the defendant did not admit guilt of the crime asked about and since there was no other evidence to show it, subsection (b) of Rule 404 did not apply to this question with respect to the defendant's prior knowledge and involvement with marijuana. *Spicer v. State*, 2 Ark. App. 325, 621 S.W.2d 235 (1981).

This rule limits the inquiry on cross-examination to specific instances of misconduct clearly probative of truthfulness or untruthfulness as distinguished from conduct probative of dishonesty. *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982).

While an absence of respect for the property rights of others is an undesirable trait, it does not directly indicate an impairment of the trait of truthfulness, and cross-examination would not be allowed on specific acts of shoplifting for which there was no conviction. *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982).

Where the state did not prove that the defendant's prior convictions for disorderly conduct, escape and criminal mischief, were for crimes punishable by imprisonment in excess of one year nor that they involved dishonesty or false statement, the trial court erred in allowing the state to use the prior convictions for impeachment purposes in the prosecution of defendant for burglary, aggravated assault, criminal mischief and battery. *Hawksley v. State*, 276 Ark. 504, 637 S.W.2d 573 (1982).

Where on cross-examination of sheriff in a prosecution for illegal manufacture of marijuana, defendant's counsel inquired of the

sheriff as to whether he had substituted marijuana samples resulting in the fact that the marijuana tested by the crime lab was not the marijuana seized in the field and the sheriff responded that he had never substituted evidence in a case, including this case, the defendant was bound by the answers received from the sheriff on cross-examination and could not impeach his testimony by the introduction of contradictory evidence since the questioning concerned collateral matters. *Vanderpool v. State*, 4 Ark. App. 93, 628 S.W.2d 576, rev'd 276 Ark. 220, 633 S.W.2d 374 (1982).

Although the defendant's plea of guilty to forgery charge did not amount to a conviction for impeachment purposes because he was only given a suspended imposition of sentence, the state was not prevented from cross-examining about the act. Specific instances of misconduct which are clearly probative of truthfulness or untruthfulness, as distinguished from dishonesty, may be inquired into on cross-examination of a defendant; most forms of forgery in the second degree are probative of truthfulness or untruthfulness. *David v. State*, 286 Ark. 205, 691 S.W.2d 133 (1985).

Cross-examination about the use of false names or identities is permissible to show a lack of truthfulness. *McKinnon v. State*, 287 Ark. 1, 695 S.W.2d 826 (1985), cert. denied, 501 U.S. 1208, 111 S. Ct. 2805, 115 L. Ed. 2d 978 (1991).

This rule provides that specific instances of misconduct, if probative of truthfulness or untruthfulness, may be inquired into on cross-examination. This has been construed to mean a lack of veracity rather than dishonesty in general. *McKinnon v. State*, 287 Ark. 1, 695 S.W.2d 826 (1985), cert. denied, 501 U.S. 1208, 111 S. Ct. 2805, 115 L. Ed. 2d 978 (1991).

While subsection (b) of this rule prohibits the admission of extrinsic evidence of the misconduct of a witness, and the rule is given a restrictive interpretation, this rule does not apply in a case where the accused has testified that he or she has not engaged in certain misconduct extrinsic to the offense with which the accused is charged. *McFadden v. State*, 290 Ark. 177, 717 S.W.2d 812 (1986).

Where the defendant was charged with rape of his stepdaughter, and on direct examination he testified he had not raped her or any of the other children who had been living with him and their now deceased mother, it was not error to permit the prosecution to present rebuttal testimony from another, younger stepdaughter that she too had been raped by the defendant. *McFadden v. State*, 290 Ark. 177, 717 S.W.2d 812 (1986).

Even if misbehavior is denied by the witness and even if it is probative of truthfulness or untruthfulness, it may not be shown by

extrinsic proof where there has been no criminal conviction for such conduct. *Tubbs v. State*, 19 Ark. App. 306, 720 S.W.2d 331 (1986).

Testimony that witness had said he knew the calf had been stolen when he bought it was not admissible for, although this evidence might tend to show that he was guilty of theft by receiving, it was a matter that could not be even inquired into on cross-examination because it was not probative of truthfulness or untruthfulness as required by subsection (b) of this rule. *Tubbs v. State*, 19 Ark. App. 306, 720 S.W.2d 331 (1986).

Attack on credibility of witness by extrinsic evidence of specific instances of conduct other than conviction of a crime prohibited. *Free v. State*, 293 Ark. 65, 732 S.W.2d 452 (1987).

Evidence regarding embezzlement by witness was not probative of untruthfulness and therefore could not be inquired about on cross examination. *Sitz v. State*, 23 Ark. App. 126, 743 S.W.2d 18 (1988).

An escape is not probative of truthfulness or untruthfulness, and is not admissible under subsection (b) of this rule. *Hamm v. State*, 301 Ark. 154, 782 S.W.2d 577 (1990).

Evidence of witness' abortions excluded where neither the pregnancy nor the abortions were relevant to any issue in the case, because they did not go to the credibility, believability, truthfulness, or veracity of the witness under Evid. Rules 401, 609, or this rule; and, in addition, even if relevant, the prejudicial impact would outweigh any probative value under Evid. Rule 403 because of the controversial nature of abortion. *Billett v. State*, 317 Ark. 346, 877 S.W.2d 913 (1994).

Evidence of a sexual affair between the victim and a witness held inadmissible where defendant failed to show how evidence of the alleged sexual affair would impeach the witness' credibility. *Davlin v. State*, 320 Ark. 624, 899 S.W.2d 451 (1995).

Under Evid. Rule 613, specific incidences of conduct may not be proved by extrinsic evidence. *Lovelady v. State*, 326 Ark. 196, 931 S.W.2d 430 (1996).

Impeachment by conduct under subsection (b) of this rule is a separate matter from impeachment by proof of bias and, therefore, the subsection does not apply to impeachment of a witness on the basis that his beliefs cast doubt on his obligation to tell the truth under oath. *Fowler v. State*, 339 Ark. 207, 5 S.W.3d 10 (1999), cert. denied 529 U.S. 1055, 120 S. Ct. 1558, 146 L. Ed. 2d 462 (2000).

In a criminal trial, defendant was not permitted to cross-examine a state's witness concerning a burglary and theft without evidence of an actual conviction because the allegations were not probative of the witness' truthfulness. *Ellison v. State*, 354 Ark. 340, 123 S.W.3d 874 (2003).

Trial court did not abuse its discretion in excluding a witness under subsection (b) of this rule that defendant wanted to call to demonstrate the victim's brother was a biased witness because the brother neither denied that he was biased nor that he was selling false documents and, as such, there was no basis for challenging the brother's credibility or showing a bias in his version of the events. *Christian Adan Villagran v. State*, 2011 Ark. App. 769, — S.W.3d —, 2011 Ark. App. LEXIS 834 (Dec. 14, 2011).

### **Test of Admissibility.**

The threefold test of admissibility is (1) the question must be asked in good faith, (2) the probative value must outweigh its prejudicial effect, and (3) the prior conduct must relate to the witness' truthfulness. *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983).

Evidence of bias which was not direct evidence, was not allowed as it was extrinsic evidence. *Dansby v. State*, 319 Ark. 506, 893 S.W.2d 331 (1995).

In an action to set aside or reform a warranty deed, the trial court erred under subsection (a) of this rule in admitting character evidence regarding one of the buyers because there was no attack on the character of the buyer; nonetheless, the error was not prejudicial to the sellers. *Stalter v. Gibson*, 2010 Ark. App. 801, — S.W.3d —, 2010 Ark. App. LEXIS 835 (Dec. 1, 2010).

### **Testimony Limited.**

The trial court did not err in limiting the testimony of a witness for the defense which was offered for the purpose of attacking the credibility of the defendant's wife and apparent accomplice, where she was not present at the trial and testimony was proffered during direct testimony. *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983).

### **Victim's Character.**

Although a defendant may impeach his own witnesses, even character witnesses, he cannot make one his witness, after he has cross-examined him, and impeach the witness's adverse testimony by asking about specific instances of conduct except he may inquire about the victim's reputation or traits of character on matters relating solely to violence. *Peals v. State*, 266 Ark. 410, 584 S.W.2d 1 (1979).

Where nothing in the record suggested that a question was not asked in good faith, the probative value of the query was high, given the critical need for the jury to evaluate the credibility of defendant versus that of the victim, no prejudice resulted to defendant because the question elicited nothing about other offenses, and the point of the inquiry on cross-examination was to explore defendant's



propensity for truthfulness, the question was permissible. *Dillon v. State*, 311 Ark. 529, 844 S.W.2d 944 (1993).

In a family doctor's trial on two counts of second-degree sexual abuse, violations of § 5-14-125, there was no prejudice in disallowing evidence of one of the victims' hot-check charges because the evidence was merely speculative without a conviction. *Arendall v. State*, 2010 Ark. App. 358, — S.W.3d —, 2010 Ark. App. LEXIS 381 (Apr. 28, 2010).

**Cited:** *Duncan v. State*, 260 Ark. 491, 541 S.W.2d 926 (1976); *Jones v. Mabry*, 476 F. Supp. 311 (E.D. Ark. 1979), *aff'd* without opinion 620 F.2d 307 (8th Cir. 1980); *Simmons v. McCollum*, 269 Ark. 811, 601 S.W.2d 232 (1980); *James v. State*, 274 Ark. 162, 622 S.W.2d 669 (1981); *Boren v. Qualls*, 284 Ark. 65, 680 S.W.2d 82 (1984); *James v. State*, 11

Ark. App. 1, 665 S.W.2d 883 (1984); *Barnes v. State*, 15 Ark. App. 153, 691 S.W.2d 178 (1985); *Garst v. Cullum*, 291 Ark. 512, 726 S.W.2d 271 (1987); *Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989); *Parette v. State*, 301 Ark. 607, 786 S.W.2d 817 (1990); *Wainwright v. State*, 302 Ark. 371, 790 S.W.2d 420 (1990), *cert. denied* 499 U.S. 913, 111 S. Ct. 1123, 113 L. Ed 2d 231 (1991); *Richmond v. State*, 302 Ark. 498, 791 S.W.2d 691 (1990); *Easter v. State*, 306 Ark. 615, 816 S.W.2d 602 (1991); *Hill v. State*, 33 Ark. App. 135, 803 S.W.2d 935 (1991); *Smallwood v. State*, 326 Ark. 813, 935 S.W.2d 530 (1996); *White v. State*, 330 Ark. 813, 958 S.W.2d 519 (1997); *Lee v. State*, 340 Ark. 504, 11 S.W.3d 553 (2000); *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006).

## Rule 609. Impeachment by evidence of conviction of crime.

(a) *General Rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one [1] year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) *Time Limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten [10] years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

(c) *Effect of Pardon, Annulment, or Certificate of Rehabilitation.* Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one [1] year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile Adjudications.* Evidence of juvenile adjudications is generally not admissible under this rule. Except as otherwise provided by statute, however, the court may in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of Appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

## RESEARCH REFERENCES

**Ark. L. Notes.** Guzman, Impeaching the Credibility of a Witness: Issues, Rules, and Suggestions, 1994 Ark. L. Notes 29.

**Ark. L. Rev.** Gitchel, Charting a Course Through Character Evidence, 41 Ark. L. Rev. 585.

**U. Ark. Little Rock L.J.** Survey of Arkansas Law, Evidence, 1 U. Ark. Little Rock L.J. 191.

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Note — Evidence — Incidents of Shoplifting

Not Probative of Truthfulness under Rule 608(b), 6 U. Ark. Little Rock L.J. 321.

**U. Ark. Little Rock L. Rev.** Annual Survey of Caselaw, Evidence, 25 U. Ark. Little Rock L. Rev. 981.

## CASE NOTES

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### In General.

The probative value must be weighed against the prejudicial effect on a case by case basis when evidence of prior convictions is admitted. *Floyd v. State*, 278 Ark. 342, 645 S.W.2d 690 (1983).

This rule makes no distinction between impeachment of character and contradiction of testimony. *Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985), cert. denied 475 U.S. 1036, 106 S. Ct. 1245, 89 L. Ed 2d 354 (1986).

Subsection (a) of this rule protects an accused person from cross-examination with respect to minor crimes. *Reel v. State*, 288 Ark. 189, 702 S.W.2d 809 (1986).

Neither this rule, Evid. Rules 608, 613, nor 806 permit impeachment by extrinsic evidence on a collateral matter. *Teas v. State*, 23 Ark. App. 154, 744 S.W.2d 739 (1988).

This rule concerns itself with the credibility of a witness who is offering testimony in the current case, and that admissibility must be decided on a case-by-case basis. *Thomas v. State*, 315 Ark. 518, 868 S.W.2d 85 (1994).

### Construction.

The state has a right to impeach the credibility of a witness with prior convictions under this rule; there is no justification for the dichotomy of permitting the state to introduce convictions for the rape of a child as probative evidence in its case-in-chief under the aegis of

Evid. Rule 404(b), but to disallow the usage of these crimes for credibility purposes under this rule. *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996).

### Applicability.

Subsection (a) of this rule did not apply where the reference to the prior conviction mentioned in cross-examination of a character witness was not made in an attempt to impeach either the testimony of the defendant or that of the witness on the stand. *Reel v. State*, 288 Ark. 189, 702 S.W.2d 809 (1986).

Subsection (d) of this rule precluding use of a juvenile adjudication to attack the credibility of a witness applies only when the witness is being examined about his or her own prior convictions rather than those of the accused. *Wilburn v. State*, 289 Ark. 224, 711 S.W.2d 760 (1986).

This rule applies only when one is attempting to show that the witness himself has been convicted of a crime. *Barker v. State*, 21 Ark. App. 56, 728 S.W.2d 204 (1987).

Evidence of witness' abortions excluded as not admissible under Evid. Rules 401, 608, and this rule. *Billett v. State*, 317 Ark. 346, 877 S.W.2d 913 (1994).

In a family doctor's trial on two counts of second-degree sexual abuse, violations of § 5-14-125, there was no prejudice in disallowing evidence of one of the victims' hot-check charges because the evidence was merely speculative without a conviction. *Arendall v. State*, 2010 Ark. App. 358, — S.W.3d —, 2010 Ark. App. LEXIS 381 (Apr. 28, 2010).

### Credibility of Witness.

When a defendant in a criminal case takes the witness stand in his own behalf, his credibility becomes an issue and the State may, under certain circumstances, test that credibility by asking the defendant if he has been convicted of certain crimes or if he is guilty of certain misconduct. *Gustafson v. State*, 267 Ark. 278, 590 S.W.2d 853 (1979), criticized *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982), questioned *Sitz v. State*, 23 Ark. App. 126, 743 S.W.2d 18 (1988).

Where a defendant in a criminal case testifies in his own behalf, his credibility is placed in issue, and the state may impeach his testimony by proof of prior felony convictions. Therefore, where the trial court in a murder prosecution determined that the probative



value of the defendant's prior conviction for murder outweighed its prejudicial effect, the trial court did not abuse its discretion in admitting the prior felony conviction for purposes of impeaching the defendant's credibility. *Washington v. State*, 6 Ark. App. 85, 638 S.W.2d 690 (1982).

Evidence of prior criminal convictions is not admissible to bolster the prosecution's case by showing that the accused is a bad person but is limited for the purpose of discrediting the witness's testimony. *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, cert. denied 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983).

The purpose of subsection (a) of this rule is to allow the witness's credibility to be impeached; the rule does not permit proof of an earlier crime merely to bolster the prosecution's case by showing that the accused is of bad character and likely to commit other crimes. *McDaniel v. State*, 282 Ark. 170, 666 S.W.2d 400 (1984); *Smith v. State*, 283 Ark. 264, 675 S.W.2d 627 (1984).

The state has the right to impeach a witness's credibility with prior convictions. Such questions would not shift the burden of proof; the questions are used to impeach credibility, not to prove the existence of prior convictions. *Robinson v. State*, 295 Ark. 693, 751 S.W.2d 335 (1988).

This rule concerns itself with the credibility of a witness who is offering testimony in the current case, and admissibility must be decided on a case-by-case basis. *Pollard v. State*, 296 Ark. 299, 756 S.W.2d 455 (1988).

Prior convictions for burglary and theft of property could be used to impeach defendant in a murder trial when his credibility was at issue. *Coleman v. State*, 315 Ark. 610, 869 S.W.2d 713 (1994).

Where defendant in an attempted rape case denied his participation in the crime altogether, his credibility was a central issue in the case, and thus his prior convictions for sexual offenses were extremely probative and admissible for impeachment purposes. *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996).

Admission of evidence of defendant's almost ten-year-old manslaughter conviction in his murder trial was not error given the assumption of subdivision (a)(1) of this rule that one who commits a serious offense is less worthy of belief. Defendant's credibility was a central issue in the case after he testified that he shot the victim in self-defense. *Lovett v. State*, 2011 Ark. App. 275, — S.W.3d —, 2011 Ark. App. LEXIS 303 (Apr. 13, 2011).

#### **Direct Testimony.**

Where defendant's counsel alluded to his prior convictions in his opening statement and the defendant testified to his various criminal involvements during direct examination, it would be a vain and useless act for the trial court to weigh the probative value of

admitting this evidence on cross-examination. *Williams v. State*, 304 Ark. 218, 800 S.W.2d 713 (1990).

#### **Discretion of Court.**

The trial court has considerable discretion in determining whether the probative value of a prior conviction outweighs its prejudicial effect and will not be reversed absent an abuse of discretion. *Jones v. State*, 15 Ark. App. 283, 692 S.W.2d 775 (1985); *Pollard v. State*, 296 Ark. 299, 756 S.W.2d 455 (1988); *Tackett v. State*, 298 Ark. 20, 766 S.W.2d 410 (1989), overruled in part *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002); *Griffin v. State*, 307 Ark. 537, 823 S.W.2d 446 (1992).

Trial court has discretion in determining the admissibility of prior convictions for impeachment purposes; this rule places no limit on the number of convictions used. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

#### **Dishonesty or False Statement.**

Offenses involving dishonesty are admissible under subdivision (a)(2) of this rule regardless of whether they are felonies or misdemeanors; felony convictions may be admissible under subdivision (a)(1) of this rule regardless of their logical relation to dishonesty. *Sims v. State*, 27 Ark. App. 46, 766 S.W.2d 20 (1989).

Where there was no offer of proof as to the factual circumstances involved in the victim's conviction for hindering apprehension, the court was unable to determine whether the conviction should have been admissible as one involving dishonesty or false statements. *West v. State*, 27 Ark. App. 49, 766 S.W.2d 22 (1989).

Assaulting a police officer involves neither dishonesty nor false statement; therefore it is not useable for impeachment. *Razorback Cab of Ft. Smith, Inc. v. Lingo*, 304 Ark. 323, 802 S.W.2d 444 (1991).

Check-kiting is a crime involving dishonesty for purposes of subsection (a) of this rule. *Wal-Mart Stores v. Regions Bank Trust Dep't*, 347 Ark. 826, 69 S.W.3d 20 (2002).

Admission of evidence of prior convictions involving dishonesty and false statements is not a matter within the discretion of the court; such evidence is always admissible for impeachment and its exclusion is an abuse of discretion. *Wal-Mart Stores v. Regions Bank Trust Dep't*, 347 Ark. 826, 69 S.W.3d 20 (2002).

#### **Duty of Trial Court.**

Once defense counsel raises the issue of whether the defendant's prior convictions should be excluded from trial, the trial judge has the duty to see that he is informed of the relevant considerations before admitting the evidence. *Hawksley v. State*, 276 Ark. 504, 637 S.W.2d 573 (1982).

**Expunged Conviction.**

Subsection (c) of this rule requires the court to refuse to allow a conviction which has been expunged to be used for testing the credibility of a witness. *Steele v. State*, 280 Ark. 51, 655 S.W.2d 381 (1983).

The trial court correctly ruled that the expungement of the prior proceedings involving witness, whether it was a conviction or not, rendered such record inadmissible and defendant was properly precluded from cross-examining the witness as to such prior record. *Steele v. State*, 280 Ark. 51, 655 S.W.2d 381 (1983).

Trial court abused its discretion in excluding evidence of plaintiff's expunged check-kiting conviction as the court did not find that she had been rehabilitated and check-kiting was a crime involving dishonesty and was admissible to impeach her. *Wal-Mart Stores v. Regions Bank Trust Dep't*, 347 Ark. 826, 69 S.W.3d 20 (2002).

**Extent of Cross-Examination.**

When an accused, or a witness, takes the stand he may be asked on cross-examination how many times he has been convicted, within the applicable restrictions set forth under this rule; however, to allow the state to go into the details of such convictions would be to defeat both the purpose and plain wording of this rule. *Floyd v. State*, 278 Ark. 342, 645 S.W.2d 690 (1983).

Where defendant took the stand and admitted he had been convicted of a felony, he could not then insist that he had been impeached and that no further questioning as to the number of prior convictions was permissible; to allow either party to head off the testimony of the other in such a manner would not be in keeping with the standard of fairness with which a trial should be conducted. *Floyd v. State*, 278 Ark. 342, 645 S.W.2d 690 (1983).

Prior convictions of similar crimes were admissible for impeachment purposes under subsection (a) of this rule. *Schalski v. State*, 322 Ark. 63, 907 S.W.2d 693 (1995).

For prior convictions involving crimes of dishonesty, the trial court need not weigh the prejudicial effect against the probative value. *Schalski v. State*, 322 Ark. 63, 907 S.W.2d 693 (1995).

During defendant's trial for the murder of defendant's stepfather, the court did not err under subsection (a) of this rule in permitting the prosecutor to inquire into the nature of defendant's prior felony convictions, which were for violent crimes and involved family members as the targets of the violence; the prosecutor's cross-examination was limited to determining the type of crime, whether a weapon was used, and defendant's relationship to the victim. *Ellis v. State*, 2012 Ark. 65, — S.W.3d —, 2012 Ark. LEXIS 84 (Feb. 16, 2012).

**Factors Governing Admissibility.**

Some of the factors which should be considered by the trial court in determining extent to which state may impeach defendant's credibility by proof of prior convictions are the impeachment value of the prior crime, the date of the conviction and the witness's subsequent history, the similarity between the prior conviction and the crime charged, the importance of the defendant's testimony and the centrality of the credibility issue. *Bell v. State*, 6 Ark. App. 388, 644 S.W.2d 601 (1982), criticized *Lincoln v. State*, 670 S.W.2d 819 (1984); *Golston v. State*, 26 Ark. App. 176, 762 S.W.2d 398 (1988); *Sims v. State*, 27 Ark. App. 46, 766 S.W.2d 20 (1989).

**Good Faith Inquiry.**

It was proper under this rule for the prosecutor in a first-degree battery prosecution to introduce defendant's prior convictions and then ask defendant whether he had any other convictions, since the prosecutor was acting in good faith, based upon information which he had from another county prosecutor's office that defendant may have been convicted for other violations under an alias. *Cook v. State*, 2 Ark. App. 278, 621 S.W.2d 224 (1981).

**Identification of Underlying Felony.**

The bare fact of a conviction of a felony does not preclude the cross-examiner from identifying that felony and others underlying the previous convictions; to the contrary, this rule, by requiring that probative value be weighed against prejudice and by admitting all convictions involving dishonesty, undeniably contemplates that the jury will know just what crimes the witness has been convicted of. *Simmons v. State*, 278 Ark. 305, 645 S.W.2d 680, cert. denied 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983).

**Limiting Instruction.**

Where the defendant in an aggravated robbery prosecution voluntarily testified as to his prior convictions, not for the purpose of showing the jury that he was not credible, but for the purposes of impressing the jury with his honesty and sincerity and of emphasizing the fact that his eligibility for parole would be postponed on account of these convictions, the defendant was not entitled to an instruction that the jury could not "consider any prior trouble in which the defendant may have been involved for any purpose other than in assessing his credibility as a witness" even if that instruction was a correct statement of the law. *Smith v. State*, 268 Ark. 282, 595 S.W.2d 671 (1980).

**Multiple Prior Convictions.**

This rule contains limitations as to the time and nature of the convictions used for impeachment and as to their comparative probative value, but none as to their number; if



proof that a witness has been convicted of murder or theft or perjury is admissible to impeach his veracity, as it usually is, then proof that he has committed such offenses time and time again may fairly be considered by the jury as further impairing his credibility. *Simmons v. State*, 278 Ark. 305, 645 S.W.2d 680, cert. denied 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983).

#### **Preservation of Issue for Review.**

To preserve for review the issue of admissibility of prior convictions for impeachment purposes, a defendant must at least, by a statement of his attorney, establish on the record that he will in fact take the stand and testify if his challenged prior convictions are excluded and sufficiently outline the nature of his testimony so that the trial court, and the reviewing court, can do the necessary balancing contemplated in this rule. If a defendant prefers not to outline his expected testimony at a pretrial hearing held before the prosecution's witnesses have testified, the trial judge may postpone a ruling upon the motion in limine until the State has rested and the time has come for the defendant to reach his final decision about testifying. *Simmons v. State*, 278 Ark. 305, 645 S.W.2d 680, cert. denied 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983).

A defendant must testify in order to raise and preserve for review the claim of improper impeachment with a prior conviction. *Smith v. State*, 300 Ark. 330, 778 S.W.2d 947 (1989).

#### **Previous Misconduct.**

While an absence of respect for the property rights of others is an undesirable trait, it does not directly indicate an impairment of the trait of truthfulness, and cross-examination would not be allowed on specific acts of shoplifting for which there was no conviction. *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982).

Although the defendant's plea of guilty to forgery charge did not amount to a conviction for impeachment purposes because he was only given a suspended imposition of sentence, the state was not prevented from cross-examining about the act. Specific instances of misconduct which are clearly probative of truthfulness or untruthfulness, as distinguished from dishonesty, may be inquired into on cross-examination of a defendant; most forms of forgery in the second degree are probative of truthfulness or untruthfulness. *David v. State*, 286 Ark. 205, 691 S.W.2d 133 (1985).

In a criminal trial, defendant was not permitted to cross-examine a state's witness concerning a burglary and theft without evidence of an actual conviction because the allega-

tions were not probative of the witness' truthfulness. *Ellison v. State*, 354 Ark. 340, 123 S.W.3d 874 (2003).

#### **Prior Convictions.**

There was no requirement under this rule that the trial court weigh and consider the prejudicial effect that prior convictions would have against their probative value in impeaching the defendant, since such consideration is only required when a prior conviction is admissible because of the seriousness of the offense, and the offense does not involve dishonesty. *James v. State*, 274 Ark. 162, 622 S.W.2d 669 (1981).

Where the state did not prove that the defendant's prior convictions were for crimes punishable by imprisonment in excess of one year or that they involved dishonesty or false statement, the trial court erred in allowing the state to use the prior convictions for impeachment purposes. *Hawksley v. State*, 276 Ark. 504, 637 S.W.2d 573 (1982).

Prior forgery convictions were admissible for impeachment purposes since they involved dishonesty or false statement, despite the fact that almost ten years had elapsed since the convictions. *Cooley v. State*, 4 Ark. App. 238, 629 S.W.2d 311 (1982).

The trial court erred when it permitted the prosecuting attorney to inquire of the defendant if he had previously entered guilty pleas on two felony charges pending against him in another county, as this rule permits the impeachment of a witness' credibility by introducing evidence proving the conviction of certain crimes, not evidence of guilt. *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982).

Where, if defendant had testified, his testimony would have been in direct conflict to the testimony of the state's principal witness, and defendant failed to show that any unfair prejudice would result from the state introducing prior felony conviction, there was no abuse of discretion in the trial court's decision to allow the state to impeach appellant's credibility by naming previous felony convictions. *Bell v. State*, 6 Ark. App. 388, 644 S.W.2d 601 (1982), criticized *Lincoln v. State*, 670 S.W.2d 819 (1984).

Trial court in rape prosecution did not err in denying defendant's motion in limine wherein he asked the court to order the state not to use evidence of his prior rape or sexual abuse conviction to impeach his credibility as a witness. *Williams v. State*, 6 Ark. App. 410, 644 S.W.2d 608 (1982), criticized *Lincoln v. State*, 670 S.W.2d 819 (1984).

Trial judge did not abuse his discretion in concluding that a prior conviction for kidnapping would be admissible if defendant elected to testify in prosecution for capital murder, in connection with kidnapping, rape and robbery. *Simmons v. State*, 278 Ark. 305, 645

S.W.2d 680, cert. denied 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983).

The trial court in a prosecution of defendant for theft by receiving and for being a habitual criminal did not err in allowing the State, during the guilt stage of the bifurcated trial, to question the appellant on cross-examination about the extent of his previous felony convictions. *Tatum v. State*, 9 Ark. App. 286, 658 S.W.2d 432 (1983).

The trial court has a great deal of discretion in determining whether the probative value of the evidence of a prior felony conviction outweighs its prejudicial effect, and the decision of the trial court should not be reversed absent an abuse of that discretion; this weighing process must be decided on a case-by-case basis. *Lincoln v. State*, 12 Ark. App. 46, 670 S.W.2d 819 (1984).

In a prosecution for possession with intent to deliver a controlled substance and criminal use of a prohibited weapon, trial court did not abuse its discretion in ruling on defendant's motion in limine, permitting evidence on cross-examination of defendant's prior drug-related convictions for impeachment purposes, in spite of defendant's contention that potential prejudice greatly outweighed any probative value and that such ruling forced him to give up his right to testify. *Beck v. State*, 12 Ark. App. 341, 676 S.W.2d 740 (1984).

A plea of guilty, coupled with a fine and a suspension of imposition of sentence, constitutes a conviction for purposes of impeaching a defendant's testimony. *David v. State*, 286 Ark. 205, 691 S.W.2d 133 (1985).

Subsection (a) of this rule provides that a witness's credibility can be attacked by proving certain prior convictions, and if the prior convictions involve false statement or dishonesty, the trial court does not determine whether the prejudicial effect of the prior convictions outweighs their probative value. Forgery is a crime involving dishonesty; thus, the trial court in a murder prosecution properly ruled that the state would be allowed to attack the credibility of the defendant on cross-examination by asking if he had been previously convicted of the crime of forgery. *David v. State*, 286 Ark. 205, 691 S.W.2d 133 (1985).

Where the defendant pleaded guilty and received a suspended sentence 14 years earlier than the trial date, it was error for the trial court to allow the cross-examination about his previous conviction for impeachment purposes. *Smith v. State*, 19 Ark. App. 188, 718 S.W.2d 475 (1986), questioned *Bullcock v. State*, 353 Ark. 577, 111 S.W.3d 380 (2003). But see *Brown v. State*, 63 Ark. App. 38, 972 S.W.2d 956 (1998).

Prosecution is limited to proof of one prior felony conviction in its case in chief where a

felony conviction is an element of the offense, the proceedings are bifurcated, and the validity of the conviction is not in dispute. *Tatum v. State*, 21 Ark. App. 237, 731 S.W.2d 227 (1987).

Evidence of prior convictions of defendant was admissible for purpose of attacking credibility. *Williams v. State*, 22 Ark. App. 253, 739 S.W.2d 174 (1987).

This rule does not prevent the introduction of felony convictions more than 10 years old to show a propensity to violence in the penalty phase of a capital murder trial. *Whitmore v. State*, 296 Ark. 308, 756 S.W.2d 890 (1988).

Prior conviction properly admitted. *Golston v. State*, 26 Ark. App. 176, 762 S.W.2d 398 (1988).

Where the offenses were dissimilar, the prior conviction was recent, and the credibility issue was central, it could not be said that the trial court abused its discretion in admitting evidence of a prior conviction. *Sims v. State*, 27 Ark. App. 46, 766 S.W.2d 20 (1989).

Any prejudice to defendant was rendered harmless where a curative instruction was given concerning evidence on prior convictions, the defendant voluntarily took the stand where his prior conviction was brought out on cross-examination, and no further objection was made by the defense counsel that the defendant was in any way compelled to testify by introduction of the prior conviction. *Ferrell v. State*, 305 Ark. 511, 810 S.W.2d 29 (1991).

The trial court was not in error in waiting to rule on defendant's motion to exclude evidence of prior convictions until he had testified. *Richardson v. State*, 33 Ark. App. 128, 803 S.W.2d 557 (1991).

The trial court did not abuse its discretion in admitting the evidence of the defendant's previous conviction where: (1) while it was shown the prior conviction was for statutory rape, it was not shown that it involved a sibling of the victim in the case, (2) the jury was instructed that a prior conviction could only be used for the purpose of judging credibility and not as evidence of guilt, (3) the importance of defendant's credibility in the case where there were only two witnesses who knew what happened, and (4) the defendant's testimony that he had been alone in the house with the victim on many other occasions, from which the jury might infer that "nothing ever happened before." *Richardson v. State*, 33 Ark. App. 128, 803 S.W.2d 557 (1991).

Trial court did not abuse its discretion by allowing defendant's prior convictions of kidnapping, theft, and burglary to be used for impeachment purposes in his trial for rape and burglary. *Griffin v. State*, 307 Ark. 537, 823 S.W.2d 446 (1992).

When a defendant chooses to testify, prior convictions may be used for impeachment,



even when the convictions are of crimes the same as or similar to those charged. *Donald v. State*, 310 Ark. 197, 833 S.W.2d 770 (1992).

Where a prior conviction was in 1971, but the release date was 1983, use of the conviction in a 1992 trial was within the ten-year limit of this rule. *Thomas v. State*, 315 Ark. 518, 868 S.W.2d 85 (1994).

The impeachment value of evidence of a prior cocaine conviction outweighed its prejudicial effect in defendant's first-degree murder trial. *Hubbard v. State*, 328 Ark. 658, 946 S.W.2d 663 (1997).

In the defendant's prosecution for murder, the court properly excluded evidence of the victim's prior felony conviction for driving under the influence of alcohol since the conviction occurred more than 10 years before the trial in the case. *Hodge v. State*, 332 Ark. 377, 965 S.W.2d 766 (1998).

Defendant's past convictions for rape, kidnapping and aggravated robbery were punishable by more than one year in prison and, thus, subject to the impeachment purposes of this rule; in denying defendant's motion in limine, the trial court properly weighed the probative value of defendant's prior convictions against any possible prejudice and concluded that, should he take the stand, his prior convictions could be used against him for impeachment purposes. *Benson v. State*, 357 Ark. 43, 160 S.W.3d 341 (2004).

Codefendant's 2002 misdemeanor conviction for domestic battery could be used to impeach codefendant's character, but was inadmissible to prove a similar act. *Price v. State*, 365 Ark. 25, 223 S.W.3d 817 (2006).

Defendant's convictions for possession of drug paraphernalia with intent to manufacture methamphetamine and possession of pseudoephedrine were upheld where the trial court properly admitted evidence of his prior marijuana conviction for impeachment purposes; defendant attempted to establish that he had been clean since his 1988 convictions, but the state was permitted to impeach him with evidence of the marijuana charge, which was punishable by more than one year imprisonment and which occurred less than 10 years ago. *Nelson v. State*, 365 Ark. 314, 229 S.W.3d 35 (2006), appeal dismissed — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 494 (Sept. 27, 2007).

Trial court did not abuse its discretion by allowing company's attorney to question plaintiff owner about the extent of his felony conviction where the owner had already admitted that he was a convicted felon. *Swink v. Lasiter Constr., Inc.*, 94 Ark. App. 262, 229 S.W.3d 553 (2006).

In defendant's rape case, the court properly admitted evidence of defendant's prior felony-theft conviction because the defense was a general denial, which made his credibility a

central issue, the conviction fell within the ten-year time limitation, and the prior crime and the crime charged were dissimilar. *Strong v. State*, 372 Ark. 404, 277 S.W.3d 159 (2008).

In defendant's capital murder trial arising out of the beating death of the two-year-old child of defendant's girlfriend, the trial court did not abuse its discretion in admitting evidence of defendant's prior felony conviction for aggravated assault because felony convictions where punishment was imprisonment for more than one year or death were admissible to impeach credibility. It was only where the punishment was less than one year that the conviction would be inadmissible unless it involved dishonesty or false statements. *Smith v. State*, 2009 Ark. 453, 343 S.W.3d 319 (2009).

Defendant's convictions for two counts of delivery of cocaine and one count of delivery of a narcotic drug were proper because the trial court did not abuse its discretion in failing to grant a mistrial, nor was there manifest prejudice to defendant. The state had a right to impeach the credibility of a witness with prior convictions under this rule and the trial court did not permit the State to inquire about the underlying facts of those convictions. *Porter v. State*, 2011 Ark. App. 545, — S.W.3d —, 2011 Ark. App. LEXIS 591 (Sept. 21, 2011).

Witness's juvenile-delinquency adjudication was admissible because a direct link of the witness to the victim's murder was established by the witness's testimony that he was present at the scene of the murder when it occurred, and the witness was one of only two eyewitnesses who testified against appellee. *State v. Harrison*, 2012 Ark. 198, — S.W.3d —, 2012 Ark. LEXIS 231 (May 10, 2012).

### **Reputation for Truthfulness.**

The impeaching testimony of a witness should have been allowed where his testimony was proffered showing he was familiar with the reputation of the defendants' witnesses' truthfulness in the community in which they lived and it was not good, and the proffer was that plaintiff's witness had an opinion personally as to their truthfulness and he would not rely on their testimony. *Garis v. Massey*, 270 Ark. 646, 606 S.W.2d 109 (1980).

### **Scope of Cross-Examination.**

The proper scope of cross-examination pursuant to this rule is made on a case by case basis. *Pruett v. State*, 282 Ark. 304, 669 S.W.2d 186, cert. denied 469 U.S. 963, 105 S.Ct. 362, 83 L. Ed. 2d 298 (1984).

The rule applies only when one is attempting to show that a witness herself has been convicted of a crime and, therefore, did not apply to a trial court ruling which permitted the State to question a defense character witness regarding her knowledge of a prior

conviction of the defendant for which she was incarcerated more than 10 years earlier. *Smith v. State*, 334 Ark. 190, 974 S.W.2d 427 (1998).

#### **Waiver.**

The court in capital murder case did not abuse its discretion in allowing prior robbery conviction to be used for impeachment purposes where the defendant himself repeatedly mentioned his prior conviction during the course of the trial; this would constitute a waiver under the circumstances. *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, cert. denied 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983).

**Cited:** *Duncan v. State*, 260 Ark. 491, 541 S.W.2d 926 (1976); *Arkansas State Hwy. Comm'n v. Cutrell*, 263 Ark. 239, 564 S.W.2d 213 (1978); *Jones v. Mabry*, 476 F. Supp. 311 (E.D. Ark. 1979), aff'd without opinion 620 F.2d 307 (8th Cir. 1980); *Spicer v. State*, 2 Ark. App. 325, 621 S.W.2d 235 (1981); *Boren v. Qualls*, 284 Ark. 65, 680 S.W.2d 82 (1984); *Coston v. State*, 284 Ark. 144, 680 S.W.2d 107 (1984); *Webster v. State*, 284 Ark. 206, 680 S.W.2d 906 (1984); *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987); *Garst v. Cullum*, 291 Ark. 512, 726 S.W.2d 271 (1987); *Houston v. State*, 299 Ark. 7, 771 S.W.2d 16 (1989); *Whitmore v. State*, 299 Ark. 55, 771 S.W.2d 266 (1989); *McDonald v. Wilcox*, 300 Ark. 445, 780 S.W.2d 17 (1989); *Lee v. State*, 27 Ark. App. 198, 770 S.W.2d 148 (1989), cert. denied 493 U.S. 847, 110 S. Ct. 142, 107 L. Ed. 2d 101

(1989); *Johnson v. Lockhart*, 921 F.2d 796 (8th Cir. 1990); *Parette v. State*, 301 Ark. 607, 786 S.W.2d 817 (1990); *George v. State*, 306 Ark. 360, 813 S.W.2d 792, amended 306 Ark. 374A, 818 S.W.2d 951 (1991), questioned *Vann v. State*, 309 Ark. 303, 831 S.W.2d 126 (1992); *Whitmore v. Lockhart*, 834 F. Supp. 1105 (E.D. Ark. 1992), aff'd 8 F.3d 614 (8th Cir. Ark. 1993); *Rudd v. State*, 308 Ark. 401, 825 S.W.2d 565 (1992); *Evans v. State*, 38 Ark. App. 42 (1992); *Edwards v. State*, 315 Ark. 126, 864 S.W.2d 866 (1993); *Jones v. State*, 317 Ark. 587, 880 S.W.2d 522 (1994); *Armstrong v. State*, 45 Ark. App. 72, 871 S.W.2d 420 (1994); *Harris v. State*, 322 Ark. 167, 907 S.W.2d 729 (1995); *Smallwood v. State*, 326 Ark. 813, 935 S.W.2d 530 (1996); *Lanes v. State*, 53 Ark. App. 266, 922 S.W.2d 349 (1996), overruled *Bradford v. State*, 325 Ark. 278, 927 S.W.2d 329 (1996); *Burton v. State*, 327 Ark. 65, 937 S.W.2d 634 (1997); *Clark v. State*, 328 Ark. 501, 944 S.W.2d 533 (1997); *Green v. State*, 330 Ark. 458, 956 S.W.2d 849 (1997); *Green v. State*, 59 Ark. App. 1, 953 S.W.2d 60 (1997); *Harrell v. State*, 331 Ark. 232, 962 S.W.2d 325 (1998); *Medlock v. State*, 332 Ark. 106, 964 S.W.2d 196 (1998); *Garling v. State*, 334 Ark. 368, 975 S.W.2d 435 (1998); *Willis v. State*, 334 Ark. 412, 977 S.W.2d 890 (1998); *West v. State*, 82 Ark. App. 165, 120 S.W.3d 100 (2003); *Nelson v. State*, 92 Ark. App. 275, 212 S.W.3d 31 (2005); *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006); *Delp v. State*, 2011 Ark. App. 108, — S.W.3d —, 2011 Ark. App. LEXIS 106 (Feb. 9, 2011).

### **Rule 610. Religious beliefs or opinions.**

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired [impaired] or enhanced.

**Publisher's Notes.** The bracketed word "impaired" was inserted by the publisher.

#### **CASE NOTES**

##### **In General.**

Asserting the bias of a witness in closing argument is different from asserting a witness's impaired credibility due to religious

beliefs under this rule. *Hill v. State*, 347 Ark. 441, 65 S.W.3d 408 (2002).

**Cited:** *Garst v. Cullum*, 291 Ark. 512, 726 S.W.2d 271 (1987).

### **Rule 611. Mode and order of interrogation and presentation.**

(a) *Control by Court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.



(b) *Scope of Cross-Examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) *Leading Questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. Whenever a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Gitchell, Direct Examination: Some Evidentiary and Practical Considerations, 9 U. Ark. Little Rock L.J. 255.

Survey — Evidence, 10 U. Ark. Little Rock L.J. 199.

## CASE NOTES

### ANALYSIS

Control by court.  
Credibility of expert.  
Discretion of court.  
Expert testimony.  
Harmless error.  
Leading questions.  
Order of interrogation.  
Scope of cross-examination.

### Control by Court.

The trial court's remarks to the plaintiff's attorney did not amount to an unmerited rebuke constituting prejudicial error. *Berry v. St. Paul Fire & Marine Ins. Co.*, 328 Ark. 553, 944 S.W.2d 838 (1997).

In defendant's prosecution under § 5-14-103(a)(3)(A), it was not an abuse of discretion to allow the state to interrupt the victim's testimony when the victim became unresponsive and later recall the victim, or to overrule defendant's request to immediately cross-examine the victim because (1) § 16-43-703 allowed reexamination of witnesses, (2) subdivision (a)(3) of this rule required the court to control the victim's interrogation, (3) subsection (b) of this rule limited the scope of the victim's cross-examination's to the victim's direct examination, and, when the victim was excused, the victim had given no testimony prejudicial to defendant, and (4) the victim's youth and timidity mitigated against finding an abuse of discretion. *Elliott v. State*, 2010 Ark. App. 810, — S.W.3d —, 2010 Ark. App. LEXIS 860 (Dec. 8, 2010).

### Credibility of Expert.

In a condemnation proceeding, an expert witness' knowledge, or lack of knowledge, and his record of accuracy regarding the value of property would go to the credibility to be given to his testimony as an expert witness.

*Arkansas State Hwy. Comm'n v. Pulaski Inv. Co.*, 265 Ark. 584, 580 S.W.2d 679 (1979).

### Discretion of Court.

A trial court may, in the exercise of its discretion, permit inquiry into matters outside the scope of direct examination. *Parker v. State*, 265 Ark. 315, 578 S.W.2d 206 (1979).

Although prosecutor did not address the value of stolen property on direct examination, the trial court did not abuse its discretion under § 16-43-703 and subsection (a) of this rule in allowing reexamination on the point during redirect because the value of the goods was relevant to the state's case. *Moore v. State*, 362 Ark. 70, 207 S.W.3d 493 (2005).

### Expert Testimony.

While the proposed cross-examination on expert's extraordinary findings in other cases might have had the effect of diminishing the expert's credibility, his findings in the prior cases were not consequential to a determination of whether his present theory was to be believed in this trial; for this reason, the trial court could restrict the scope of the cross-examination. *Larimore v. State*, 317 Ark. 111, 877 S.W.2d 570 (1994).

### Harmless Error.

While a trial court erred in refusing to allow appellant to call a witness during a hearing on appellee's petition for an order of protection against appellant, appellant failed to show that he was prejudiced by the trial court's order. *Pablo v. Crowder*, 95 Ark. App. 268, 236 S.W.3d 559 (2006).

### Leading Questions.

In cases involving very young females who are alleged to have been victims of crimes of a sexual nature, the Supreme Court will not disturb the action of the trial judge in permit-

ting leading questions to be asked by the prosecution, if it appeared to him to be necessary to elicit the truth, unless his discretion has been abused; the youth, timidity and ignorance of the witness are important factors militating against the finding of an abuse of discretion. *Hamblin v. State*, 268 Ark. 497, 597 S.W.2d 589 (1980).

It is always in the sound discretion of the trial judge to permit a witness to be asked leading questions on direct examination. *Hamblin v. State*, 268 Ark. 497, 597 S.W.2d 589 (1980).

Where the prosecuting witness in rape prosecution was 11 years of age and was nervous and upset at the intimate nature of the questions, this rule allowed the trial judge some discretion in permitting leading questions under those circumstances. *Scantling v. State*, 271 Ark. 678, 609 S.W.2d 925 (1981).

Where counsel for defendant in personal injury case asked doctor testifying for defense whether the difference between his five percent impairment rating given to plaintiff and the 25 percent to 50 percent impairment rating given by plaintiff's doctor resulted from the different meaning given the word "disability," such question was leading under this rule, and the trial court properly excluded the answer. *Northwestern Nat'l Cas. Co. v. Mays*, 273 Ark. 16, 616 S.W.2d 734 (1981).

A ruling permitting the prosecution to ask leading questions is a matter of state evidentiary law which is committed to the trial court's discretion; accordingly, the validity of such a ruling is reviewable in a federal habeas corpus proceeding only insofar as it results in a trial so fundamentally unfair as to deny the defendant due process. *Wallace v. Lockhart*, 701 F.2d 719 (8th Cir.), cert. denied 464 U.S. 934, 104 S. Ct. 340, 78 L. Ed. 2d 308 (1983).

Where the victim of rape was 87 years of age, and she had some difficulty understanding, and she was reluctant to answer questions on a subject not normally discussed in public, the trial judge did not abuse his discretion in permitting the prosecutor's use of leading questions. *D.D. v. State*, 40 Ark. App. 75, 842 S.W.2d 62 (1992).

The court properly allowed the use of leading questions during the direct examination of the mother of the victim and the defendant, where the court reporter and judge could not hear and understand her testimony. *Chase v. State*, 334 Ark. 274, 973 S.W.2d 791 (1998).

In the prosecution of the defendant for the murder of his brother, it was not error for the court to allow the prosecutor to use leading questions while examining the defendant's and his brother's mother where the use of leading questions was allowed because the court reporter and judge had difficulty hearing the mother's testimony and the jury could

otherwise have been confused or misled. *Chase v. State*, 334 Ark. 274, 973 S.W.2d 791 (1998).

Trial court did not err in allowing certain questions; although the trial court warned the prosecutor that the questions were bordering on leading pursuant to subsection (c) of this rule, the questions objected to were used to clarify or highlight elements of the witness's previous testimony. *Moore v. State*, 362 Ark. 70, 207 S.W.3d 493 (2005).

Trial court did not err in denying appellant's petition for postconviction relief because appellant did not demonstrate that an objection that the prosecution was leading would have had merit. *Bell v. State*, 2010 Ark. 65, 360 S.W.3d 98 (2010).

### Order of Interrogation.

The trial court has considerable discretion in regulating the mode and order of interrogation and presentation of proof, and the trial court in an action arising from an automobile accident did not abuse its discretion when it allowed a police officer, at the defendant's request, to return to the stand and testify after his release from the witness rule and in the interruption of the plaintiff's order of proof, in order to allow the officer to testify as to his considerable qualifications in the area of automobile body repair. *Freeman v. Anderson*, 279 Ark. 282, 651 S.W.2d 450 (1983).

There was no abuse of discretion when the circuit court allowed defendant to recall plaintiff, in personal injury action, for several additional questions on cross-examination while plaintiff was still putting on his case. *Piercy v. Wal-Mart Stores, Inc.*, 311 Ark. 424, 844 S.W.2d 337 (1993).

### Scope of Cross-Examination.

Where, in a prosecution for rape, the defendant produced five character witnesses to prove his reputation for truthfulness, the trial court properly allowed the prosecutor to cross-examine the witnesses by asking whether their opinions as to the defendant's reputation would be altered by knowing of the defendant's prior conviction of sexual abuse, since such conviction had been brought out on direct examination of the defendant by his defense counsel. *Caldwell v. State*, 267 Ark. 1053, 594 S.W.2d 24 (1980).

Once the defendant takes the stand, he has waived his right not to be a witness against himself and is subject to cross-examination; the state can properly cross-examine a defendant on his failure to deny guilt when he has raised the issue on direct. *Hill v. State*, 285 Ark. 77, 685 S.W.2d 495 (1985).

Where, during the cross-examination of the defendant's girlfriend, the defense counsel had elicited an admission from her that she was engaged in a legal battle about the custody of her children and the attorney later



asked whether if the defendant was convicted, it would remove one potential witness that she would have a problem with, the court properly sustained the state's objection on the ground that the question was argumentative, and it contained unwarranted assumptions of fact on the part of the interrogator. *Holland v. State*, 288 Ark. 435, 706 S.W.2d 375 (1986).

The cross-examiner is given wide latitude, particularly in matters relating to the witness's credibility. *Shaver v. State*, 37 Ark. App. 124, 826 S.W.2d 300 (1992).

The trial judge has considerable discretion in determining the scope of cross-examination. *Shaver v. State*, 37 Ark. App. 124, 826 S.W.2d 300 (1992).

The trial court did not err in refusing to allow the condemning authority to impeach the property owners' expert witness on collateral issues that were not testified to on direct examination nor used by the expert in determining the value of the land. *Board of Comm'rs v. Rollins*, 57 Ark. App. 241, 945 S.W.2d 384 (1997).

Trial court did not err by allowing the state

to cross-examine defense's expert witness about whether something other than a learning disability or emotional immaturity, such as drug abuse, could also lead to psychosis because the examination clarified the facts as to what could cause a psychosis. *Holloway v. State*, 363 Ark. 254, 213 S.W.3d 633 (2005).

**Cited:** *Pascall v. Smith*, 263 Ark. 428, 569 S.W.2d 89 (1978); *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980); *Hunter v. McDaniel Constr. Co.*, 274 Ark. 178, 623 S.W.2d 196 (1981); *Simpson v. State*, 278 Ark. 334, 645 S.W.2d 688 (1983); *Linell v. State*, 283 Ark. 162, 671 S.W.2d 741 (1984), cert. denied 470 U.S. 1062, 105 S. Ct. 1778, 84 L. Ed 2d 837 (1985); *Easter v. State*, 306 Ark. 452, 815 S.W.2d 924 (1991); *Epps v. State*, 72 Ark. App. 370, 38 S.W.3d 899 (2001); *Ridling v. State*, 348 Ark. 213, 72 S.W.3d 466 (2002); *Linker-Flores v. Ark. Dep't of Human Servs.*, 364 Ark. 224, 217 S.W.3d 107 (2005); *Hanna v. Hanna*, 2010 Ark. App. 58, — S.W.3d —, 2010 Ark. App. LEXIS 72 (Jan. 20, 2010); *Rice v. Seals*, 2010 Ark. App. 393, — S.W.3d —, 2010 Ark. App. LEXIS 390 (May 5, 2010).

## Rule 612. Writing or object used to refresh memory.

(a) *While Testifying.* If, while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

(b) *Before Testifying.* If, before testifying, a witness uses a writing or object to refresh his memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

(c) *Terms and Conditions of Production and Use.* A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony, the court shall examine the writing or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

## CASE NOTES

## ANALYSIS

Construction.  
Affidavit.  
Discretion of court.  
Hypnosis.  
Photographs.  
Police reports or notes.  
Statement reduced to writing.  
Time line exhibit.

**Construction.**

A witness may occasionally consult a writing to refresh his memory, but this does not mean that one may read from a transcript which is beyond the bounds of refreshing a recollection. *Dillon v. State*, 317 Ark. 384, 877 S.W.2d 915 (1994).

**Affidavit.**

Surgeon did not preserve his argument that this rule precluded the patient's expert from reading his affidavit during his direct examination because the surgeon never objected on the grounds that reading from the affidavit would violate this rule. *McCoy v. Montgomery*, 370 Ark. 333, 259 S.W.3d 430 (2007).

**Discretion of Court.**

Since subsection (b) of this rule provides that an adverse party is entitled to a writing used by a witness to refresh his memory before testifying and for that purpose, if the court in its discretion determines that the interests of justice require that it be produced, this was a matter lying within the sound judicial discretion of the trial judge, and will not be reversed unless there has been an abuse of discretion. *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978).

Although the party offering the witness was willing to provide a copy of those records relied upon to refresh the witness' memory, the judge was within his discretion when he denied the witness the use of the records because the records were requested in discovery, but were not provided to the other party. *Marvel v. Parker*, 317 Ark. 232, 878 S.W.2d 364 (1994).

During defendant's trial for permitting the abuse of her minor child, the court did not abuse its discretion in allowing the use of a transcript of a child witness's former testimony to reflect the child witness's recollection; the 11-year-old child witness had been impeached and was testifying to matters the child witness had testified to some five years previously at the age of six years. *Sullivan v. State*, 2012 Ark. 74, — S.W.3d —, 2012 Ark. LEXIS 93 (Feb. 23, 2012).

**Hypnosis.**

No abuse of discretion found in court's disallowing the use of witness' statements made

under hypnosis to expand her testimony. *Mills v. State*, 322 Ark. 647, 910 S.W.2d 682 (1995).

**Photographs.**

It was not error for a police officer to refer to photographs he had taken of a crime scene, despite the fact that the photographs had previously been held to be inflammatory and inadmissible, since he referred to the photographs to refresh his memory of the scene while testifying at the trial, as permitted by this rule, and the photographs were never viewed by the jury. *Singleton v. State*, 274 Ark. 126, 623 S.W.2d 180 (1981), cert. denied 456 U.S. 938, 102 S. Ct. 1996, 72 L. Ed. 2d 458 (1982), cert. denied 459 U.S. 882, 103 S. Ct. 184, 74 L. Ed. 2d 149 (1982).

**Police Reports or Notes.**

There was no reason to allow the police incident/offense reports into evidence based on this rule, where the officer testified from her own memory and there was no indication from the record that she used these reports to refresh her memory. *Bennett v. State*, 307 Ark. 400, 821 S.W.2d 13 (1991).

Officer, who participated in a drug operation that involved 101 drug dealers and 224 drug purchases, understandably, was unable to remember the details of each purchase without the aid of his notes, and the use of his notes was proper under this rule. *Sweat v. State*, 307 Ark. 406, 820 S.W.2d 459 (1991).

**Statement Reduced to Writing.**

Where the defendant, after being given his Miranda rights, voluntarily gave a statement which the county sheriff reduced to writing, the sheriff could use the writing to refresh his own memory while testifying, despite the fact that the statement had not been signed by the defendant. *Wilson v. State*, 277 Ark. 43, 639 S.W.2d 45 (1982).

A statement made by the defendant to the police was reliably proven, even though the original signed copy of the confession had been destroyed and was therefore not available at the trial, where a copy of the statement was used to refresh the memory of the three officials who were present during the interrogation and all three witnesses testified that they remembered the statement being made by the defendant and recalled in general terms what was said. *Smith v. State*, 286 Ark. 247, 691 S.W.2d 154 (1985).

**Time Line Exhibit.**

A time-line premarked by defense counsel was admissible where it was used as demonstrative evidence, not to shape the witness's testimony. *Berry v. St. Paul Fire & Marine Ins. Co.*, 328 Ark. 553, 944 S.W.2d 838 (1997).



**Cited:** Strain v. State, 2012 Ark. 42, — S.W.3d —, 2012 Ark. LEXIS 58 (Feb. 2, 2012).

**Rule 613. Prior statements of witness.**

(a) *Examining Witness Concerning Prior Statement.* In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) *Extrinsic Evidence of Prior Inconsistent Statement of Witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

**RESEARCH REFERENCES**

**Ark. L. Notes.** Guzman, Impeaching the Credibility of a Witness: Issues, Rules, and Suggestions, 1994 Ark. L. Notes 29.

**Ark. L. Rev.** Case Note, Roberts v. State: A Limitation on the Impeachment of Witnesses by Extrinsic Evidence of Prior Inconsistent Statements, 37 Ark. L. Rev. 688.

**U. Ark. Little Rock L.J.** Impeachment of

One's Own Witness by Prior Inconsistent Statements Under the Federal and Arkansas Rules of Evidence, Perroni, 1 U. Ark. Little Rock L.J. 277.

Sullivan, The Need for a Business or Payroll Records Affidavit for Use in Child Support Matters, 11 U. Ark. Little Rock L.J. 651.

**CASE NOTES**

**ANALYSIS**

- In general.
- Applicability.
- Appellate review.
- Cumulative evidence.
- Evidence of bias.
- Extrinsic evidence.
- Harmless error.
- Impeachment by contradiction.
- Opportunity to deny statement.
- Out-of-court statements.
- Prior inconsistent statements.

**In General.**

Neither Evid. Rules 608, 609, 806, nor this rule permit impeachment by extrinsic evidence on a collateral matter. Teas v. State, 23 Ark. App. 154, 744 S.W.2d 739 (1988).

A prior inconsistent statement cannot be quoted into evidence as part of the impeachment process. Williams v. State, 55 Ark. App. 156, 934 S.W.2d 931 (1996).

**Applicability.**

This rule did not apply to the introduction of the deposition of a psychiatrist who had evaluated a witness and codefendant, where the defendant did not attempt to impeach the codefendant with statements made to the psychiatrist. McArthur v. State, 309 Ark. 196,

830 S.W.2d 842 (1992).

Coconspirator's statements made to police officers and recorded on tape were clearly within the scope of this rule, where they were made during the course of criminal conduct, which occurred within a brief interval in time, and they were designed to further the specific objective of such conduct, i.e., a purchase by police officers of some 15 rocks of crack cocaine and by his statements the coconspirator was both promoting the product of his confederate and abetting a completion of the sale. Dixon v. State, 310 Ark. 460, 839 S.W.2d 173 (1992).

In murder case, trial court did not err in allowing extrinsic evidence to impeach a witness where witness's testimony left doubt as to whether she admitted her earlier statement was a lie. Threadgill v. State, 347 Ark. 986, 69 S.W.3d 423 (2002).

Argument that state's purpose was not to introduce a statement to impeach the child witness pursuant to subsection (b) of this rule, but to introduce the statement as substantive evidence of defendant's guilt, was rejected because there was no evidence that the state knew that, at trial, the child would deny making a statement to the police. Wil-

liams v. State, 2010 Ark. 89, — S.W.3d —, 2010 Ark. LEXIS 117 (Feb. 25, 2010).

### **Appellate Review.**

In order for an appellate court to hold that testimony regarding an inconsistent statement was improperly excluded under this rule, appellant must have made a proffer of the evidence under Evid. Rule 103; where there was no proffer and the substance of the testimony was not apparent, the appellate court had no way of knowing whether the answer would have revealed an inconsistent statement. *Patterson v. State*, 318 Ark. 358, 885 S.W.2d 667 (1994).

Appellant's argument that the trial court erred in prohibiting her from introducing a handwritten letter, purportedly from a witness concerning appellant's husband's shooting death, into evidence for the purpose of impeaching the witness's testimony was rejected as the claim was not preserved for appeal; further, defense counsel never mentioned subsection (b) of this rule when objecting to the trial court's ruling, nor did he claim that the letter should have been admitted to impeach the witness. *Gately v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 737 (Oct. 12, 2005).

### **Cumulative Evidence.**

There was no abuse of discretion in the exclusion of a letter written by the co-defendant to a federal magistrate judge because it was consistent with co-defendant's testimony; since there was nothing in the letter which contradicted anything co-defendant said on the witness stand, the letter would have no impeachment value and would strictly be cumulative. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

### **Evidence of Bias.**

Where the defendant wished to show that an undercover policeman had attempted to recruit him as an informer, promising to get all charges dismissed if he agreed, but vowing to see that he went to prison if he did not, it was reversible error to exclude it, as this testimony had a bearing on possible bias, but it was necessary that the officer first deny his bias. *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978).

### **Extrinsic Evidence.**

Where a witness admits having made a prior inconsistent statement, the court should not allow extrinsic evidence of the prior statement, nor evidence to prove the statement is incorrect. *Rouse v. Goode*, 293 Ark. 272, 737 S.W.2d 447 (1987); *Ford v. State*, 296 Ark. 8, 753 S.W.2d 258 (1988).

Trial court did not err in excluding testimony as further impeachment of the victim's credibility where, for the purpose of eliciting testimony that the events mentioned in the

rape victim's prior statement had never occurred, the defendant attempted to call to the stand a witness alleged to have been mentioned and identified in the prior statement. *Teas v. State*, 23 Ark. App. 154, 744 S.W.2d 739 (1988).

The requirements for admitting extrinsic evidence of a witness's prior inconsistent statements were met where the witness demonstrated an inability to recall the facts or to remember what she had previously said to the police, admitted only that she had given a statement or interview to the police, and attempted to disavow that statement by stating that she told the police what she thought she knew, but that she was not "for sure" about what happened at the time of her prior statement. *Kennedy v. State*, 344 Ark. 433, 42 S.W.3d 407 (2001).

### **Harmless Error.**

Although admission of extrinsic proof of witness's prior inconsistent statement violated subsection (b) of this rule, the error was harmless because the statement's key detail, defendant's threat, was brought before the jury only when the state sought to impeach the witness with her prior statement, and defendant did not object during her testimony or seek a limiting instruction; thus, the statement relating to defendant's alleged threat was put before the jury without objection. Likewise, defendant not object to the state's use of the statement as substantive evidence during closing argument. *White v. State*, 2010 Ark. App. 588, — S.W.3d —, 2010 Ark. App. LEXIS 645 (Sept. 15, 2010).

### **Impeachment by Contradiction.**

State was properly permitted to impeach its own witness under Rule 607 for comparatively minor matter where the prosecution complied with this rule by showing that the witness had made a prior inconsistent statement, even though the state may have waited too long before adducing the impeachment testimony on rebuttal, since that matter rested in the trial court's sound discretion. *Heard v. State*, 272 Ark. 140, 612 S.W.2d 312 (1981).

Where defendant's sister had made detailed statements to sheriff investigating murder case, but acknowledged only the principal one and did not sign any of them, and, further, at trial professed not to remember what she had told the sheriff, the state properly used the statements since they were admissible under this rule to impeach the sister, despite her asserted lack of memory, and such statements were admissible as substantive evidence under subdivision (d)(1) of Rule 801 even though the prior statement was not under oath. *Chisum v. State*, 273 Ark. 1, 616 S.W.2d 728 (1981).

Where the state's witness admitted making



a prior inconsistent statement, the trial judge correctly ruled that the prior statement was admissible solely for impeachment purposes. *Lewis v. State*, 288 Ark. 595, 709 S.W.2d 56 (1986).

Statements are clearly relevant for impeachment purposes where they contradict testimony, and are therefore admissible under this rule. *McDaniel v. State*, 291 Ark. 596, 726 S.W.2d 679 (1987).

Where cross-examination related to alleged statements made by the defendant which would contradict his direct testimony, this was impeachment by contradiction; there is no express provision for it in the Uniform Rules of Evidence, although it is implicitly authorized by this rule. *Shaver v. State*, 37 Ark. App. 124, 826 S.W.2d 300 (1992).

Witness' assertions that she could not recall her unsworn statements to police were sufficiently inconsistent to allow her to be impeached at trial with her prior statement under subsection (b) of this rule. *Roseby v. State*, 329 Ark. 554, 953 S.W.2d 32 (1997), overruled *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998).

#### **Opportunity to Deny Statement.**

Where witness claimed not to recollect defendant's participation in crime, he became unavailable, and thus his prior inconsistent statement was admissible as substantive evidence for the state; nevertheless, the witness was entitled to an opportunity to explain or deny his former statement and it was an abuse of the trial court's discretion to refuse the defendant the right to make a proffer of testimony during the in-chambers hearing. *David v. State*, 269 Ark. 498, 601 S.W.2d 864 (1980).

It was proper for investigator to testify to informant's prior inconsistent statement since the informant was given an opportunity to explain or deny that testimony, and there was a proper foundation to admit the testimony under this rule. *Hackett v. State*, 2 Ark. App. 228, 619 S.W.2d 687 (1981).

#### **Out-of-Court Statements.**

Where trial court allowed sheriff and his secretary to narrate statements made by sister of defendant during his investigation of murder case, and such statements had not been signed by her, but she had acknowledged the principal statement, it was error for the court to admit such evidence as recorded recollections under Rule 803 since her statements were not within the rule as reviving present recollection through a contemporaneously made memorandum; however, since the statements could be used to impeach inconsistent out-of-court statements made by the defendant's sister under this rule, where the state impeaches its own witness under Rule 607, the ruling of the trial judge was correct

for the wrong reasons and thus was not reversed. *Chisum v. State*, 273 Ark. 1, 616 S.W.2d 728 (1981).

Although the witness's statement in question was signed, it was not given under oath and subject to the penalty of perjury, therefore, it was hearsay and inadmissible as substantive evidence. *Harris v. State*, 36 Ark. App. 120, 819 S.W.2d 30 (1991).

Unsworn prior statements made by a witness cannot be introduced as substantive evidence in a criminal case to prove the truth of the matter asserted therein. *Lewis v. State*, 41 Ark. App. 89, 848 S.W.2d 955 (1993).

The trial court acted correctly, where it did not rule that defense counsel could not ask the witness whether she had made the statement that was attributed to her by the police report, but simply would not allow counsel to reveal what the report stated the witness had said until after she had been asked whether she had made that statement. *Lewis v. State*, 41 Ark. App. 89, 848 S.W.2d 955 (1993).

#### **Prior Inconsistent Statements.**

Where there was nothing in the record to indicate that one witness ever made a remark either in accordance with, or in opposition to, the statement testified to by a second witness, no "prior inconsistent statement" was at issue. *National Bank of Commerce v. Beavers*, 304 Ark. 81, 802 S.W.2d 132 (1990).

Admissibility is not limited to the admission of prior inconsistent statements in which diametrically opposite assertions have been made, instead, a witness' prior statement is admissible whenever a reasonable man could infer on comparing the whole effect of the two statements that they have been produced by inconsistent beliefs. *Truck Ctr. of Tulsa, Inc. v. Autrey*, 310 Ark. 260, 836 S.W.2d 359 (1992).

If the defendant seeks to impeach the prosecuting witness with the latter's complaint filed in a civil action, the complaint qualifies as a prior inconsistent statement under this rule. *Jernigan v. State*, 38 Ark. App. 102, 828 S.W.2d 864 (1992).

In prosecution for rape, the victim's prior inconsistent statements were not admissible for purposes of impeachment since the victim admitted making them, and the statements were not admissible as substantive evidence because they had not been made under oath. *Hinzman v. State*, 53 Ark. App. 256, 922 S.W.2d 725 (1996).

The rule permits extrinsic evidence of prior inconsistent statements of a witness to be introduced for the purpose of impeachment only if the witness is afforded the opportunity to explain or deny the statement, and the other party is afforded the opportunity to interrogate the witness on that statement. *Byrd v. State*, 337 Ark. 413, 992 S.W.2d 759 (1999), overruled in part, limited *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002).

In an action against the workers' compensation carrier for the decedent's employer in which the plaintiffs alleged that the carrier committed the tort of outrage by interfering with their rights to promptly bury the decedent in accord with their wishes, a representative of the carrier opened the door to impeachment by a prior inconsistent statement when the representative testified that it was not true that the carrier believed its claims adjuster had misrepresented his actions in dealing with claims and, therefore, the plaintiffs were properly permitted to introduce into evidence a memorandum in which a manager of the carrier wrote that he was convinced that the adjuster had misrepresented his responses in a meeting pertaining to another claim. *Travelers Ins. Co. v. State*, 338 Ark. 81, 991 S.W.2d 591 (1999).

In a prosecution for robbery, it was reversible error for the court to refuse to allow the defendant to impeach a state witness with a prior inconsistent statement that the victim was intoxicated at the time of the robbery as the state's case boiled down to the testimony of only two witnesses and the excluded statement was an indispensable part of the defendant's case. *Pryor v. State*, 71 Ark. App. 87, 27 S.W.3d 440 (2000).

A witness's trial testimony was sufficiently inconsistent with her prior detailed statements to the police so as to allow impeachment of the witness with her prior statement where, at trial, she claimed loss of memory, which was conveniently favorable to the defendant, her husband's first cousin. *Kennedy v. State*, 344 Ark. 433, 42 S.W.3d 407 (2001).

Where victim admitted that her testimony at trial differed from her earlier written statement, subsection (b) of this rule did not allow introduction of the prior statement to impeach the victim's credibility. *Garner v. State*, 81 Ark. App. 309, 101 S.W.3d 857 (2003).

Trial court did not abuse its discretion in allowing the state to impeach a defense witness with his prior inconsistent statement where the witness testified that he did not remember telling the police anything about the rifle; inconsistency may be found in the witness's inability to recall. *McConnell v. State*, — Ark. App. —, — S.W.3d —, 2003 Ark. App. LEXIS 888 (Dec. 10, 2003).

Trial court did not err by denying the admission of testimony from an impeachment witness as the witness defendant sought to impeach had already left the courthouse and had not been given an opportunity to explain

or deny her allegedly inconsistent statement; further, defendant failed to argue at the trial level that the impeachment witness should have been allowed in the interests of justice, thus, he could not raise that argument for the first time on appeal. *Yankaway v. State*, 366 Ark. 18, 233 S.W.3d 136 (2006).

Because an ex-wife's testimony left doubt as to whether she admitted that an earlier statement was a lie, the statements which were made during a telephone conversation between the ex-wife and a victim could be used by the state for the purpose of impeaching the ex-wife during defendant's rape trial. The recorded statements directly contradicted the ex-wife's assertion that she never believed that the charges against defendant were true. *Winkle v. State*, 374 Ark. 128, 286 S.W.3d 147 (2008).

During defendant's trial for aggravated assault, his wife was given the opportunity to explain a prior inconsistent statement; she was asked about her 911 call to a dispatcher and explained her statements during that call, saying that she was "more mad than hurt." *Mathis v. State*, 2012 Ark. App. 285, — S.W.3d —, 2012 Ark. App. LEXIS 400 (Apr. 25, 2012).

**Cited:** *Baysinger v. State*, 261 Ark. 605, 550 S.W.2d 445 (1977); *Morrison v. Lowe*, 274 Ark. 358, 625 S.W.2d 452 (1981); *Gross v. State*, 8 Ark. App. 241, 650 S.W.2d 603 (1983); *Walker v. Lockhart*, 598 F. Supp. 1410 (E.D. Ark. 1984), rev'd en banc 763 F.2d 942 (8th Cir. 1985); *Linell v. State*, 283 Ark. 162, 671 S.W.2d 741 (1984), cert. denied 470 U.S. 1062, 105 S. Ct. 1778, 84 L. Ed. 2d 837 (1985); *Garst v. Cullum*, 291 Ark. 512, 726 S.W.2d 271 (1987); *Pemberton v. State*, 292 Ark. 405, 730 S.W.2d 889 (1987); *Farmers Bank v. Perry*, 301 Ark. 547, 787 S.W.2d 645 (1990); *Crawford v. State*, 309 Ark. 54, 827 S.W.2d 134 (1992); *Terry v. State*, 309 Ark. 64, 826 S.W.2d 817 (1992); *Truck Ctr. of Tulsa, Inc. v. Autrey*, 310 Ark. 260, 836 S.W.2d 359 (1992); *Hughey v. State*, 310 Ark. 721, 840 S.W.2d 183 (1992); *Mikel v. Hubbard*, 317 Ark. 125, 876 S.W.2d 558 (1994); *Patterson v. State*, 318 Ark. 358, 885 S.W.2d 667 (1994); *Lovelady v. State*, 326 Ark. 196, 931 S.W.2d 430 (1996); *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001); *Threadgill v. State*, 74 Ark. App. 301, 47 S.W.3d 304 (2001), aff'd 347 Ark. 986, 69 S.W.3d 423 (2002); *Strain v. State*, 2012 Ark. 42, — S.W.3d —, 2012 Ark. LEXIS 58 (Feb. 2, 2012).

## Rule 614. Calling and interrogation of witnesses by court.

(a) *Calling by Court.* The court, at the suggestion of a party or on its own motion, may call witnesses, and all parties are entitled to cross-examine witnesses thus called.



(b) *Interrogation by Court.* The court may interrogate witnesses, whether called by itself or by a party.

(c) *Objections.* Objections to the calling of witnesses by court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

CASE NOTES

**Interrogation by Court.**

Trial court did not abuse its discretion in asking questions designed merely to confirm testimony previously given by officer. *Hillard v. State*, 321 Ark. 39, 900 S.W.2d 167 (1995).

The court did not abuse its discretion in its questioning of witnesses where (1) the occasional questioning of witnesses before the State's response to a defense objection did not impugn or bolster the credibility of the witnesses, and (2) the questioning of the medical examiner did not intimate an opinion as to his credibility. *Britt v. State*, 334 Ark. 142, 974 S.W.2d 436 (1998).

A trial court did not abuse its discretion in recalling and interrogating two of the state's witnesses in order to confirm previous testimony because defendant had the opportunity to cross-examine the witnesses, the trial court allowed defendant a continuance to rebut the testimony they offered, and defendant failed to demonstrate prejudice. *Bradley v. State*, 2009 Ark. App. 714, — S.W.3d —, 2009 Ark. App. LEXIS 885 (2009).

**Rule 615. Exclusion of witnesses.**

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

RESEARCH REFERENCES

**Ark. L. Notes.** Gitelman and Watkins, No Requiem for Ricarte: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

**U. Ark. Little Rock L.J.** Arkansas Law Survey, Hall, Evidence, 8 U. Ark. Little Rock L.J. 157.

Legislative Survey, Evidence, 8 U. Ark. Little Rock L.J. 573.

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  - The defendant was not entitled to a mistrial because a witness for the state testified on cross-examination that he asked another witness, who had already testified, what questions were asked of her. *Porter v. State*, 308 Ark. 137, 823 S.W.2d 846 (1992).
  - Trial court did not err in plaintiff's adverse

possession action in denying plaintiff's request that plaintiff's daughter be allowed to sit at counsel's table and assist in the presentation of the case because plaintiff was illiterate and suffering from Alzheimer's disease; under subdivision (3) of this rule, there was no proof that the daughter was essential to the presentation of plaintiff's case. *Cleary v. Sledge Props.*, 2010 Ark. App. 755, — S.W.3d —, 2010 Ark. App. LEXIS 797 (Nov. 10, 2010).

#### Construction.

This rule must be construed as mandatory. *Chambers v. State*, 264 Ark. 279, 571 S.W.2d 79 (1978); *Breeden v. State*, 270 Ark. 90, 603 S.W.2d 459 (1980); *Menard v. City of Carlisle*, 309 Ark. 522, 834 S.W.2d 632 (1992).

The rule on sequestering witnesses is mandatory when requested by one or both of the parties. *Morton v. Wiley*, 271 Ark. 319, 609 S.W.2d 322 (1980); *Dillard v. State*, 20 Ark. App. 35, 723 S.W.2d 373 (1987), overruled *Menard v. Carlisle*, 309 Ark. 522, 834 S.W.2d 632 (1992) (but see *Menard v. Carlisle*, 309 Ark. 522, 834 S.W.2d 632 (1992)).

This rule does not specifically require that the exclusionary request be made at any particular state of the trial and the trial court does not have discretion to refuse to grant the rule solely because the trial has commenced; overruling *Dillard v. State*, 20 Ark. App. 35, 723 S.W.2d 373 (1987). *Menard v. City of Carlisle*, 309 Ark. 522, 834 S.W.2d 632 (1992).

Exception in subdivision (3) of this rule applies to such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. *Cleary v. Sledge Props.*, 2010 Ark. App. 755, — S.W.3d —, 2010 Ark. App. LEXIS 797 (Nov. 10, 2010).

#### Purpose.

The sequestration or exclusion of witnesses is employed to expose inconsistencies in their testimonies and to prevent the possibility of one witness' shaping his or her testimony to match that given by other witnesses at trial. *Fite v. Friends of Mayflower, Inc.*, 13 Ark. App. 213, 682 S.W.2d 457 (1985); *Dyson v. Ferncliff Properties, Inc.*, 16 Ark. App. 64, 696 S.W.2d 767 (1985); *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996).

The purpose of this rule is to expose inconsistencies in the testimonies of different witnesses and to prevent the possibility of one witness's shaping his or her testimony to match that given by other witnesses at trial. *Solomon v. State*, 323 Ark. 178, 913 S.W.2d 288 (1996).

#### Attorney.

In an action to foreclose a purchase-money mortgage on farmlands, the mortgagors were not prejudiced by the trial court's exclusion of the mortgagors' only Arkansas attorney from the proceedings at the request of the mort-

gagee who indicated an intention to call the local attorney as an adverse witness, where the facts were undisputed and the legal question was adequately presented, and where on appeal no attempt was made to offer evidence that had not been offered at the trial or to present any legal argument that had not been made. *McCoy Farms, Inc. v. McKee*, 263 Ark. 20, 563 S.W.2d 409, cert. denied 439 U.S. 862, 99 S. Ct. 184, 58 L. Ed. 2 171 (1978).

Where defendant sought to prove he had had ineffective assistance of counsel, his former counsel was not a party to the action, but merely a witness and should have been excluded, at the defendant's request, pending his call to testify. *Chambers v. State*, 264 Ark. 279, 571 S.W.2d 79 (1978).

A party's only lawyer falls within the category of essential persons under subdivision (3) of this rule; the rule against the attorney who becomes a witness continuing as an advocate was not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him. *Foster v. State*, 285 Ark. 363, 687 S.W.2d 829 (1985), cert. denied, 482 U.S. 929, 107 S. Ct. 3213, 96 L. Ed. 2d 700 (1987).

This rule does not prohibit an attorney, in the course of preparing his or her witness, from describing in any way what another witness has said on the stand; such a broad prohibition would unduly restrict an attorney's ability to consult with witnesses before examining them at trial. *Bayless v. State*, 326 Ark. 869, 935 S.W.2d 534 (1996).

Trial lawyers, in the course of preparing their witnesses, must be careful not to indicate specifically what other witnesses have testified about, since the sequestration rule may be circumvented in the guise of attorneys "prepping" their witnesses; whether an attorney violates this rule in the course of preparing a witness must be determined on a case-by-case basis. *Bayless v. State*, 326 Ark. 869, 935 S.W.2d 534 (1996).

#### Description of Testimony.

This rule does not prohibit an attorney, in the course of preparing his or her witness, from describing in any way what another witness has said on the stand; such a broad prohibition would unduly restrict an attorney's ability to consult with witnesses before examining them at trial. *Bayless v. State*, 326 Ark. 869, 935 S.W.2d 534 (1996).

Trial lawyers, in the course of preparing their witnesses, must be careful not to indicate specifically what other witnesses have testified about, since the sequestration rule may be circumvented in the guise of attorneys "prepping" their witnesses; whether an attorney violates this rule in the course of preparing a witness must be determined on a case-by-case basis. *Bayless v. State*, 326 Ark. 869, 935 S.W.2d 534 (1996).



**Discretion of Court.**

The discretion of the trial court in refusing the testimony of a rebuttal witness is narrow even when the witness has violated the rule of sequestration of witnesses and more readily abused by excluding the testimony than by admitting it. *McCorkle v. State*, 270 Ark. 679, 607 S.W.2d 655 (1980).

Where a party seeks to exempt an expert witness pursuant to this rule, the decision is within the discretion of the trial judge which should not normally be disturbed on appeal absent an abuse of discretion. *Arkansas Power & Light Co. v. Melkovitz*, 11 Ark. App. 90, 668 S.W.2d 37 (1984); *Martin v. State*, 22 Ark. App. 126, 736 S.W.2d 287 (1987).

This rule, providing for the exclusion of witnesses, may involve three different types of rulings by a trial judge, and each type presents a different standard for the judge. The standard of discretion given to the trial judge by the first sentence of the rule is that of no discretion; if a party requests the rule, it must be granted. Under the rest of the rule, on deciding whether a person should be sequestered because he is an officer or employee of a party, or person whose presence is necessary, the standard of discretion afforded a trial judge is average discretion. The third standard arises when a witness has been ordered sequestered, but does not comply; the rule does not mention the consequences of noncompliance with an order of exclusion, and therefore the sanctions are a matter of case law; the three possible methods of enforcement available to the trial judge are: (1) citing the witness for contempt, (2) permitting comment on the witness's noncompliance in order to reflect on his credibility, and (3) refusing to let him testify. *Blaylock v. Strecker*, 291 Ark. 340, 724 S.W.2d 470 (1987).

A trial court has a very narrow discretion to exclude the testimony of a noncomplying witness. *Daniels v. State*, 293 Ark. 422, 739 S.W.2d 135 (1987).

Under first sentence of this rule, trial judge has no discretion; use of the word "shall" makes exclusion of the witnesses mandatory, if a party requests exclusion. *Martin v. State*, 22 Ark. App. 126, 736 S.W.2d 287 (1987).

When dealing with the exemption from this rule, the trial judge has average discretion. *City of Crossett v. Pacific Bldgs., Inc.*, 298 Ark. 520, 769 S.W.2d 730 (1989).

Rulings dealing with the exemptions from this rule are within a trial court's discretion. *Parker v. Holder*, 315 Ark. 307, 867 S.W.2d 436 (1993).

The standard of narrow discretion to exclude witnesses remains as it has been for many years. *Swanigan v. State*, 316 Ark. 16, 870 S.W.2d 712 (1994).

The trial court's discretion is more readily abused by excluding the testimony than by

admitting it. *Swanigan v. State*, 316 Ark. 16, 870 S.W.2d 712 (1994).

The controlling rationale regarding the rarely exercised discretion to exclude testimony for noncompliance with this rule is this: with the offending witness subject to punishment for contempt and the adverse party free to raise the issue of credibility in argument to the jury, the party who is innocent of the rule's violation should not ordinarily be deprived of the testimony. *Swanigan v. State*, 316 Ark. 16, 870 S.W.2d 712 (1994).

Even when there has been a clear violation of this rule, the trial court does not abuse its discretion in permitting the witness's testimony when exercising its option of allowing comment on the witness's violation in order to reflect on his credibility. *Swanigan v. State*, 316 Ark. 16, 870 S.W.2d 712 (1994).

**Effect of Violation.**

A violation of this witness exclusion rule goes to credibility, rather than competency. *Cooley v. State*, 4 Ark. App. 238, 629 S.W.2d 311 (1982); *Daniels v. State*, 293 Ark. 422, 739 S.W.2d 135 (1987); *Martin v. State*, 22 Ark. App. 126, 736 S.W.2d 287 (1987).

Where in violation of the witness exclusion rule the deputy prosecuting attorney and a police officer engaged in a discussion outside the courtroom with a witness and showed him a prior statement in which he said he and the defendant were at the victim's home two weeks before the incident, and following that discussion the witness was recalled and testified that he had erred in his previous testimony when he testified that he and the defendant were in the victim's home the night before the incident, the admission of the revised testimony was not reversible error since both the witness and the police officer who allegedly refreshed the witness' memory were thoroughly cross-examined and admitted what had happened outside the courtroom. *Cooley v. State*, 4 Ark. App. 238, 629 S.W.2d 311 (1982).

Even if there has been a clear violation of this rule, the trial court has the option of permitting comment on the witness's violation of the rule in order to reflect on his credibility. *Graham v. State*, 296 Ark. 400, 757 S.W.2d 538 (1988).

Trial court did not err in denying defendant's motion for a mistrial where a later witness admitted that he spoke to the state's first witness in the hallway after that first witness had testified in defendant's murder trial because the later witness admitted that there was no discussion of his upcoming testimony and because the trial court permitted defense counsel to question the witness about the conversation, reflecting upon the witness's credibility. *Pollard v. State*, 2009 Ark. 434, 336 S.W.3d 866 (2009).

**Enforcement of Order.**

There are three possible methods of enforcement of an exclusion order that are available to a trial judge: (1) citing the witness for contempt; (2) permitting comment on the witness's noncompliance in order to reflect on his credibility; and (3) refusing to let the witness testify. *Swanigan v. State*, 316 Ark. 16, 870 S.W.2d 712 (1994).

**Erroneous Exclusion.**

Since error is generally presumed to be prejudicial unless the opposite is affirmatively shown, where the issue was negligent design of a lawn mower still in existence and subject to view, exclusion from the courtroom of defendant's employee in charge of safety design of equipment was contrary to this rule and reversible error. *International Harvester Corp. v. Hardin*, 264 Ark. 717, 574 S.W.2d 260 (1978).

The trial court improperly excluded the testimony of a defense witness who violated a sequestration rule in a negligence action arising from a motor vehicle accident where the plaintiff's attorney immediately informed the court when he learned that the witness was in the courtroom, while asserting that the witness heard no testimony that was pertinent to her own testimony, the witness testified that she was unaware of the sequestration rule and was told in the clerk's office to go to the courtroom, and the trial court stated that the violation was unintentional. *Lowe v. Ralph*, 61 Ark. App. 231, 966 S.W.2d 283 (1998).

**Expert Witnesses.**

The trial judge did not abuse his discretion in refusing to exempt experts, under Evid. Rule 703, from sequestration pursuant to this rule, where there was no indication that these witnesses intended to base their opinion on the testimony of other witnesses heard in the courtroom and would be unable or hindered in some way to give opinion testimony if excluded but, on the contrary, the record indicated that the opinions of both witnesses were based on independent observations and differed from opposing witnesses only as to conclusion. *Arkansas Power & Light Co. v. Melkovitz*, 11 Ark. App. 90, 668 S.W.2d 37 (1984).

In a condemnation proceeding, trial court did not err in ruling that presence of condemnor's expert witnesses was not essential to presentation of the case, where there was no showing that witnesses had such specialized expertise or intimate knowledge of the facts of the case that the party's attorney could not effectively function without the presence and aid of the witnesses or that the witnesses would be unable to present essential testimony without hearing the testimony of all

other witnesses. *Arkansas Power & Light Co. v. Melkovitz*, 11 Ark. App. 90, 668 S.W.2d 37 (1984).

It was not error to allow an investigator to testify after he appeared on the stand to read another witness' prior testimony into evidence, where the defendant did not demonstrate that the investigator's testimony related to the other witness' prior testimony in such a way that the investigator's answers could have been affected by his presence in the courtroom. *Lewis v. State*, 288 Ark. 595, 709 S.W.2d 56 (1986).

Party is free to challenge the credibility of the experts' testimony on the basis that they have heard testimony by prior witnesses. *Martin v. State*, 22 Ark. App. 126, 736 S.W.2d 287 (1987).

The exception provided by subdivision (3) of this rule is not automatic and depends upon the extent to which the expert will base his opinion upon testimony presented in court. *Martin v. State*, 22 Ark. App. 126, 736 S.W.2d 287 (1987).

The exception provided by subdivision (3) of this rule applied where a party showed that an expert witness would be unable to present essential testimony without hearing the testimony of other witnesses. *McGraw v. Weeks*, 326 Ark. 285, 930 S.W.2d 365 (1996).

**Failure to Exclude Witness.**

Where there was no showing that presence of prosecution witness, who was the first witness in prosecution for second-degree battery, was necessary to prosecution of the case and defendant argued that presence of such witness, who was city marshal, may have affected testimony of defense witnesses, the error must be assumed to be prejudicial and the conviction would be reversed. *Breeden v. State*, 270 Ark. 90, 603 S.W.2d 459 (1980).

The trial court did not err in failing to exclude a witness who was no longer active in the operation of defendant corporation but was still listed on record as secretary-treasurer of the corporation, where he was intricately involved in all the transactions between the parties in the action. *Dyson v. Ferncliff Properties, Inc.*, 16 Ark. App. 64, 696 S.W.2d 767 (1985).

Family service worker, not qualified to remain in the courtroom under any exception, should have been excluded from the courtroom. *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996).

The defendant was entitled to a new hearing on her motion for postconviction relief where the court improperly refused to exclude her trial counsel from the courtroom during her testimony with regard to his alleged ineffective assistance. *Finch v. State*, 335 Ark. 254, 984 S.W.2d 360 (1998).

In a prosecution for four counts of rape involving three children younger than age



fourteen, it was not error for the court to allow the children's foster parents and one case-worker to remain in the courtroom after the defendant invoked this rule, as such witnesses were covered by the exceptions stated in Rule 616 and as the defendant never called such witnesses to take the stand; therefore, there was no prejudice. *Hill v. State*, 337 Ark. 219, 988 S.W.2d 487 (1999).

#### **Harmless Error.**

It may have been only harmless error for the trial judge to permit the prosecuting attorney's investigator to remain in the courtroom, where the investigator testified after the first witness had been called for the state and his testimony did not appear to relate in any way to the testimony of the first witness. *Gustafson v. State*, 267 Ark. 278, 590 S.W.2d 853 (1979), criticized *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982), questioned *Sitz v. State*, 23 Ark. App. 126, 743 S.W.2d 18 (1988).

Where the need for the rebuttal testimony did not arise until after defendant testified, the witness was in the courtroom only briefly and did not hear the appellant testify and there was no contention that the testimony he did hear, a policeman's, was in any way related to the matter about which the witness testified, there was no error in allowing the rebuttal testimony. *McCorkle v. State*, 270 Ark. 679, 607 S.W.2d 655 (1980).

#### **Objections.**

Invocation of mandatory right to exclude witness pursuant to this rule sufficed to bring this issue to the attention of the trial court. Party was not procedurally barred from raising this issue by his failure to object when the trial court refused to exclude witness. *King v. State*, 322 Ark. 51, 907 S.W.2d 127 (1995).

#### **Officer or Employee of Party.**

In an action against a defendant corporation, shareholder witnesses could only be exempt from exclusion under this rule if the corporate party's attorney had designated any one of them as the corporation's officer or employee or if their presence was shown by the corporation to be essential to the presentation of its cause. *Fite v. Friends of Mayflower, Inc.*, 13 Ark. App. 213, 682 S.W.2d 457 (1985).

#### **Parent.**

Court did not err in refusing to declare mistrial where mother of victims remained in the courtroom after other witnesses had been excluded under this rule, and heard the testimony of her daughters before she testified, since Rule 616 provides that the parent of a minor victim has the right to be present during the trial. *McArdell v. State*, 38 Ark. App. 261, 833 S.W.2d 786 (1992).

#### **Relatives of Victim.**

Victim's daughters, prosecution witnesses, were not exempted from the application of this rule by Evid. Rule 616, since none of the victim's daughters were victims and no minor victim was involved. *Solomon v. State*, 323 Ark. 178, 913 S.W.2d 288 (1996).

#### **Sequestration After Commencement of Trial.**

Where neither of the parties in an action to recover for personal injuries desired to invoke the rule on sequestering witnesses when inquiry was made by the trial court at the beginning of the trial, but where counsel for defendant requested the rule after the defendant was called by the plaintiffs as their first witness, the trial court did not abuse its discretion in granting the request for sequestration of witnesses after the trial had begun. *Morton v. Wiley*, 271 Ark. 319, 609 S.W.2d 322 (1980).

This rule was not violated where the sequestered witnesses did not discuss the facts of the case or what their testimony would be or had been, but one merely returned to the witness room after testifying and said it was "rough." *Cox v. State*, 305 Ark. 244, 808 S.W.2d 306 (1991).

#### **Sequestration Before Trial.**

This rule is only applicable during an evidentiary hearing presided over by the court, and it does not require that the witnesses for either party during the investigation or preparation of a case be sequestered; accordingly, there was no technical violation of this rule where the prosecutor assembled all of the state's witnesses in a criminal trial, without the knowledge of the defense attorney or the trial judge, in the courtroom four days before the trial and questioned each under oath and in the presence of the other witnesses regarding the crime. *Cook v. State*, 274 Ark. 244, 623 S.W.2d 820 (1981).

#### **Subsequent Motion to Remain in Courtroom.**

Where both sides in a prosecution for theft had requested the exclusion of witnesses pursuant to this rule, the trial court was correct in denying the defendant's subsequent motion, made over the state's objection, that a prosecution witness be allowed to remain in the courtroom during the trial. *Wilson v. State*, 277 Ark. 43, 639 S.W.2d 45 (1982).

#### **Supersession of Statutes.**

This rule superseded former statutes governing witness exclusion in civil and criminal cases. *Cooley v. State*, 4 Ark. App. 238, 629 S.W.2d 311 (1982).

#### **Victims.**

Evidence Rule 616 allows the victim to be present notwithstanding the witness-exclu-

sion provisions of this rule, and Evid. Rule 616 purports to leave no discretion to the trial court. *Golston v. State*, 26 Ark. App. 176, 762 S.W.2d 398 (1988).

Victim of the crime had the right to be present notwithstanding this rule. *Brandon v. State*, 300 Ark. 32, 776 S.W.2d 345 (1989).

This rule deals with exclusion of witnesses from the courtroom upon a motion or upon the initiative of a trial court, but says nothing about allowing a victim-witness to sit at counsel's table. *Mask v. State*, 314 Ark. 25, 858 S.W.2d 108 (1993), substituted opinion 314 Ark. 25, 869 S.W.2d 1 (1993).

The trial court committed reversible error by allowing a robbery victim to sit at counsel's table during the trial, as neither Evid. Rule 616 nor this rule says anything about allowing a victim of a crime to sit at counsel's table, and permitting the victim to sit there in this case may have unfairly prejudiced the defendant. *Mask v. State*, 314 Ark. 25, 858 S.W.2d 108 (1993), substituted opinion 314 Ark. 25, 869 S.W.2d 1 (1993).

**Cited:** *Stephens v. State*, 290 Ark. 440, 720 S.W.2d 301 (1986); *Burris v. State*, 291 Ark. 157, 722 S.W.2d 858 (1987); *Kester v. State*, 303 Ark. 303, 797 S.W.2d 704 (1990); *Harris v. State*, 308 Ark. 150, 823 S.W.2d 860 (1992); *Evans v. State*, 38 Ark. App. 42 (1992); *Jacobs v. State*, 317 Ark. 454, 878 S.W.2d 734 (1994); *Claiborne v. State*, 319 Ark. 537, 893 S.W.2d 324 (1995); *DeGracia v. State*, 321 Ark. 530, 906 S.W.2d 278 (1995); *Mitchell v. State*, 323 Ark. 116, 913 S.W.2d 264 (1996), overruled *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998); *Primm v. United States Fid. & Guar. Ins. Corp.*, 324 Ark. 409, 922 S.W.2d 319 (1996); *King v. State*, 325 Ark. 313, 925 S.W.2d 159 (1996); *Balentine v. Sparkman*, 327 Ark. 180, 937 S.W.2d 647 (1997); *Chavis v. State*, 328 Ark. 251, 942 S.W.2d 853 (1997); *Lenoir v. State*, 77 Ark. App. 250, 72 S.W.3d 899 (2002); *Holland v. State*, 365 Ark. 55, 225 S.W.3d 353 (2006); *Mooney v. State*, 2009 Ark. App. 622, 331 S.W.3d 588 (2009).

## Rule 616. Right of victim to be present at hearing.

Notwithstanding any provision to the contrary, in any criminal prosecution, the victim of a crime, and in the event that the victim of a crime is a minor child under eighteen (18) years of age, that minor victim's parents, guardian, custodian or other person with custody of the alleged minor victim shall have the right to be present during any hearing, deposition, or trial of the offense.

**Publisher's Notes.** Prior to the 1986 adoption of the Arkansas Rules of Evidence by the Supreme Court, Acts 1985, No. 462, § 1, added this rule by amending Acts 1975 (Extended Sess., 1976), No. 1143, § 1. Neither the court's opinion in *Ricarte v. State*, 290 Ark. 100, 717 S.W.2d 488 (1986), nor its

accompanying per curiam of October 13, 1986, which adopted the rules "as set forth" in the 1976 act, specifically refers to this amendment and it is unclear whether the court intended to include it in its adoption of the pre-existing rules.

## RESEARCH REFERENCES

**Ark. L. Notes.** Gitelman and Watkins, No Requiem for *Ricarte*: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

**U. Ark. Little Rock L.J.** Legislative Survey, Evidence, 8 U. Ark. Little Rock L.J. 573.

## CASE NOTES

### ANALYSIS

Constitutionality.  
In general.  
Custodian.  
Discretion of court.  
Relatives of victim.  
Request not required.  
Victim.

### Constitutionality.

This rule is not unconstitutional; nothing in the constitution touches on the exclusion of witnesses during criminal trials. United States Const., Amend. 6 and Ark. Const., Art. 2, § 10, guarantee an accused a speedy and public trial and to be confronted with the witnesses against him; otherwise, neither



document contains anything that might be seen as a right to limit those who may want to attend the trial. *Stephens v. State*, 290 Ark. 440, 720 S.W.2d 301 (1986).

#### **In General.**

This rule allows the victim of a crime the right to be present during a trial, notwithstanding Evid. Rule 615 which permits the exclusion of witnesses when requested by either party. *Stephens v. State*, 290 Ark. 440, 720 S.W.2d 301 (1986); *Golston v. State*, 26 Ark. App. 176, 762 S.W.2d 398 (1988).

Court did not err in refusing to declare mistrial where mother of victims remained in the courtroom after other witnesses had been excluded under Rule 615, and heard the testimony of her daughters before she testified, since this rule provides that the parent of a minor victim has the right to be present during the trial. *McArdell v. State*, 38 Ark. App. 261, 833 S.W.2d 786 (1992).

The trial court committed reversible error by allowing a robbery victim to sit at counsel's table during the trial, as neither this rule nor Evid. Rule 615 says anything about allowing a victim of a crime to sit at counsel's table, and permitting the victim to sit there in this case may have unfairly prejudiced the defendant. *Mask v. State*, 314 Ark. 25, 858 S.W.2d 108 (1993), substituted opinion 314 Ark. 25, 869 S.W.2d 1 (1993).

Although the presence of a victim in the courtroom throughout the trial conceivably could put the fairness of the trial in jeopardy under some circumstances, there is no error in allowing victim to remain where defendant fails to show how fairness would be jeopardized by the victim's presence. *Mitchell v. State*, 323 Ark. 116, 913 S.W.2d 264 (1996), overruled *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998).

#### **Custodian.**

Where the Department of Human Services had custody of the victim at the time of trial, the Department of Human Services social worker could stand next to the victim while she testified. *Gadberry v. State*, 46 Ark. App. 121, 877 S.W.2d 941 (1994).

#### **Discretion of Court.**

This rule purports to leave no discretion to the trial court. *Stephens v. State*, 290 Ark. 440, 720 S.W.2d 301 (1986); *Golston v. State*, 26 Ark. App. 176, 762 S.W.2d 398 (1988).

#### **Relatives of Victim.**

Victim's daughters, state's witnesses, were not exempted from the application of Evid. Rule 615 by this rule, since none of the victim's daughters were victims and no minor victim was involved. *Solomon v. State*, 323 Ark. 178, 913 S.W.2d 288 (1996).

In a prosecution for four counts of rape involving three children younger than age fourteen, it was not error for the court to allow the children's foster parents and one case-worker to remain in the courtroom after the defendant invoked this rule, as such witnesses were covered by the exceptions stated in this rule and as the defendant never called such witnesses to take the stand; therefore, there was no prejudice. *Hill v. State*, 337 Ark. 219, 988 S.W.2d 487 (1999).

#### **Request Not Required.**

No request to remain in the courtroom is required by this rule. *Golston v. State*, 26 Ark. App. 176, 762 S.W.2d 398 (1988).

#### **Victim.**

Evidence supported finding individuals in question were victims. *Harris v. State*, 308 Ark. 150, 823 S.W.2d 860 (1992).

One victim was allowed to remain in the courtroom at the suppression hearing while another victim identified defendant. *Claiborne v. State*, 319 Ark. 537, 893 S.W.2d 324 (1995).

The "victim of the crime" language in this rule does not refer to any one other than the primary victims. *Williams v. State*, 320 Ark. 67, 894 S.W.2d 923 (1995).

Police officer in full uniform, as a victim of an offense, was entitled to remain in the courtroom during the trial, and his presence did not prejudice the defendant. *Robinson v. State*, 49 Ark. App. 58, 896 S.W.2d 442 (1995).

**Cited:** *Burris v. State*, 291 Ark. 157, 722 S.W.2d 858 (1987); *Kester v. State*, 303 Ark. 303, 797 S.W.2d 704 (1990); *Wallace v. State*, 314 Ark. 247, 862 S.W.2d 235 (1993); *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996).

## **ARTICLE VII. OPINIONS AND EXPERT TESTIMONY**

### **Rule 701. Opinion testimony by lay witnesses.**

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are

- (1) Rationally based on the perception of the witness; and
- (2) Helpful to a clear understanding of his testimony or the determination of a fact in issue.

## RESEARCH REFERENCES

**ALR.** Vertical gaze nystagmus test: Use in impaired driving prosecution. 117 ALR 5th 491.

**Ark. L. Rev. Notes**, A Restrictive Interpretation of Rule 704 of the Arkansas Uniform Rules of Evidence: *Grambling v. Jennings*, 36 Ark. L. Rev. 178.

**U. Ark. Little Rock L.J.** Impeachment of One's Own Witness by Prior Inconsistent Statements Under the Federal and Arkansas Rules of Evidence, Perroni, 1 U. Ark. Little Rock L.J. 277.

Arkansas Law Survey, Hall, Evidence, 8 U. Ark. Little Rock L.J. 157.

## CASE NOTES

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**In General.**

This rule is not a rule against opinions, but is a rule that conditionally favors them. *Moore v. State*, 323 Ark. 529, 915 S.W.2d 284 (1996).

**Purpose.**

This rule conditionally favors opinions by seeking to balance the need for relevant evidence against the danger of admitting unreliable testimony and recognizing that necessity and expedience may dictate receiving opinion evidence, but that a factual account insofar as feasible may further the values of the adversary system. *Carton v. Missouri Pac. R.R.*, 303 Ark. 568, 798 S.W.2d 674 (1990).

**Cause of Death.**

In action for damages of loss of decedent's services and future earnings where only evidence that accident was the cause of death was the testimony of lay witnesses with no previous exposure to sudden death occurrence, decedent's estate failed to make a *prima facie* case. *McAway v. Holland*, 266 Ark. 878, 599 S.W.2d 387 (1979).

Lay witnesses are permitted to give their own opinion as to the cause of death or other physical condition if the witness is qualified by experience and observation with regard to the subject matter; however, where the sub-

ject matter is so complex that expert knowledge is necessary to give a knowledgeable opinion, only an expert could give evidence as to the cause of death or physical condition. *McAway v. Holland*, 266 Ark. 878, 599 S.W.2d 387 (1979).

**Cumulative Evidence.**

Defendant's conviction for murder in the second degree was proper because her argument regarding an officer's footprint analysis was without merit since, at the time the officer testified regarding that issue, unchallenged testimony and photographic exhibits had already established which shoes were worn by the victim and which were worn by defendant. Blood on the shoes and the differences in the treads were obvious and that same evidence, and specifically, unchallenged testimony from a certified crime-scene technician, had established that there were pools of blood at the crime scene that contained shoe prints matching defendant's shoes and appeared to have been made by those shoes. *Johnson v. State*, 2010 Ark. App. 153, — S.W.3d —, 2010 Ark. App. LEXIS 167 (2010).

During defendant's trial for attempted rape of his 13-year-old stepdaughter, the court did not err in disallowing the lay opinion of defendant's wife, who was presumably going to testify that she believed the victim's motive to lie about the incident was so she could be permanently moved to her grandmother's house, because the point had already been clearly brought to the jury's attention. *Forrest v. State*, 2010 Ark. App. 686, — S.W.3d —, 2010 Ark. App. LEXIS 729 (Oct. 20, 2010).

**Description of Property.**

In an action to set aside a deed, testimony by a witness that his land was similar to the property in issue and that he was familiar with land prices in the area was not irrelevant and should have been admitted. *Garis v. Massey*, 270 Ark. 646, 606 S.W.2d 109 (1980).

**Expert Testimony.**

Where the consulting engineer to the industrial park, from which a right-of-way for a freeway was taken, testified that he told the developers not to locate a sewerage treatment plant on the valuable industrial land, the



engineer never expressed an opinion as to the monetary value of the industrial land, and therefore, his testimony was not improper since the trial court found that his expert testimony would assist the jury in understanding the other evidence. *Arkansas State Hwy. Comm'n v. First Pyramid Life Ins. Co. of Am.*, 269 Ark. 278, 602 S.W.2d 609 (1980).

A witness who worked for a heavy equipment manufacturer for six years, was service manager for the equipment for three years, performed the predelivery inspection on the piece of equipment in question, showed rental customers how to operate the equipment, drove, maintained and serviced the piece of equipment in question; and operated all similar equipment, had the knowledge, skill, experience and training and was qualified to testify as either an expert or lay witness. *Dildine v. Clark Equip. Co.*, 285 Ark. 325, 686 S.W.2d 791 (1985).

Where the pathologist had been allowed to testify, without objection, that powder stippling had occurred on the forehead, but not the hands, of the victim, and that such stippling occurs only when a gun is fired at a very close range, her opinion that the hands were not within inches of the forehead was rationally based on her perceptions and was helpful in making a determination as to whether the victim had been able to use his hands in attempting to ward off the shot; therefore, the trial court did not err in overruling defendant's objection to the testimony. *Biniore v. State*, 16 Ark. App. 275, 701 S.W.2d 385 (1985).

### **Intoxication.**

The trial court in a murder prosecution did not err in allowing a layman, who had been drinking beer, to give his opinion about the defendant's state of intoxication, since lay persons and police officers have been allowed for some time to give an opinion regarding intoxication. The fact that the witness had consumed some beer goes to the weight to be given his testimony and not to its admissibility. *David v. State*, 286 Ark. 205, 691 S.W.2d 133 (1985).

### **Lay Opinion Admissible.**

The testimony of the county clerk as to the number of qualified voters in the area proposed for incorporation was properly admitted, whether the testimony of the county clerk be considered opinion testimony of a lay witness, or an opinion of an expert. *Dunkum v. Moore*, 265 Ark. 544, 580 S.W.2d 183 (1979).

Lay opinion testimony held admissible. *Townsend v. State*, 292 Ark. 157, 728 S.W.2d 516 (1987); *Echo, Inc. v. Stafford*, 21 Ark. App. 201, 730 S.W.2d 913 (1987); *Thompson v. Perkins*, 322 Ark. 720, 911 S.W.2d 582 (1995).

Trial court did not abuse its discretion in excluding opinion evidence of nonexpert con-

cerning safe following distance of vehicles, given the obvious reluctance of the witness to express an opinion as to what following distances were appropriate for an oncoming vehicle under extraordinary weather conditions, the absence of any proof that the difference between 250 feet and 300 feet would have had any bearing on defendant's ability to avoid both a truck and plaintiff's vehicle and, finally, the fact that the trial court carefully considered the proffered testimony in camera before excluding it. *Scoggins v. Southern Farmers' Ass'n*, 304 Ark. 426, 803 S.W.2d 515 (1991), limited *Druckenmiller v. Cluff*, 316 Ark. 517, 873 S.W.2d 526 (1994). But see *Druckenmiller v. Cluff*, 316 Ark. 517, 873 S.W.2d 526 (1994).

Where expert witness was not recognized as an expert, his technical knowledge and experience could have qualified him as an expert with specialized knowledge to assist the jury in determining a fact in issue under Rule 702 or as a lay witness whose opinion was helpful in the determination of a fact in issue under this rule. *Ferrell v. State*, 305 Ark. 511, 810 S.W.2d 29 (1991).

Opinion testimony by lay witnesses is allowed concerning observation of everyday occurrences, or matters within the common experience of most persons. *Felty v. State*, 306 Ark. 634, 816 S.W.2d 872 (1991).

A lay witness may give an opinion with two (2) limitations: (1) there must be firsthand knowledge or observation; and (2) the opinion must be phrased in terms of requiring testimony to be helpful in resolving issues. *Felty v. State*, 306 Ark. 634, 816 S.W.2d 872 (1991).

The requirements of this rule regarding the admissibility of lay opinions are satisfied if the opinion or inference is one which a normal person would form on the basis of the observed facts, but if an opinion without the underlying facts would be misleading, then an objection to its admission should be sustained. *Brown v. State*, 316 Ark. 724, 875 S.W.2d 828 (1994); *Moore v. State*, 323 Ark. 529, 915 S.W.2d 284 (1996).

Officer properly allowed to give lay opinion testimony to show that the defendant's shoe print matched the picture of print found on center of victim's bedroom floor, even though the officer was not an expert in that field, where the officer had some experience in that area and was clearly testifying that the patterns matched. *Moore v. State*, 323 Ark. 529, 915 S.W.2d 284 (1996).

Coroner's lay-opinion testimony regarding his process of matching bullets to victim's wound, and stating the size of bullet that matched the wound, held admissible. *Moore v. State*, 58 Ark. App. 120, 947 S.W.2d 395 (1997).

The trial court did not abuse its discretion when it allowed a witness to testify about a

conversation he had with the defendant in which the defendant said “I got him” and further allowed the witness to testify that he understood such statement to be a threat since the testimony was rationally based on his perception, which was based on his familiarity with the defendant and with neighborhood terminology. *Parker v. State*, 333 Ark. 137, 968 S.W.2d 592 (1998).

Trial court did not err in admitting a detective's opinion that a window of a truck, which was involved in a capital murder, was broken from the inside because the opinion was rationally based on the detective's prior law enforcement experience, forensic training, and personal observation. *Flowers v. State*, 373 Ark. 127, 282 S.W.3d 767 (2008).

Where defendant was charged with murder after beating the victim, a lay witness was permitted to give his opinion testimony under this rule that he heard the sound of defendant driving a car over a human body; the testimony was admissible under Ark. R. Evid. 602, because it was based on personal knowledge. The opinion testimony was rationally based on the perception of the witness and the surrounding circumstances. *Marks v. State*, 375 Ark. 265, 289 S.W.3d 923 (2008).

Trial court did not err in allowing a police officer to render a lay opinion that the amount of money that was found on defendant at the time of defendant's arrest was consistent with drug sales; the officer's testimony that the officer had been involved in many undercover drug deals established a rational basis upon which to express an opinion, and the testimony helped flesh out the issue of whether defendant possessed the cocaine with intent to deliver. *Williams v. State*, 2012 Ark. App. 310, — S.W.3d —, 2012 Ark. App. LEXIS 428 (May 2, 2012).

#### **Lay Opinion Inadmissible.**

Trial court did not abuse its discretion by excluding the proffered testimony of the real party in interest's expert, which could have amounted to his opinion as a lawyer about whether the term “mental illness” was ambiguous. *Williams v. First Unum Life Ins. Co.*, 358 Ark. 224, 188 S.W.3d 908 (2004).

Trial court did not err in disallowing a witness's opinion about the effects of carbon monoxide poisoning where the witness testified that his personal knowledge consisted only of treating one person more than ten years earlier. *Morton v. State*, 2011 Ark. App. 432, — S.W.3d —, 2011 Ark. App. LEXIS 462 (June 15, 2011).

#### **Mental Condition.**

Even though the strict rules of evidence would not have governed in the sentencing phase of the defendant's trial for capital murder, had defendant been found guilty of capital murder, any error in the court's ruling

which sustained the state's objection to the questioning of a lay witness as to whether he felt that the defendant had some mental problems was harmless, since the jury's verdict found the defendant guilty of the lesser offense of first degree murder, since no proffer of the testimony that the lay witness would have given about his “feelings” as to whether or not the defendant had some mental problems was ever made, and since the question asked called for speculation. *Titus v. State*, 268 Ark. 9, 593 S.W.2d 164 (1980).

In prosecution for aggravated robbery, it was prejudicial error to refuse to allow the defendant's mother and grandmother to testify during the guilt-innocence phase of the trial to the effect that under pressure the defendant “goes to pieces,” as purposeful intent is an essential element of aggravated robbery. *Graham v. State*, 290 Ark. 107, 717 S.W.2d 203 (1986).

At defendant's probation revocation hearing, a trial court did not err in allowing an arresting officer to testify that defendant was not retarded over defendant's objection that the officer was not qualified. The officer could relate his experiences and perceptions of defendant reading and signing Miranda forms on prior occasions, pursuant to this rule. *Green v. State*, 2010 Ark. App. 174, — S.W.3d —, 2010 Ark. App. LEXIS 214 (Feb. 24, 2010).

#### **Observation of Shooting.**

Where an eyewitness was in a position from which she could observe the struggle over a gun between her daughter and the defendant, with whom her daughter was living, the witness was properly allowed to testify as to whether she felt the shooting was accidental or intentional, since such observations were rationally perceived and were helpful to the trier of fact in determining the defendant's intent. *Mathis v. State*, 267 Ark. 904, 591 S.W.2d 679 (Ct. App. 1979), overruled *Rogers v. State*, 10 Ark. App. 19, 660 S.W.2d 949 (1983), questioned *State v. Murphy*, 315 Ark. 68, 864 S.W.2d 842 (1993), questioned *Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001).

Trial court did not abuse its discretion by refusing to allow lay opinion testimony by an eyewitness that the shooting by defendant was accidental; all of the witness's testimony up to the conclusion was admitted and the trial court's reasoning that the jury could reach its own conclusion was rational and not arbitrary or groundless. *Simpson v. State*, — Ark. App. —, 119 S.W.3d 83, 2003 Ark. App. LEXIS 726 (2003).

#### **Personal Knowledge.**

Any inferences or opinions a witness expresses that pass the rational connection and “helpful” tests of this rule, must also pass the personal knowledge test of Rule 602. *Carton v.*



Missouri Pac. R.R., 303 Ark. 568, 798 S.W.2d 674 (1990).

Testimony of emergency medical technician concerning the instrument with which victim's injuries were inflicted based on his personal knowledge and the observation of her wounds was properly admitted; the opinion was one which a normal person who had previously seen puncture wounds made by screwdrivers would form; and his opinion was helpful to the determination of a fact in issue, the cause of the victim's wounds. *Russell v. State*, 306 Ark. 436, 815 S.W.2d 929 (1991).

Where witnesses had ample contact with defendant to make an identification and to develop opinions based on their perceptions, trial court did not abuse its discretion in permitting them to relay their opinions to the jury. *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995), cert. denied 517 U.S. 1143, 116 S. Ct. 1436, 134 L. Ed. 2d 558 (1996).

Trial court did not err in admitting certain testimony because the questioning of an officer did not necessarily call for information outside the scope of the officer's knowledge and the officer's opinion on the matter would not have helped the jury determine an issue of fact. *Moore v. State*, 362 Ark. 70, 207 S.W.3d 493 (2005).

#### **Rational Connection.**

The rational connection test means only that the opinion or inference is one which a normal person would form on the basis of the observed facts. *Carton v. Missouri Pac. R.R.*, 303 Ark. 568, 798 S.W.2d 674 (1990).

#### **Sanity of Defendant.**

A nonexpert witness may testify as to the sanity of a defendant if a proper foundation is laid; however, the trial court should exclude the opinion testimony of a nonexpert witness whose association with the accused and opportunities for observation for a sufficient length of time are not adequately shown. *Avery v. State*, 271 Ark. 584, 609 S.W.2d 52 (1980).

#### **Speculative Testimony.**

Eyewitness' testimony that defendant was "going like a bat out of hell" prior to the collision of two automobiles was correctly excluded from the jury since it was speculative and not helpful to a clear understanding of the testimony or to a determination of a fact in issue. *Miller v. Tipton*, 272 Ark. 1, 611 S.W.2d 764 (1981).

Although this rule provides for opinion testimony rationally based on the perception of the witness, there was no abuse of discretion where the trial court disallowed testimony by plaintiff in response to a hypothetical question that did not pertain to the circumstances which, plaintiff contended, caused the acci-

dent that injured him. *Piercy v. Wal-Mart Stores, Inc.*, 311 Ark. 424, 844 S.W.2d 337 (1993).

Stated another way, evidence is "speculative" under this rule where it is not helpful to a clear understanding of the testimony or to a determination of a fact in issue. *Diffie v. State*, 319 Ark. 669, 894 S.W.2d 564 (1995).

During defendant's trial for the armed robbery of a convenience store, he raised a speculation objection under this rule to an officer's testimony characterizing defendant's behavior in custody as a "fishing expedition;" the objection was sufficient to preserve the matter for appellate review. Because defendant's evasiveness in custody was not a fact in issue at trial, any error in the "fishing expedition" testimony was harmless. *Dunahue v. State*, 2009 Ark. App. 810, — S.W.3d —, 2009 Ark. App. LEXIS 974 (2009).

#### **State of Mind.**

The trial court in a first-degree murder case properly excluded the opinion of the arresting officer that the defendant was "scared to death" at the time of his arrest, despite the fact that this rule permits even lay witnesses to describe whether a defendant was angry, nervous or scared, since the defendant's state of mind after the shooting has no relevance under Rule 401 and Rule 402 tending to make the existence of a consequential fact more or less probable than it would be without the evidence, and since the excluded testimony was merely repetitious to that presented by the defendant himself as to his actions after the shooting. *Graham v. State*, 2 Ark. App. 266, 621 S.W.2d 4 (1981).

#### **Testimony of Police Officer.**

For a police officer to give a "qualified lay opinion" the showing of a "rational basis" for his opinion would have to consist of evidence which would be little different from that which would show him to be an expert. *Stapleton v. Holiman*, 268 Ark. 1101, 598 S.W.2d 453 (1980).

The court in a burglary prosecution did not err in allowing a deputy to give an opinion that the defendants' car had backed from the driveway of the burglarized house just before he saw it, since whether the car had backed from the driveway was a relevant issue and its diagonal position in the highway, relative to the driveway, and its movement as he observed it, provided a rational basis for the opinion he gave. *Tillman v. State*, 275 Ark. 275, 630 S.W.2d 5 (1982), cert. denied 459 U.S. 1201, 103 S. Ct. 1185, 75 L. Ed 2d 432 (1983).

Where the witness' opinion was rationally based on his perception of the victim's body when it was removed from the water and on his past experience with drowned persons as a police investigator, in light of the fact that

the judge gave the jury a cautionary instruction, and the fact that two pathologists testified that determining time of death was not an exact science, the judge did not err in allowing the police investigator to give his opinion as to when the drowning victim died. *Gruzen v. State*, 276 Ark. 149, 634 S.W.2d 92, cert. denied 459 U.S. 1020, 103 S. Ct. 386, 74 L. Ed. 2d 517 (1982).

Where an officer investigated a vehicle accident, observed sufficient relevant evidence such as skid marks, debris from the vehicles, position of the vehicles, or made other observations, and where he could rationally form an opinion about the point of impact, he should have been allowed to testify as to that opinion; it was for the trial court to determine whether proper foundation had been laid for the testimony. *Smith v. Davis*, 281 Ark. 122, 663 S.W.2d 165 (1983).

The testimony of police officers, one of them the intended victim, that a handgun was fired point blank at an officer and that the defendant appeared to be shooting to kill is admissible opinion testimony. *Salley v. State*, 303 Ark. 278, 796 S.W.2d 335 (1990).

Court erred in ruling that state trooper could not state her opinion about the location of the vehicles at the moment of impact where her opinion was based on position of wrecked vehicles, skid marks and scuff marks. *Sledge v. Meyers*, 304 Ark. 301, 801 S.W.2d 650 (1991).

Where an officer testified that the defendant made an illegal left turn based upon his investigation of the accident, but the officer was not an eyewitness to the accident, and there was no way to tell from investigating the scene of the accident whether the defendant used his left turn signal or whether the plaintiff sounded his horn before he attempted to pass the defendant, the officer's testimony did not help the fact finder determine the facts and reach his decision on who was responsible for the accident, and thus, was inadmissible under this rule. *Butler v. Dowdy*, 304 Ark. 481, 803 S.W.2d 534 (1991).

Where the case was tried to the court without a jury and the record reflected competent evidence existed that supported the judgment, it was not reversible error that officer's testimony was admitted where it should have been inadmissible under this rule. *Butler v. Dowdy*, 304 Ark. 481, 803 S.W.2d 534 (1991).

Officer's reading of defendant's diary and explanation of notations concerning crossbows was admissible because his response was based at least in part from his investigation and his acquired knowledge of crossbows and their brand names. *Crow v. State*, 306 Ark. 411, 814 S.W.2d 909 (1991).

The trial court properly allowed a police officer to testify that a shotgun barrel ap-

peared to have been cut. *Bridges v. State*, 327 Ark. 392, 938 S.W.2d 561 (1997).

In a prosecution for robbery, the court properly refused to allow a police officer to testify as to whether the defendant could have carried certain items without anyone seeing those items since such testimony was not necessary to assist the jury in understanding the officer's testimony or in making a determination of fact. *Skiver v. State*, 336 Ark. 86, 983 S.W.2d 931 (1999).

In a murder trial, officer was not offered as an expert, and officer's testimony on rebuttal regarding the amount of blood loss in similar cases was rationally based on the officer's years of experience as a homicide investigator; therefore, the testimony was admissible as a lay opinion. *Robinson v. State*, 353 Ark. 372, 108 S.W.3d 622 (2003).

In defendant's trial for aggravated robbery, his argument, that the trial court erred in allowing a sergeant to testify that cigarettes found in defendant's vehicle during his arrest were those stolen from the liquor store, was not preserved for review because it was only after the last question that defendant's counsel objected, arguing that the sergeant was not qualified to tell the jury what the numbers on the cigarette pack signified; defendant should have objected at the first opportunity to that line of questioning. *McClain v. State*, 361 Ark. 133, 205 S.W.3d 123 (2005).

In defendant's murder case, the court properly allowed a detective to testify that there was no blood found on the screwdriver recovered from defendant's home and that it was not unusual to not find blood or fingerprints on objects, even after they had been touched or penetrated into a body, because the detective testified as to his opinion, rationally based on his thirteen years of experience as an investigator. *Navarro v. State*, 371 Ark. 179, 264 S.W.3d 530 (2007).

Defendant's conviction for murder in the second degree was proper because the admission of an officer's opinion that defendant would go from controlled to crying, back and forth, through the entire interview, was admissible. Because the officer was testifying not only about defendant's statement to the police but also her demeanor after the crime and the discrepancies that he noticed between her statements and the physical evidence, it was not an abuse of discretion to allow him to testify about his perception of the changes in defendant's demeanor during her statement. *Johnson v. State*, 2010 Ark. App. 153, — S.W.3d —, 2010 Ark. App. LEXIS 167 (2010).

Trial court did not abuse its discretion by allowing the agent to testify that when he took photographs of defendant at the crime scene he had what appeared to be blood on his hand because the agent's opinion was based on his personal experience as a law enforce-



ment officer and observing defendant at that particular crime scene, it was rationally based on the agent's observations at the crime scene, and it was helpful for him in explaining why he took photographs of defendant's hands and to determine a fact issue. *Leach v. State*, 2012 Ark. 179, — S.W.3d —, 2012 Ark. LEXIS 200 (Apr. 26, 2012).

#### Underlying Observations.

A witness may express an opinion or inference rather than the underlying observations if the expression would be "helpful to a clear understanding of his testimony or the determination of a fact in issue where is"; if, however, an opinion without the underlying facts would be misleading, then an objection may be properly sustained. *Carton v. Missouri Pac. R.R.*, 303 Ark. 568, 798 S.W.2d 674 (1990).

### Rule 702. Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

#### RESEARCH REFERENCES

**ALR.** Admissibility and weight of voice spectrographic analysis evidence. 95 ALR 5th 471.

Admissibility and effect of evidence of electromagnetic fields generated by power lines, or public perception thereof, in action to value land or to recover for personal injury or property damage. 104 ALR 5th 503.

Admissibility and weight of fingerprint evidence obtained or visualized by chemical, laser, and digitally enhanced imaging processes. 110 ALR 5th 213.

Vertical gaze nystagmus test: Use in impaired driving prosecution. 117 ALR 5th 491.

Admissibility of ion scan evidence. 124 ALR 5th 691.

Admissibility and sufficiency of bite mark evidence as basis for identification of accused. 1 ALR 6th 657.

Admissibility in state criminal case of results of polygraph (lie detector) test—Post]Daubert cases. 10 ALR 6th 463.

Qualification as Expert To Testify as to Findings or Results of Scientific Test Concerning DNA Matching. 38 ALR 6th 439.

Admissibility of Computer Forensic Testimony. 40 ALR 6th 355.

Admissibility of Evidence Taken from Vehicular Event Data Recorders (EDR), Sensing Diagnostic Modules (SDM), or "Black Boxes". 40 ALR 6th 595.

Admissibility of Biomedical Engineer Testimony. 43 ALR 6th 327.

#### Value of Property.

Testimony of department store superintendent as to value of stolen department store property held admissible. *Williams v. State*, 29 Ark. App. 61, 781 S.W.2d 37 (1989).

**Cited:** *Clawson v. Rye*, 281 Ark. 8, 661 S.W.2d 354 (1983); *Whaley v. State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984); *Jones v. State*, 15 Ark. App. 283, 692 S.W.2d 775 (1985); *Ross v. State*, 300 Ark. 369, 779 S.W.2d 161 (1989); *White v. State*, 303 Ark. 30, 792 S.W.2d 867 (1990); *Thomson v. Littlefield*, 319 Ark. 648, 893 S.W.2d 788 (1995); *Wyles v. State*, 357 Ark. 530, 182 S.W.3d 142 (2004); *Agracat, Inc. v. AFS-NWA, LLC*, 2010 Ark. App. 458, — S.W.3d —, 2010 Ark. App. LEXIS 484 (June 2, 2010).

Necessity and Admissibility of Expert Testimony to Establish Malpractice or Breach of Professional Standard of Care by Architect. 47 ALR 6th 303.

Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney — General Principles and Conduct Related to Interaction with Client. 58 ALR 6th 1.

Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney — Conduct Related to Procedural Issues. 59 ALR 6th 1.

Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney — Conduct Related to Substantive Representation and Transactional Matters. 60 ALR 6th 1.

**Ark. L. Rev. Notes,** A Restrictive Interpretation of Rule 704 of the Arkansas Uniform Rules of Evidence: *Gramling v. Jennings*, 36 Ark. L. Rev. 178.

*Haase v. Starness: The Arkansas Supreme Court's Refusal to Require Expert Testimony in Express Warranty Medical Malpractice Litigation*, 50 Ark. L. Rev. 731.

Arkansas Adopts a Second Admissibility Test for Novel Scientific Evidence: Do Two Tests Equal One Standard?, 56 Ark. L. Rev. 21.

**U. Ark. Little Rock L.J.** Powell, Survey of Torts, 3 U. Ark. Little Rock L.J. 316.

Arkansas Law Survey, Hall, Evidence, 8 U. Ark. Little Rock L.J. 157.

Evidence — Novel Scientific Evidence — DNA Profiling Held Admissible Under the Relevancy Standard. *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991), 15 U. Ark. Little Rock L.J. 71.

Note, Evidence — New Federal Standard for Admission of Scientific Evidence: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), 17 U. Ark. Little Rock L.J. 1.

**U. Ark. Little Rock L. Rev.** Annual Survey of Caselaw, Tort Law, 26 U. Ark. Little Rock L. Rev. 993.

## CASE NOTES

### ANALYSIS

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### In General.

Where a psychologist was never qualified as an expert witness and where it became apparent that his report on a battery of tests administered to the defendant could not be admitted without its approval by a supervising psychiatrist or consulting psychologist, it was proper for the trial judge to limit the witness to testifying as a psychological examiner and layman, and to allow him to give a description and the results of the tests the defendant took, but exclude his findings. *Robinson v. State*, 274 Ark. 312, 624 S.W.2d 435 (1981).

A determination under this rule of whether the evidence might confuse or mislead the jury is separate from a Rule 403 weighing. *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991).

### Accident Reconstruction.

The determination of an expert witness' qualifications is a matter lying within the trial judge's discretion, to be upheld on appeal absent an abuse of that discretion; with regard to accident reconstruction, the important consideration is whether the situation is beyond the jurors' ability to understand the facts and draw their own conclusions. *B. & J. Byers Trucking, Inc. v. Robinson*, 281 Ark. 442, 665 S.W.2d 258 (1984); *Drope v. Owens*, 298 Ark. 69, 765 S.W.2d 8 (1989).

Attempts to reconstruct traffic accidents are viewed with disfavor, and in the absence of anything to indicate it was beyond the ability of the jury to understand the facts and draw their own conclusions, expert testimony is not admissible. *Sims v. Safeway Trails, Inc.*, 297 Ark. 588, 764 S.W.2d 427 (1989); *Drope v. Owens*, 298 Ark. 69, 765 S.W.2d 8 (1989).

While attempts to reconstruct accidents by means of an expert testimony are viewed with disfavor, with the enactment of this rule the emphasis of inquiry became whether the expert could assist the jury in that endeavor, providing a broader, more expansive window for the admissibility of reconstructionist testimony than under the former standard. *Banks v. Jackson*, 312 Ark. 232, 848 S.W.2d 408 (1993).

Where there was directly contradictory testimony from the persons involved in the collision and one eyewitness, disputes concerning the damage sustained by the car and bicycle involved in the collision, as well as the speed of the vehicles, the testimony of an expert reconstructionist satisfied the criteria of this rule by aiding the jury in understanding the evidence, and the circuit court did not abuse its discretion in allowing the expert to testify. *Banks v. Jackson*, 312 Ark. 232, 848 S.W.2d 408 (1993).

Insured's proffer of accident reconstruction expert's testimony made it abundantly clear that the expert would not be offering expert opinion solely on the issue of how fast the employee was driving, rather, the proffered testimony contained the expert's opinion that the 123 feet of straight skid marks left by the tractor-trailer at the scene of the accident showed that the brakes on both the left and



right sides of the axle were braking equally and that the brakes on the tractor and the brakes on the trailer were both working properly; therefore, the trial court erred in ruling that the expert's entire testimony was inadmissible. *Southern Farm Bureau Cas. Ins. Co. v. Daggett*, 354 Ark. 112, 118 S.W.3d 525 (2003).

#### **Arson Detection.**

The trial court did not abuse its discretion in qualifying a witness as an expert in the field of arson detection and allowing his testimony regarding the nature of the fire, where in its attempt to prove that the fire was not of accidental origin but had been intentionally set, the state called this witness who had been employed at the state fire marshal's office from September, 1978, through September, 1979, where he stated that he had attended several training sessions at the Arkansas Fire Training Academy and had on-the-job training under the direct supervision of the state fire marshal, and where he also testified that he had not only attended classes but had taught classes on the investigation of fires. *Parris v. State*, 270 Ark. 269, 604 S.W.2d 582 (Ct. App. 1980).

#### **Autopsy.**

Expert in forensic pathology, who observed injuries on the murder victim while performing an autopsy on the victim, was permitted to testify about the likely cause of death, even though he had not been qualified as a reconstructionist, because his opinion helped determine how the victim died. *MacKintrush v. State*, 60 Ark. App. 42, 959 S.W.2d 404 (1997), *aff'd* 334 Ark. 390, 978 S.W.2d 293 (1998).

#### **Basis of Opinion.**

The relative weakness or strength of the factual underpinning of the expert's opinion goes to the weight and credibility, rather than admissibility. *Arkansas State Hwy. Comm'n v. Schell*, 13 Ark. App. 293, 683 S.W.2d 618 (1985); *Killian v. Hill*, 32 Ark. App. 25, 795 S.W.2d 369 (1990).

When an expert's testimony is based on hearsay, the lack of personal knowledge on the part of the expert does not mandate the exclusion of the opinion but, rather presents a jury question as to the weight which should be assigned the opinion. *Arkansas State Hwy. Comm'n v. Schell*, 13 Ark. App. 293, 683 S.W.2d 618 (1985).

A state trooper should not have been permitted to testify concerning his opinion on the speed issue absent some indication that his opinion was based on information that went beyond the experience and understanding of the average juror, where the question before the jury was whether the defendant was driving negligently when he collided with the

decedent's car. *Higgs v. Hodges*, 16 Ark. App. 146, 697 S.W.2d 943 (1985).

Where the testimony shows a questionable basis for the opinion of the expert, the issue becomes one of credibility for the fact finder, rather than a question of law. *Killian v. Hill*, 32 Ark. App. 25, 795 S.W.2d 369 (1990).

A county deputy sheriff was properly declared an expert on the issue of who had caused a motor vehicle collision, notwithstanding his modest refusal to declare himself an expert, where he detailed his academy training and work experience and described his investigation at the scene that led him to reach his conclusions. *New Prospect Drilling Co. v. First Com. Trust*, 332 Ark. 466, 966 S.W.2d 233 (1998).

In defendant's manslaughter case, the court properly admitted expert regarding the effects of methamphetamine because the trial court conducted a Daubert hearing and the expert testified to his training and experience and also testified to the fact that his opinion testimony was widely accepted by the scientific community. *Hoyle v. State*, 371 Ark. 495, 268 S.W.3d 313 (2007).

In the parents' action after their child developed a rare form of leukemia, a test used by a doctor had not been subjected to peer review and, allowing the doctor to take samples from homes and present them as school samples would have grossly misled the jury. Therefore, the parents failed to carry their burden of proof regarding the admissibility on the issue of reliability. *Green v. AlphaPharma, Inc.*, 373 Ark. 378, 284 S.W.3d 29 (2008).

#### **Blood-Splatter Analysis.**

State's blood-splatter expert witness had received extensive training and education in blood-spatter analysis, as well as experience in conducting that analysis at crime scenes, blood-splatter analysis was a well-recognized science which has been in existence for many years, and the expert had previously been certified by a trial court in Arkansas as an expert and had testified regarding blood-pattern analysis; thus, the reliability of the expert's testimony was established and, additionally, the expert's testimony was also relevant because it not only corroborated other evidence regarding the murder, but also assisted the jury in understanding the manner of the attack and what was found at the crime scene. *Hudson v. State*, 85 Ark. App. 85, 146 S.W.3d 380 (2004).

Trial court did not err in allowing a police detective to testify as to blood spatter because the detective had specialized training that would have provided her with more than ordinary knowledge in blood-spatter analysis. *Flowers v. State*, 373 Ark. 127, 282 S.W.3d 767 (2008).

**Burden of Proof.**

Evidence Rules 702 through 705 emphasize the function of cross-examination, with the burden being placed upon the opponent of the testimony to show that the expert's conclusion lacks adequate support and is subject to being stricken by the trial court. *Collins v. Hinton*, 327 Ark. 159, 937 S.W.2d 164 (1997).

**Construction with Other Law.**

The requirements of § 16-114-206(a) are not in direct conflict with the requirements of this rule; the facts of any given case determine whether expert testimony is required in a medical malpractice claim for negligence. *Haase v. Starnes*, 323 Ark. 263, 915 S.W.2d 675 (1996), appeal dismissed 337 Ark. 193, 987 S.W.2d 704 (1999).

Because the language, "By means of expert testimony provided only by a medical care provider of the same specialty as the defendant" in § 16-114-206(a) adds requirements to this rule, attempts to dictate procedure, and invades the province of the judiciary's authority to set and control procedure, it violates the separation-of-powers doctrine, Ark. Const. Amend. 80, § 3, and the inherent authority of the courts to protect the integrity of proceedings and the rights of the litigants. *Broussard v. St. Edward Mercy Health Sys.*, 2012 Ark. 14, — S.W.3d —, 2012 Ark. LEXIS 20 (Jan. 19, 2012).

**Cross-Examination.**

Once the trial court determined witness qualified as an expert, he was entitled to testify in the form of an opinion or otherwise give his reasons without prior disclosure of underlying facts or data; he was required, however, to disclose the underlying facts or data on cross-examination. *Bull v. Brantner*, 10 Ark. App. 229, 662 S.W.2d 476 (1984).

In defendant's murder trial, the court properly limited the scope of defendant's questioning of the state's expert witness where the court determined that the expert was not qualified to testify about the psychology of the crime and, when testifying, the expert did express his opinion that the attempted decapitation was "overkill" and that the killer could have inflicted the wound to the victim's neck due to "emotional things"; thus, the testimony that defendant sought, that his wife might have killed the victim for emotional reasons, was before the jury. *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006).

**Cumulative Evidence.**

Defendant's conviction for murder in the second degree was proper because defendant's argument regarding an officer's footprint analysis was without merit since, at the time the officer testified regarding that issue, unchallenged testimony and photographic exhibits had already established which shoes were worn by the victim and which were worn

by defendant. Blood on the shoes and the differences in the treads were obvious and that same evidence, and specifically, unchallenged testimony from a certified crime-scene technician, had established that there were pools of blood at the crime scene that contained shoe prints matching defendant's shoes and appeared to have been made by those shoes. *Johnson v. State*, 2010 Ark. App. 153, — S.W.3d —, 2010 Ark. App. LEXIS 167 (2010).

**Damages.**

Rice farmers' expert's testimony on the farmers' past and future damages due to contamination of their rice seed with genetically engineered rice seed was admissible under this rule. The engineered rice's manufacturer's objections to the expert's methods of calculation went to the weight of the testimony, not its admissibility. *Bayer CropScience LP v. Schafer*, 2011 Ark. 518, — S.W.3d —, 2011 Ark. LEXIS 598 (Dec. 8, 2011).

**Discretion of Court.**

Whether a witness qualifies as an expert is a matter to be decided within the sound discretion of a trial court, and in the absence of abuse of that discretion, the Supreme Court will not reverse the decision of the trial court. *Parker v. State*, 268 Ark. 441, 597 S.W.2d 586 (1980).

The determination of the qualifications of an expert witness lies within the discretion of the trial court, and his decision will not be reversed unless that discretion has been abused. *Dixon v. State*, 268 Ark. 471, 597 S.W.2d 77 (1980); *Phillips v. Clark*, 297 Ark. 16, 759 S.W.2d 207 (1988); *Montgomery v. Butler*, 309 Ark. 491, 834 S.W.2d 148 (1992); *Hendrix v. State*, 40 Ark. App. 52, 842 S.W.2d 443 (1992); *Mearns v. Mearns*, 58 Ark. App. 42, 946 S.W.2d 188 (1997).

The determination of an expert's qualifications as a witness is within the sound discretion of the trial court and, absent an abuse of this discretion, his decision will not be reversed on appeal. *Whaley v. State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984); *Gregory v. State*, 37 Ark. App. 135, 825 S.W.2d 269 (1992).

Whether a witness is qualified to testify as an expert upon a particular question is a matter to be decided within the discretion of the trial court. *Cathey v. Williams*, 290 Ark. 189, 718 S.W.2d 98 (1986); *Duncan v. State*, 38 Ark. App. 47, 828 S.W.2d 847 (1992).

Since the admissibility of expert testimony rests largely on the broad discretion of the trial court, on appeal, the appellant has the burdensome task of demonstrating that the trial court has abused its discretion. *Sims v. Safeway Trails, Inc.*, 297 Ark. 588, 764 S.W.2d



427 (1989); *Mearns v. Mearns*, 58 Ark. App. 42, 946 S.W.2d 188 (1997).

Whether to allow a witness to give expert testimony rests largely within the sound discretion of the trial court, and that determination will not be reversed absent an abuse of that discretion. *Swadley v. Krugler*, 67 Ark. App. 297, 999 S.W.2d 209 (1999).

#### **DNA Testing.**

DNA tests should not be ruled admissible before the accused's expert has had a chance to examine the evidence, procedures, and protocol; ideally, an accused should even be provided with the actual DNA samples in order to reproduce the tests, but an accused must be given the opportunity for independent expert review before a determination of reliability is made. *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991).

DNA profiling evidence should no longer be viewed as novel scientific evidence requiring a preliminary inquiry, beyond the showing that the expert properly performed a reliable methodology in creating the DNA profiles. *Moore v. State*, 323 Ark. 529, 915 S.W.2d 284 (1996).

#### **Exclusion of Expert Testimony.**

Where, in a prosecution for rape, the defense offered the testimony of a qualified expert in the field of human perception for the purposes of aiding the jury in understanding how human perception works mechanically and what factors influence the perception and the ability of an individual to later recall that perception, and for the purpose of an opinion as to the reliability of the victim's perception and recall under the circumstances of her attack, the expert's testimony was properly excluded by the trial court as an invasion into the province of the trier of fact. *Caldwell v. State*, 267 Ark. 1053, 594 S.W.2d 24 (1980).

An expert witness in crime scene investigation and in the scientific examination of minute physical evidence should not have been permitted to testify that in his opinion the murder victim met her death in the defendant's house, where the expert's conclusion seemed to be based solely on the proof that the victim had at some time been in the defendant's house and that she did not walk out of the house on her own feet. *Maxwell v. State*, 279 Ark. 423, 652 S.W.2d 31 (1983).

Expert testimony properly excluded where defendant was given adequate opportunity to cross-examine the eyewitnesses and expert testimony could have hindered the jury's ability to judge impartially the credibility of witnesses and the weight to be accorded their testimony. *Utey v. State*, 308 Ark. 622, 826 S.W.2d 268 (1992).

Expert witness testimony of a maritime and marine safety expert was not allowed where nothing indicated that the knowledge

was so specialized that it was beyond the ability of the trier of fact to understand and draw its own conclusions. *Williams v. Ingram*, 320 Ark. 615, 899 S.W.2d 454 (1995).

Testimony from a maritime and marine safety expert regarding the requisite standard of care and the danger of river currents was not allowed as there was no indication that the witness had specialized knowledge that went beyond the general knowledge of an average person. *Wade v. Grace*, 321 Ark. 482, 902 S.W.2d 785 (1995).

Psycho-social history prepared by interviewing people who knew defendant properly excluded. *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995), cert. denied 517 U.S. 1226, 116 S. Ct. 1861, 134 L. Ed. 2d 960 (1996).

The trial court did not abuse its discretion in refusing to allow testimony in a murder prosecution by a forensic psychologist who would have testified about the unreliability of eyewitness testimony. *Parker v. State*, 333 Ark. 137, 968 S.W.2d 592 (1998).

Court did not err in refusing to allow defendant's expert witness to testify regarding the credibility and weight of defendant's custodial statement because defendant had the opportunity to cross-examine the investigating officers regarding the custodial interrogation, he took the stand and testified to his version of the events surrounding his custodial interrogation, and the prejudice that would have resulted from the testimony regarding his opinion of the voluntariness of the confession would have far outweighed the probative value of the evidence because such testimony would have usurped the jury's role as the trier of fact. *Flowers v. State*, 362 Ark. 193, 208 S.W.3d 113 (2005).

In a medical malpractice suit against a pediatrician arising from the treatment of a child during an emergency room visit, an expert witness on emergency room care was not qualified to offer expert testimony where, in her practice, she did not perform vitals on neonates nor did she examine children; thus, the trial court properly excluded her expert witness deposition. *Hill v. Billups*, 92 Ark. App. 259, 212 S.W.3d 53 (2005).

Although the circuit court abused its discretion in refusing to qualify a doctor as an expert witness, the doctor's affidavit was not sufficient to overcome a summary-judgment motion; although the doctor's affidavit stated that he was familiar with the standard of care required of physical therapists under Arkansas law, it did not state the relevant standard of care with specificity and it did not state with any reasonable degree of medical certainty that the patient's injuries were proximately caused by the therapist's alleged negligence. *Fryar v. Touchstone Physical Therapy, Inc.*, 365 Ark. 295, 229 S.W.3d 7 (2006).

Trial court did not err by excluding the testimony of a defense expert witness because of an alleged discovery violation as defense counsel failed to properly prepare the witness's findings and give them to the state well in advance of the trial so that the state could prepare its cross-examination and any rebuttal witness; the trial court correctly noted that the witness's findings did not provide anything more than common knowledge where, in two exhibits, the witness stated that she claimed that an interviewer led the child victims with her questions and the expert failed to suggest how she would have conducted the interviews of the victims. *White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006).

Denial of the class member's motion to strike in an action against cellular providers was inappropriate, in part because expert testimony focused on one provider's damages and how other costs might increase if the early termination fees were invalidated; thus, the expert's opinion was concerned with the underlying merits of the case and it was improper to consider the underlying merits at the class-certification stage of proceedings. Moreover, the expert opinion contained conclusions that invaded the role of the circuit court. *Rosenow v. Alltel Corp.*, 2010 Ark. 26, 358 S.W.3d 879 (2010).

Circuit court abused its discretion by applying too rigid a standard in excluding the testimony of a company's experts because the expert witnesses possessed greater-than-ordinary knowledge of floor-plan lending and banking in general and could have assisted a fact-finder in interpreting the ambiguous interest-rate clause, both witnesses were veteran bankers with practical experience in commercial lending and floor-plan financing, and they were no strangers to Arkansas banking practices; although neither witness professed to be an expert in contract interpretation, that did not disqualify their testimony, and because they had superior knowledge to offer the jury, gained from their experience in the commercial banking industry, it remained the jury's prerogative to interpret the contract, with the aid of the experts. *Tri-Eagle Enters. v. Regions Bank*, 2010 Ark. App. 64, — S.W.3d —, 2010 Ark. App. LEXIS 58 (Jan. 20, 2010).

Circuit court did not err in granting the state's motion in limine to exclude the proffered testimony a neuropsychologist and expert in forensic psychology, and an expert in psychology and developmental disabilities because defendant had ample opportunity to cross-examine the officers who took his statements and the jury viewed a videotape of one of defendant's statements and heard an audio recording of two others. The proffered testimony was not beyond the ability of the jury to

understand and draw its own conclusions. *Vance v. State*, 2011 Ark. 243, — S.W.3d —, 2011 Ark. LEXIS 223 (June 2, 2011).

Trial court did not abuse its discretion by granting the railroad company's motion in limine excluding the testimony of the employee's experts under this rule in the employee's action under the Federal Employers' Liability Act because the fact that some studies showed that higher levels of benzene could cause multiple myeloma did not prove that the lower levels of that chemical found in diesel exhaust and fuel played a role in causing the employee's cancer; the employee produced no reliable data of his actual exposure to diesel exhaust or benzene. The physician's reliance on a particular study was misplaced in view of the fact that it analyzed chemical workers, not railroad employees, with direct exposure to nearly-pure benzene; the toxicologist relied only on anecdotal testimony, refused to consider the employee's test results, and defined "excessive exposure" as anything above ambient levels. *Richardson v. Union Pac. R.R. Co.*, 2011 Ark. App. 562, — S.W.3d —, 2011 Ark. App. LEXIS 602 (Sept. 28, 2011).

Court properly granted the state's motion in limine to exclude defendant's expert testimony because, in the proffer, the expert testified that he could not tell the jury what actually happened, but that he could illuminate defendant's reactions, mental capabilities, deficits, and reasons for those deficits. The testimony was simply an attempt to make a mental-disease-or-defect defense after the fact, or, at the very least, confusing as to the point of its admission. *Laswell v. State*, 2012 Ark. 201, — S.W.3d —, 2012 Ark. LEXIS 230 (May 10, 2012).

### **Eyewitness Perception.**

Although the trial court refused to allow expert witness to testify concerning factors affecting eyewitness perception concerning identification of defendant in a police lineup, such expert testimony, touching only generally on factors which influence eyewitness perception, was not so essential to the jury that its exclusion constituted an abuse of discretion. *Jones v. State*, 314 Ark. 289, 862 S.W.2d 242 (1993).

### **Funeral Director.**

In wrongful death action trial court erred in allowing a funeral home director to testify as an expert witness on the issue of what is more than normal grief where funeral director's only expert qualifications were that he had participated in approximately 200 funerals over the past 24 years and that he had attended an institute of mortuary science. *Williams v. Carr*, 263 Ark. 326, 565 S.W.2d 400 (1978).



**Harmless Error.**

While the psychologist should not have been allowed to testify that the history given by the victim was consistent with sexual abuse, the testimony merely provided the jurors with a hint of the testimony which they would receive from the victim; therefore, the error was harmless and did not affect the judgment. *Russell v. State*, 289 Ark. 533, 712 S.W.2d 916 (1986), criticized *Marcum v. State*, 299 Ark. 30, 771 S.W.2d 250 (1989).

Trial court committed harmless error in allowing police officer to testify regarding contributing factors to automobile accident. *Muskogee Bridge Co. v. Stansell*, 311 Ark. 113, 842 S.W.2d 15 (1992).

Trial court's decision allowing expert testimony involving the examination of two photographs for similarity was correct as the techniques involved were not novel and the predicate for the testimony concerning the expert's examination was laid outside the jury's presence by his testimony that his technique was accepted by the scientific community; the techniques had been used by the expert for six years, had been used in Arkansas for nearly 20 years, and had been accepted as reliable by courts in Arkansas and Texas. *Ridling v. State*, 360 Ark. 424, 203 S.W.3d 63 (2005).

In a rape case, a trial court erred by admitting expert testimony regarding whether a child victim was being truthful as this invaded the province of the jury; however, the error was harmless since the victim's testimony was sufficient and it was corroborated by independent eyewitnesses. *Buford v. State*, 368 Ark. 87, 243 S.W.3d 300 (2006).

**Impeachment of Expert.**

In a medical malpractice action, the court did not abuse its discretion in excluding evidence that the defendant had failed a board certification examination on a number of occasions; although evidence of a physician's lack of board certification may be used to impeach the physician's credibility as an expert witness, a trial court must still properly weigh the interests under Rule 403 and may exclude relevant evidence if its probative value is substantially outweighed by the possibility of unfair prejudice or confusion of the issues. *Jackson v. Buchman*, 338 Ark. 467, 996 S.W.2d 30 (1999).

**Insurance Industry Expert.**

In the insured's action against the insurer for defamation, the trial court did not err in allowing the insured's insurance industry expert to testify because there was a sufficient connection between his testimony national practices and the insured's scenario for the testimony to have some relevancy. *Allstate Ins. Co. v. Dodson*, 2011 Ark. 19, — S.W.3d —, 2011 Ark. LEXIS 26 (Jan. 27, 2011).

**Knowledge of Facts.**

Where the state offered testimony of an expert on the child abuse syndrome and, by the time she testified, there was strong evidence on the record that a child abuse case was before the court and evidence of the behavior of abused children generally was relevant to explain the conduct of the alleged victims in this action, including their unwillingness to discuss it until after their father and mother separated, the expert testimony was admissible even though the expert witness had no knowledge of the facts in the case before the court. *Poyner v. State*, 288 Ark. 402, 705 S.W.2d 882 (1986).

**Legal Insanity.**

Expert testimony regarding the legal standard for criminal insanity, and the expert's opinion that the defendant was not criminally insane, held admissible as rebuttal evidence on the issue of whether the defendant was mentally competent at the time of the offense. *Matthews v. State*, 327 Ark. 70, 938 S.W.2d 545 (1997).

**Medical Doctors.**

In a rape case, testimony from two doctors that a tear to a child's vaginal wall was consistent with an intentional injury caused by penetration by a blunt force object was not subject to the *Daubert* standard as it was based on experience and observation, not anything novel; moreover, even though the testimony touched on the ultimate issue, it was allowable because it did not mandate a legal conclusion. *Turbyfill v. State*, 92 Ark. App. 145, 211 S.W.3d 557 (2005).

During defendant's trial for permitting the abuse of her minor child, the court did not err in allowing a pediatrician to testify; as a medical expert in the field of child abuse, the pediatrician was familiar with how the child's hand injuries would have appeared at the time they were incurred and whether their appearance at that time would have been apparent to a care giver, something the jury could not have determined from the photographs taken of the child. *Sullivan v. State*, 2012 Ark. 74, — S.W.3d —, 2012 Ark. LEXIS 93 (Feb. 23, 2012).

**Medical Examiner.**

A medical examiner was properly permitted to testify in a murder prosecution that the cause of the victim's death was strangulation where he based his opinion on the presence of petechial hemorrhages on the surfaces of the eyes and in the surfaces of the eyelids and the presence of hemorrhages in the cricoid thyroid muscle and behind both horns of the thyroid and went on to state that these particular types of hemorrhages are caused by pressure that is applied from outside the neck and that some of the external injuries were indicative of a struggle. *MacKintrush v. State*,

334 Ark. 390, 978 S.W.2d 293 (1998).

#### **Motorists.**

It was not an abuse of the trial court's discretion to allow a state agency representative to testify concerning the reaction time of motorists. *Redman v. St. Louis S.W. Ry.*, 316 Ark. 636, 873 S.W.2d 542 (1994).

#### **Nurses.**

Nurse's expert testimony was properly allowed under this rule as the testimony was helpful as a lay person might otherwise think that, because a victim alleged that the abuse occurred over a period of several years, there had to have been some physical manifestation found upon examination; the testimony was not an impermissible opinion regarding the victim's credibility as the nurse never implied that an assault had occurred or that any injury had ever been sustained, but testified as to why the absence of physical evidence did not necessarily mean that the victim had not suffered sexual abuse. *Strickland v. State*, 2010 Ark. App. 599, — S.W.3d —, 2010 Ark. App. LEXIS 644 (Sept. 15, 2010).

#### **Pharmacologists.**

A pharmacologist was properly qualified as an expert in the field of pharmacology and, specifically, on the matter of the drug Rohypnol where his private lab was hired by the drug manufacturer of Rohypnol to develop testing procedures to detect the presence of the drug in humans, his testimony detailed the physiological effects of the drug on humans, and his familiarity with the effects of the drug came from his testing and research. *Sera v. State*, 341 Ark. 415, 17 S.W.3d 61 (2000), cert. denied 531 U.S. 998, 121 S. Ct. 495, 148 L. Ed. 2d 466 (2000).

#### **Police Officer.**

Officer's testimony regarding his training that dealt in depth with the horizontal gaze nystagmus test was sufficient to establish him as an expert witness qualified to discuss the details and results of the test. *Brown v. State*, 38 Ark. App. 18, 827 S.W.2d 174 (1992).

Law enforcement officers are allowed to testify based on their education and experience. *Redman v. St. Louis S.W. Ry.*, 316 Ark. 636, 873 S.W.2d 542 (1994).

Police officer permitted to testify about the drug trade where the officer had specialized training and experience in the drug trade and could assist the jury in determining whether the defendant might have murdered the victim to obtain property to buy drugs. *Martin v. State*, 328 Ark. 420, 944 S.W.2d 512 (1997), overruled *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

A police officer can qualify as a drug-recognition expert. *Mace v. State*, 328 Ark. 536, 944 S.W.2d 830 (1997).

This rule applied to a gang intelligence

detective's testimony regarding gang activity and, because the detective's expertise came from his personal experiences, a Daubert analysis was not required; while it was abuse of discretion to allow the detective to testify that defendant was a "slinger" and a "banger" under Ark. R. Evid. 403, the error was harmless because the evidence was cumulative. *Jackson v. State*, 359 Ark. 297, 197 S.W.3d 468 (2004), cert. denied 544 U.S. 1039, 125 S. Ct. 2266, 161 L. Ed. 2d 1070 (2005).

In a case involving the manufacturing of methamphetamine, the trial court did not err by allowing a police officer to testify as an expert witness regarding the manufacturing process; it was relevant as defendant disputed whether or not the items found could have been used to manufacture drugs. *Saul v. State*, 92 Ark. App. 49, 211 S.W.3d 1 (2005).

In defendant's trial for manufacturing methamphetamine in violation of § 5-64-401(a), a detective could testify as an expert and offer opinions about whether methamphetamine was manufactured under this rule because defendant disputed whether or not the items could have been used to manufacture methamphetamine, and thus, the process was relevant in the trial. *Saul v. State*, 92 Ark. App. 49, 211 S.W.3d 1 (2005).

Defendant's conviction for DWI was upheld where the trial court did not err in giving the jury an expert-witness instruction; there was a reasonable basis from which it could be said that two police officers had knowledge beyond that of ordinary knowledge, and the officers' specialized training and knowledge aided the jury in determining whether defendant was a danger. *Weisenfels v. State*, 102 Ark. App. 191, 283 S.W.3d 622 (2008).

#### **Qualifications.**

No firm rule can be derived which would serve uniformly as a means of measuring the qualifications of an expert, but too rigid a standard should be avoided, and if some reasonable basis exists from which it can be said the witness has knowledge of the subject beyond that of persons of ordinary knowledge, his evidence is admissible. *Dildine v. Clark Equip. Co.*, 282 Ark. 130, 666 S.W.2d 692 (1984).

Where a witness possessed significant experience and training in the field of mechanical engineering in that he held a Ph.D. degree, a master's degree in machinery design, and was Chairman of the Engineering Department at Arkansas State University, was then teaching machinery design, was otherwise experienced in machinery design, and professed to have a general and working knowledge of agricultural machinery and where witness had tested machines similar to one involved in accident giving rise to products liability action, his credentials to give an expert opinion in the context of this case were



beyond serious question and his testimony should have been admitted. *Dildine v. Clark Equip. Co.*, 282 Ark. 130, 666 S.W.2d 692 (1984).

The trial court did not abuse its discretion simply because it allowed a witness to qualify for the first time as an expert, where the witness testified that he had specialized in fingerprint work for six years and that he had 80 hours of training at the FBI Academy in latent fingerprint analysis. *Blair v. State*, 284 Ark. 330, 681 S.W.2d 374 (1984).

The trial court, in a manslaughter prosecution arising from an automobile accident, did not err in admitting the expert testimony of a state trooper as to the speed at which the defendant's vehicle was traveling at the time of the accident where the officer testified that he had been a state trooper for 15 years and had worked many similar accidents during that period, that he had received training in investigation of accidents, and that the training coupled with his years of experience enabled him to determine how accidents occur and speeds of automobiles from skid marks and other physical evidence. *Whaley v. State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984).

Whether a witness qualifies as an expert is a matter to be decided by the trial court, and in the absence of abuse of that discretion, the court will not reverse the trial court's decision. *Beck v. State*, 12 Ark. App. 341, 676 S.W.2d 740 (1984).

Where a witness testified that he had worked for the U.S. Treasury Bureau of Alcohol, Firearms and Tobacco for 13 years and that he had attended Automatic Weapons School, was qualified to use an automatic weapon, and had fired between 20 and 25 different automatic weapons, the trial court did not abuse its discretion in finding him an expert or in permitting him to testify that the weapon in question was an automatic weapon. *Beck v. State*, 12 Ark. App. 341, 676 S.W.2d 740 (1984).

In an action to determine the proper distribution of funds and assets among redistricted school districts, the testimony of, and an exhibit prepared by, a Department of Education employee were admissible as specialized knowledge under this rule, where the employee had many years experience in the business of fixing the value of the kind of property involved and he gave a full explanation of how he arrived at the values shown on the exhibit introduced. *Koelzer v. Bagley*, 13 Ark. App. 48, 680 S.W.2d 111 (1984).

A witness who worked for a heavy equipment manufacturer for six years; was service manager for the equipment for three years; performed the predelivery inspection on the piece of equipment in question; showed rental customers how to operate the equipment; drove, maintained and serviced the piece of

equipment in question; and operated all similar equipment, had the knowledge, skill, experience and training and was qualified to testify as either an expert or lay witness. *Dildine v. Clark Equip. Co.*, 285 Ark. 325, 686 S.W.2d 791 (1985).

Where the qualifications of the expert witness on the child abuse syndrome included a college degree in special education, a master's degree in school psychology, and three and a half years experience as a school counselor during which she had been involved in 25 to 50 child abuse cases, her education and experience with respect to child abuse were greater than those of ordinary persons, and her testimony about child abuse in general was thus admissible. *Poyner v. State*, 288 Ark. 402, 705 S.W.2d 882 (1986).

In a medical malpractice action, the general practitioner who had treated the patient for ten years was competent to testify as to whether the patient needed an immediate CT (computerized tomography) scan, where the doctor testified that as part of his regular practice he had to decide whether or not to recommend CT scans, he explained that various neurological tests are used to determine whether there are neurological abnormalities, and he demonstrated his own knowledge of the tests. *Cathey v. Williams*, 290 Ark. 189, 718 S.W.2d 98 (1986).

When the particular issue relates to a question lying within the general practitioner's own area of expertise, he or she is not prohibited from testifying upon that question as an expert. *Cathey v. Williams*, 290 Ark. 189, 718 S.W.2d 98 (1986).

If there is a reasonable basis for saying a witness knows more of the subject at hand than a person of ordinary knowledge, his evidence is admissible. *Courteau v. Dodd*, 299 Ark. 380, 773 S.W.2d 436 (1989); *Gregory v. State*, 37 Ark. App. 135, 825 S.W.2d 269 (1992).

Where expert witness was not recognized as an expert, his technical knowledge and experience could have qualified him as an expert with specialized knowledge to assist the jury in determining a fact in issue under this rule, or as a lay witness whose opinion was helpful in the determination of a fact issue under A.R.E. Rule 701. *Ferrell v. State*, 305 Ark. 511, 810 S.W.2d 29 (1991).

Court erroneously granted motion precluding state from introducing evidence of officer concerning use of antenna, found on the defendant, as drug paraphernalia. *Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991).

There was a reasonable basis for qualifying witness as an expert, as automobile mechanic and parts manager. *Duncan v. State*, 38 Ark. App. 47, 828 S.W.2d 847 (1992).

Trial court erred in allowing police officer to state his opinion that substance discovered in

defendant's possession was cocaine, where the testimony was admitted over defendant's continuing objection that there had not been a proper foundation laid establishing the officer's qualifications in the matter. *Hendrix v. State*, 40 Ark. App. 52, 842 S.W.2d 443 (1992).

Expert testimony may be given by individuals qualified by experience, knowledge or training; they need not be licensed professionals. *John H. Parker Constr. Co. v. Aldridge*, 312 Ark. 69, 847 S.W.2d 687 (1993).

It was not necessary that the trial court state formally that the witness was qualified as an expert; that omission did not constitute error. *Redman v. St. Louis S.W. Ry.*, 316 Ark. 636, 873 S.W.2d 542 (1994).

The trial court erred in permitting a witness certified in chiropractic roentgenology to testify as to a medical radiologist's definition of "subluxation" where there was no evidence that the witness was competent to testify on matters regarding medical radiology. *Hill v. State Farm Mut. Auto. Ins. Co.*, 56 Ark. App. 67, 937 S.W.2d 684 (1997).

In a medical malpractice case in which a child's delivery was complicated by a shoulder dystocia and the child was diagnosed with a permanent brachial plexus injury, the trial court properly refused to grant plaintiffs' motion in limine seeking to prohibit defendant's expert, who had delivered almost 11,000 babies and had published scientific articles that dealt with the problems of brachial plexus injury and shoulder dystocia, from testifying at trial. *Regions Bank v. Hagaman*, 79 Ark. App. 88, 84 S.W.3d 66 (2002).

Trial court did not err in qualifying a witness as an expert witness in electricity because the witness was a journeyman electrician, the head electrician at a plant for 18 years, and had inspected the concession trailer where a high school custodian was injured by an electrical shock; the questions surrounding the staleness of the witness's electrical experience affected the weight to be given to the testimony and not to whether the witness should have been qualified as an expert. *Coca-Cola Bottling Co. v. Gill*, 352 Ark. 240, 100 S.W.3d 715 (2003).

Finding in favor of the administratrix in her wrongful death action against the manufacturer of a medical device was proper where, pursuant to this rule, the opinion by her physician witness did not require him to be an expert in any field other than the one in which he was unquestionable qualified, the field of medicine; further, ARE 704 permitted the physician witness to rely on information provided by others in the formulation of his opinion. *Arrow Int'l v. Sparks*, 81 Ark. App. 42, 98 S.W.3d 48 (2003).

In a negligence action involving a propane explosion, the propane company's owner was qualified as an expert witness because of his

experience in propane delivery. *Miller v. Hometown Propane Gas, Inc.*, 86 Ark. App. 189, 167 S.W.3d 172 (2004).

Trial court did not err in admitting plaintiff's expert's testimony where defendant never objected to the expert's qualifications but instead objected to the use of hearsay testimony in the basis of the opinion that was allowed by Ark. R. Evid. 703. *Jackson v. Pitts*, 93 Ark. App. 466, 220 S.W.3d 265 (2005).

Court did not abuse its discretion in allowing officers to testify as experts regarding the manufacture of methamphetamine where they both had specialized knowledge relating to methamphetamine production. *Saul v. State*, 365 Ark. 77, 225 S.W.3d 373 (2006).

In defendant's rape case, the court properly admitted the testimony of a sexual assault nurse because she testified that she had earned bachelor's, master's, post-master's, and doctoral degrees in nursing, that she was a college professor in the field of nursing and also taught sexual assault nurse examiner courses, and that she had performed over 2,000 sexual-abuse examinations on children. *Strong v. State*, 372 Ark. 404, 277 S.W.3d 159 (2008).

Where the patient alleged that a doctor and a medical center's nursing staff were negligent in connection with a fall she sustained while a patient at the medical center, the trial court did not err by denying the patient's proffered instruction that would have allowed the jury to consider the testimony of her physician expert on the standard of care for the nursing staff; the physician was never qualified as an expert on nursing. Furthermore, the patient did not appeal the circuit judge's ruling that § 16-114-206(a) controlled the admissibility of the doctor's testimony as to the standard of care for nurses rather than this rule. *Nelson v. Stubblefield*, 2009 Ark. 256, 308 S.W.3d 586 (2009).

Circuit court's concern that experts' opinions were based merely on their experience was not well founded because this rule recognizes that an expert's testimony could be based on experience in addition to knowledge and training; the circuit court's reservations about the quality of the witnesses' knowledge and training should go to the weight of their testimony and not to its admissibility. *Tri-Eagle Enters. v. Regions Bank*, 2010 Ark. App. 64, — S.W.3d —, 2010 Ark. App. LEXIS 58 (Jan. 20, 2010).

Pursuant to this rule, in an eminent domain case, the trial court did not err in treating the landowner's appraiser as an expert when questioning him about his appraisal as he possessed specialized knowledge that would assist the trier of fact and he had knowledge, skill, or experience that would qualify him to testify in the form of an opinion. *Centerpoint Energy Gas Transmission*



Co. v. Green, 2012 Ark. App. 326, — S.W.3d —, 2012 Ark. App. LEXIS 445 (May 9, 2012).

### Standard of Review.

Abuse-of-discretion standard is applicable to an appeal from a trial court's ruling on the scientific validity underpinning expert opinion. *Richardson v. Union Pac. R.R. Co.*, 2011 Ark. App. 562, — S.W.3d —, 2011 Ark. App. LEXIS 602 (Sept. 28, 2011).

### Test of Admissibility.

The general test regarding the admissibility of expert testimony is whether the jury can receive "appreciable help" from such testimony; and the balancing of the probative value of the tendered expert testimony evidence against its prejudicial effect is committed to the "broad discretion" of the trial judge and his action will not be disturbed on appeal unless manifestly erroneous. *Caldwell v. State*, 267 Ark. 1053, 594 S.W.2d 24 (1980).

The general test for admissibility of expert testimony is whether the testimony will aid the trier of fact in understanding the evidence or in determining a fact issue; an important consideration in determining whether the testimony will aid the trier of fact is whether the situation is beyond the trier of fact's ability to understand and draw its own conclusions. *Russell v. State*, 289 Ark. 533, 712 S.W.2d 916 (1986), criticized *Marcum v. State*, 299 Ark. 30, 771 S.W.2d 250 (1989); *Utey v. State*, 308 Ark. 622, 826 S.W.2d 268 (1992); *Montgomery v. Butler*, 309 Ark. 491, 834 S.W.2d 148 (1992).

Evidence was insufficient to show that testimony was improper under the standard of this rule that it assist the trier of fact to understand the evidence. *Dawson v. Fulton*, 294 Ark. 624, 745 S.W.2d 617 (1988).

The test for admissibility of expert testimony is whether specialized knowledge will aid the trier of fact in understanding the evidence or in determining a fact in issue. *Swadley v. Krugler*, 67 Ark. App. 297, 999 S.W.2d 209 (1999).

The test for admissibility of expert testimony is whether specialized knowledge would aid the trier of fact in understanding the evidence or in determining a fact in issue. *Auger Timber Co. v. Jiles*, 75 Ark. App. 179, 56 S.W.3d 386 (2001).

Allowing distributor's experts to testify regarding damages was not an abuse of discretion where both experts' knowledge and experience were sufficient to assist the jury in understanding the evidence and in determin-

ing the fact issues. *Miller Brewing Co. v. Ed Roleson, Jr., Inc.*, 365 Ark. 38, 223 S.W.3d 806 (2006).

During defendant's trial for internet stalking of a child, the trial court did not err in admitting the testimony of a digital evidence analyst with the state of Arkansas Crime Laboratory as expert testimony where the analyst's testimony was based on the analyst's own experience and observation. The testimony was helpful to the trier of fact. *Gikonyo v. State*, 102 Ark. App. 223, 283 S.W.3d 631 (2008).

Trial court erred in a medical malpractice action in permitting a personal representative's expert to testify as to the meaning of dignity, as it was used in § 20-10-1204(a)(21); the word dignity, simply because it was part of the statute, was not complex and did not mean something different than its ordinary and usually accepted meaning in common language. *Bedell v. Williams*, 2012 Ark. 75, — S.W.3d —, 2012 Ark. LEXIS 89 (Feb. 23, 2012).

**Cited:** *McAway v. Holland*, 266 Ark. 878, 599 S.W.2d 387 (1979); *Hay v. Scott*, 276 Ark. 46, 631 S.W.2d 841 (1982); *Smith v. Davis*, 281 Ark. 122, 663 S.W.2d 165 (1983); *Ethridge v. State*, 9 Ark. App. 111, 654 S.W.2d 595 (1983); *Duhon v. State*, 299 Ark. 503, 774 S.W.2d 830 (1989); *Ross v. State*, 300 Ark. 369, 779 S.W.2d 161 (1989); *Scoggins v. Southern Farmers' Ass'n*, 304 Ark. 426, 803 S.W.2d 515 (1991), limited *Druckenmiller v. Cluff*, 316 Ark. 517, 873 S.W.2d 526 (1994); *Butler v. Dowdy*, 304 Ark. 481, 803 S.W.2d 534 (1991); *Thomas v. Sessions*, 307 Ark. 203, 818 S.W.2d 940 (1991), criticized *Kenning v. St. Paul Fire & Marine Ins. Co.*, 990 F. Supp. 1104 (W.D. Ark. 1997); *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993), appeal dismissed 316 Ark. 249, 871 S.W.2d 372 (1994); *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993); *Williams v. Southwestern Bell Tel. Co.*, 319 Ark. 626, 893 S.W.2d 770 (1995); *Davlin v. State*, 320 Ark. 624, 899 S.W.2d 451 (1995); *Robinson v. Robinson*, 323 Ark. 224, 914 S.W.2d 292 (1996), questioned *Fields v. Southern Farm Bureau Cas. Ins. Co.*, 350 Ark. 75, 87 S.W.3d 224 (2002); *Bowden v. State*, 328 Ark. 15, 940 S.W.2d 494 (1997); *Lenoir v. State*, 77 Ark. App. 250, 72 S.W.3d 899 (2002); *Wyles v. State*, 357 Ark. 530, 182 S.W.3d 142 (2004); *Williams v. First Unum Life Ins. Co.*, 358 Ark. 224, 188 S.W.3d 908 (2004); *Johnson v. State*, 2010 Ark. App. 153, — S.W.3d —, 2010 Ark. App. LEXIS 167 (2010).

## Rule 703. Basis of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the

particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

### RESEARCH REFERENCES

**ALR.** Admissibility and effect of evidence of electromagnetic fields generated by power lines, or public perception thereof, in action to value land or to recover for personal injury or property damage. 104 ALR 5th 503.

Admissibility of ion scan evidence. 124 ALR 5th 691.

Admissibility and sufficiency of bite mark evidence as basis for identification of accused. 1 ALR 6th 657.

Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney — General Principles and Conduct Related to Interaction with Client. 58 ALR 6th 1.

Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney — Conduct Related to Procedural Issues. 59 ALR 6th 1.

Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney — Conduct Related to Substantive Representation and Transactional Matters. 60 ALR 6th 1.

**U. Ark. Little Rock L.J.** Arkansas Law Survey, Hall, Evidence, 8 U. Ark. Little Rock L.J. 157.

### CASE NOTES

#### ANALYSIS

In general.

Purpose.

Arson detection.

Burden of proof.

Cost of replacement trees.

Cost of supplies.

DNA testing.

Excludable testimony.

Factual basis.

Hearsay as basis.

Hypothetical.

Licensed pharmacist.

Medical diagnosis.

Novel scientific evidence.

Photographs.

Presence in court.

Real estate appraisal.

Sobriety tests.

#### In General.

The governing rule of evidence permits an expert witness to base his opinion upon, or to draw an inference from, facts or data in the particular case perceived or made known to him at or before the hearing. *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938 (1979).

Social worker did not qualify as a medical expert and her testimony was not admissible pursuant to Ark. R. Evid. 803(4); however, the testimony was generally admissible under this rule where the social worker was an expert witness and the children's statements to the social worker about remarks their father made about their mother and stepfather helped form the basis of her opinion that the animosity between the parents caused the children to be stressed and that visitation

exchanges should occur on neutral territory. *Meins v. Meins*, 93 Ark. App. 292, 218 S.W.3d 366 (2005).

#### Purpose.

The very purpose of this rule is to allow the courts to follow the same practice as do experts themselves in forming their opinions, illustrated, for example, by allowing a physician to base his diagnosis on reports from other medical sources; moreover, when an expert's testimony is based on hearsay, the lack of personal knowledge on the part of the expert does not mandate the exclusion of the testimony, but rather presents a jury question as to the weight of the testimony. *Scott v. State*, 318 Ark. 747, 888 S.W.2d 628 (1994).

In a capital murder case, the trial court did not err in allowing the testimony of a medical examiner from the state crime laboratory who relied upon an autopsy report prepared by another medical examiner as this type of testimony was in line with the purpose of this rule; defendant was able to cross-examine the state's expert and there was nothing to indicate that defendant's right to confront the witnesses against him was violated, nor that the testimony of the state's expert was hearsay. *Sauerwin v. State*, 363 Ark. 324, 214 S.W.3d 266 (2005).

#### Arson Detection.

The trial court did not abuse its discretion in qualifying a witness as an expert in the field of arson detection and allowing his testimony regarding the nature of the fire, where in its attempt to prove that the fire was not of accidental origin but had been intentionally set, the state called this witness who had been employed at the state fire marshal's office



from September, 1978, through September, 1979, where he stated that he had attended several training sessions at the Arkansas Fire Training Academy and had on-the-job training under the direct supervision of the state fire marshal, and where he also testified that he had not only attended classes but had taught classes on the investigation of fires. *Parris v. State*, 270 Ark. 269, 604 S.W.2d 582 (Ct. App. 1980).

#### **Burden of Proof.**

Evidence Rules 702 through 705 emphasize the function of cross-examination, with the burden being placed upon the opponent of the testimony to show that the expert's conclusion lacks adequate support and is subject to being stricken by the trial court. *Collins v. Hinton*, 327 Ark. 159, 937 S.W.2d 164 (1997).

#### **Cost of Replacement Trees.**

Where witness in the landscaping and tree business was permitted to give his opinion as an expert as to the replacement cost of the trees allegedly destroyed by defendant but did not examine the site, and his values were determined on the basis of plaintiff's testimony in the case and upon information given him by plaintiff prior to his court appearance, the trial court properly allowed the witness to give his opinion on the basis of information he obtained before the trial and information he gained from the testimony of other witnesses during the trial. *Bowman v. McFarlin*, 1 Ark. App. 235, 615 S.W.2d 383 (1981).

#### **Cost of Supplies.**

In a suit brought by homeowners against the residential contractor to recover damages for defects in their house the court did not err in allowing the plaintiffs' expert witness to testify concerning the cost of installing copper pans to remedy drainage problems even though the expert based his opinion on the cost of the required pieces of metal on an estimate provided by a supplier. *Dixon v. Ledbetter*, 262 Ark. 758, 561 S.W.2d 294 (1978).

#### **DNA Testing.**

Expert testimony concerning DNA blood testing by a lab supervisor using her supervisor's report held admissible under this rule and Evid. Rule 803(8). *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997).

#### **Excludable Testimony.**

Where documents were held to be not relevant, a witness' testimony regarding those documents was properly stricken. *Bryant v. Arkansas Pub. Serv. Comm'n*, 54 Ark. App. 157, 924 S.W.2d 472 (1996).

Trial court did not err by excluding the testimony of a defense expert witness because of an alleged discovery violation as defense counsel failed to properly prepare the wit-

ness's findings and give them to the state well in advance of the trial so that the state could prepare its cross-examination and any rebuttal witness; the trial court correctly noted that the witness's findings did not provide anything more than common knowledge where, in two exhibits, the witness stated that she claimed that an interviewer led the child victims with her questions and the expert failed to suggest how she would have conducted the interviews of the victims. *White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006).

Patient sought to introduce a statement from an expert, her urologist, which would address the suturing of the patient's bladder during a hysterectomy; the expert had passed away before the medical malpractice trial began. The trial court did not err in refusing to admit the patient's expert's affidavit because the affidavit was inadmissible hearsay, and the physician had not had an opportunity to cross-examine the expert. *Crowell v. Barker*, 369 Ark. 428, 255 S.W.3d 858 (2007).

Trial court's exclusion of a therapist's testimony as to a custody preference expressed by a daughter was not harmless because although the trial court erred in excluding the therapist's testimony as hearsay, it was not required to attach any weight to the testimony, and the trial court also found that the daughter was not sufficiently mature to express an opinion as to custody. *Stacks v. Stacks*, 2009 Ark. App. 862, — S.W.3d —, 2009 Ark. App. LEXIS 1028 (2009).

#### **Factual Basis.**

The relative weakness or strength of the factual underpinning of the expert's opinion goes to the weight and credibility, rather than admissibility. *Arkansas State Hwy. Comm'n v. Schell*, 13 Ark. App. 293, 683 S.W.2d 618 (1985); *Carter v. Saint Vincent Infirmary*, 15 Ark. App. 169, 690 S.W.2d 741 (1985); *Killian v. Hill*, 32 Ark. App. 25, 795 S.W.2d 369 (1990); *Duncan v. State*, 38 Ark. App. 47, 828 S.W.2d 847 (1992).

Expert must be allowed to disclose to the trier of fact the basic facts on which his opinion is based; otherwise the opinion is left unsupported and trier of fact is left with little means of evaluating its correctness. *Arkansas State Hwy. Comm'n v. Schell*, 13 Ark. App. 293, 683 S.W.2d 618 (1985); *Carter v. Saint Vincent Infirmary*, 15 Ark. App. 169, 690 S.W.2d 741 (1985); *Morris v. State*, 21 Ark. App. 228, 731 S.W.2d 230 (1987).

Expert may base his opinion upon facts learned from others, even though those facts are themselves hearsay. *Morris v. State*, 21 Ark. App. 228, 731 S.W.2d 230 (1987).

Where the testimony shows a questionable basis for the opinion of the expert, the issue becomes one of credibility for the fact finder,

rather than a question of law. *Killian v. Hill*, 32 Ark. App. 25, 795 S.W.2d 369 (1990).

Even though the court refused to allow expert witness to refer to an interview with defendant regarding coercive influence of interrogation, defendant did not show that he was prejudiced by the court's ruling where the expert was allowed to identify all other matters on which he based his opinion, and where witness testified that he had formed a preliminary opinion regarding the coercive nature of the interrogation based on the materials available to him which included his having interviewed defendant. *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996), cert. denied, 519 U.S. 898, 117 S. Ct. 246, 136 L. Ed. 2d 174 (1996).

Evidence adduced at trial and by deposition that (1) a short in a field shed receptacle was not by itself the cause of an electrical shock injury to a high school custodian when the custodian opened a concession trailer window, which trailer was plugged into the shed receptacle, and (2) the trailer should have been grounded with a metal rod, gave an expert witness a sufficient basis of data upon which the witness was able to construct an expert opinion; the witness read the depositions, studied relevant photographs, personally observed the cord connected to the trailer and saw the trailer four months after the accident, all of which caused the court to conclude that the witness's testimony was competent. *Coca-Cola Bottling Co. v. Gill*, 352 Ark. 240, 100 S.W.3d 715 (2003).

### **Hearsay as Basis.**

When an expert's testimony is based on hearsay, the lack of personal knowledge on the part of the expert does not mandate the exclusion of the opinion but, rather presents a jury question as to the weight which should be assigned the opinion. *Arkansas State Hwy. Comm'n v. Schell*, 13 Ark. App. 293, 683 S.W.2d 618 (1985); *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995), cert. denied 517 U.S. 1226, 116 S. Ct. 1861, 134 L. Ed. 2d 960 (1996).

An expert may base his opinion on facts learned from others despite their being hearsay. *Carter v. Saint Vincent Infirmary*, 15 Ark. App. 169, 690 S.W.2d 741 (1985).

This rule is not intended to give an expert witness license to merely repeat hearsay for the sake of bringing such information before the fact finder; rather, it is to enable the expert to make certain assumptions for the purpose of arriving at an opinion within the witness's area of expertise. *Sims v. Safeway Trails, Inc.*, 297 Ark. 588, 764 S.W.2d 427 (1989).

Statements of an expert were not inadmissible as based on hearsay, where he had read similar information in trade magazines relied upon by persons skilled or having responsibil-

ity in his field, and there was no indication that trade magazines subscribed to by persons in a particular trade were less than reliable. *Duncan v. State*, 38 Ark. App. 47, 828 S.W.2d 847 (1992).

Although it is true that this rule is not intended to give an expert witness license to merely repeat hearsay for the sake of bringing such information before the fact-finder, an expert must be allowed to disclose to the trier of fact the factual basis for his opinion because the opinion would otherwise be left unsupported, and the trier of fact would be left with little if any means of evaluating its correctness. *Lawhon v. Ayres Corp.*, 67 Ark. App. 66, 992 S.W.2d 162 (1999).

Trial court did not err in admitting plaintiff's expert's testimony where defendant never objected to the expert's qualifications but instead objected to the use of hearsay testimony in the basis of the opinion that was allowed by this rule. *Jackson v. Pitts*, 93 Ark. App. 466, 220 S.W.3d 265 (2005).

Expert's testimony as to a capital murder defendant's previous acts of violence based on hearsay was properly allowed because the doctor stated that having such background information was critical in rendering a forensic evaluation because it indicated any behavioral patterns and any actions taken in the past. This was permissible under this rule. *Miller v. State*, 2010 Ark. 1, 362 S.W.3d 264 (2010).

### **Hypothetical.**

Questions calling for the opinion of an expert witness are not necessarily subject to objection because they are not in the hypothetical. *Bowman v. McFarlin*, 1 Ark. App. 235, 615 S.W.2d 383 (1981).

### **Licensed Pharmacist.**

In a prosecution for obtaining a controlled substance with a fraudulent prescription, the testimony of licensed pharmacist who filled the prescription was authorized by this rule. *Armstrong v. State*, 5 Ark. App. 96, 633 S.W.2d 51 (1982).

### **Medical Diagnosis.**

Although defendant argued that physician's opinion as to the cause or aggravation of plaintiff's knee injury was based entirely on plaintiff's statement, and that such a statement was hearsay and not included as an exception to the hearsay rule found in Evid. Rule 803(4) because it was made to the doctor after litigation had begun and was, therefore, self-serving, there is no provision in Evid. Rule 803(4) that prohibits statements given after litigation has begun; also, the statement was admissible under this rule. *Collins v. Hinton*, 327 Ark. 159, 937 S.W.2d 164 (1997).

In a rape case, testimony from two doctors that a tear to a child's vaginal wall was



consistent with an intentional injury caused by penetration by a blunt force object was not subject to the *Daubert* standard as it was based on experience and observation, not anything novel; moreover, even though the testimony touched on the ultimate issue, it was allowable because it did not mandate a legal conclusion. *Turbyfill v. State*, 92 Ark. App. 145, 211 S.W.3d 557 (2005).

Circuit court did not err in allowing defendant to paraphrase letters from two of plaintiff's doctors regarding plaintiff's 1999 injuries, which had been excluded from evidence as hearsay, because the defendant used the prior opinions of the doctors to test the reliability of plaintiff's current doctor; the use of the records during cross-examination allowed defense counsel to show that the symptoms on which plaintiff's doctor based his opinions had existed prior to the 2001 accident. *House v. Volunteer Transp., Inc.*, 365 Ark. 11, 223 S.W.3d 798 (2006).

During defendant's trial for the rape of a nine-year-old girl, the trial court did not err in allowing an examining physician to testify that the victim tested positive for chlamydia because the physician's testimony was based upon a lab report containing data reasonably relied upon by physicians. *Kelley v. State*, 375 Ark. 483, 292 S.W.3d 297 (2009).

**Novel Scientific Evidence.**

The traditional standard for determining the admissibility of novel scientific evidence requires a showing that the scientific principle or discovery had been generally accepted in the particular field to which it relates. *Middleton v. State*, 29 Ark. App. 83, 780 S.W.2d 581 (1989).

**Rule 704. Opinion on ultimate issue.**

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

**RESEARCH REFERENCES**

**Ark. L. Rev. Notes**, A Restrictive Interpretation of Rule 704 of the Arkansas Uniform Rules of Evidence: *Gramling v. Jennings*, 36 Ark. L. Rev. 178.

**Photographs.**

Trial court did not err in allowing expert in accident reconstruction to testify using photographs. *Clark v. State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989).

**Presence in Court.**

This rule implies that the particular expert witness will be present in court to hear the evidence. *Martin v. State*, 22 Ark. App. 126, 736 S.W.2d 287 (1987).

**Real Estate Appraisal.**

Appraiser, as expert witness, properly used several appraisals of a property, done by other appraisers, to determine its market value. *City of Ft. Smith v. Findlay*, 48 Ark. App. 197, 893 S.W.2d 358 (1995).

**Sobriety Tests.**

Officer's testimony was insufficient to establish that gaze nystagmus testing is reliable and generally accepted in the scientific community. *Middleton v. State*, 29 Ark. App. 83, 780 S.W.2d 581 (1989).

**Cited:** *Parker v. State*, 268 Ark. 441, 597 S.W.2d 586 (1980); *Surridge v. State*, 279 Ark. 183, 650 S.W.2d 561 (1983); *Arkansas Power & Light Co. v. Melkovitz*, 11 Ark. App. 90, 668 S.W.2d 37 (1984); *Kelley v. Wiggins*, 291 Ark. 280, 724 S.W.2d 443 (1987); *Ross v. State*, 300 Ark. 369, 779 S.W.2d 161 (1989); *Butler v. Dowdy*, 304 Ark. 481, 803 S.W.2d 534 (1991); *McVay v. State*, 312 Ark. 73, 847 S.W.2d 28 (1993); *Taylor v. Taylor*, 345 Ark. 300, 47 S.W.3d 222 (2001); *Williams v. First Unum Life Ins. Co.*, 358 Ark. 224, 188 S.W.3d 908 (2004).

- ANALYSIS
- In general.
  - Burden of proof.
  - Guilt of defendant.
  - Identification.
  - Intent.
  - Opinion in technical field.
  - Ultimate issue.

Workers' compensation proceeding.

**In General.**

This rule applies regardless of whether the witness is lay or expert. *Mathis v. State*, 267 Ark. 904, 591 S.W.2d 679 (Ct. App. 1979), overruled *Rogers v. State*, 10 Ark. App. 19, 660 S.W.2d 949 (1983), questioned *State v.*

Murphy, 315 Ark. 68, 864 S.W.2d 842 (1993), questioned *Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001).

Finding in favor of the administratrix in her wrongful death action against the manufacturer of a medical device was proper where, pursuant to ARE 702, the opinion by her physician witness did not require him to be an expert in any field other than the one in which he was unquestionable qualified, the field of medicine; further, this rule permitted the physician witness to rely on information provided by others in the formulation of his opinion. *Arrow Int'l v. Sparks*, 81 Ark. App. 42, 98 S.W.3d 48 (2003).

Trial court did not abuse its discretion by refusing to allow lay opinion testimony by an eyewitness that the shooting by defendant was accidental; all of the witness's testimony up to the conclusion was admitted and the trial court's reasoning that the jury could reach its own conclusion was rational and not arbitrary or groundless. *Simpson v. State*, — Ark. App. —, 119 S.W.3d 83, 2003 Ark. App. LEXIS 726 (2003).

#### **Burden of Proof.**

Evidence Rules 702 through 705 emphasize the function of cross-examination, with the burden being placed upon the opponent of the testimony to show that the expert's conclusion lacks adequate support and is subject to being stricken by the trial court. *Collins v. Hinton*, 327 Ark. 159, 937 S.W.2d 164 (1997).

#### **Guilt of Defendant.**

Where the witness, a former sheriff, in effect, stated after he had made his own investigation of the allegations in the indictment and information, had concluded they were true, the only logical conclusion to be reached from this testimony was that the witness believed defendant was guilty. *Patterson v. State*, 267 Ark. 436, 591 S.W.2d 356 (1979), cert. denied 447 U.S. 923, 100 S. Ct. 3014, 65 L. Ed. 2d 1115 (1980).

In a personal injury action arising out of the drilling of a well, a trial court did not err in excluding the well driller's employee's statement that the accident was "our fault" under this rule, because the statement went beyond embracing the underlying issue and mandated a legal conclusion. *W.E. Pender & Sons, Inc. v. Lee*, 2010 Ark. 52, — S.W.3d —, 2010 Ark. LEXIS 74 (Feb. 4, 2010).

#### **Identification.**

Witnesses had ample contact with defendant to be able to make an identification to develop opinions based on their perceptions and the trial court did not abuse its discretion in permitting them to relay their opinions to the jury. *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995), cert. denied 517 U.S. 1143, 116 S. Ct. 1436, 134 L. Ed. 2d 558 (1996).

#### **Intent.**

Expert testimony on the ability of a defendant to form specific intent to murder is not admissible under this rule. *Stewart v. State*, 316 Ark. 153, 870 S.W.2d 752 (1994); *DeGracia v. State*, 321 Ark. 530, 906 S.W.2d 278 (1995).

#### **Opinion in Technical Field.**

To permit an expert to state an opinion in a technical field, which the trial court feels may be of assistance to the jury, is not an invasion of province of jury, merely because the opinion has relation to some ultimate fact on which the verdict of the jury may depend. *United States Borax & Chem. Co. v. Blackhawk Warehousing & Leasing Co.*, 266 Ark. 831, 586 S.W.2d 248 (1979).

Testimony of a law professor which informed the jury of the basic remedies available for the breaches of an installment sales contract and lease agreement was acceptable where the trial court specifically ruled that the professor could not couch his testimony in terms of any opinion comparing the remedies under the lease with the normal remedies for an installment sale. *Sutton v. Ryder Truck Rental, Inc.*, 305 Ark. 231, 807 S.W.2d 905 (1991).

It was within the discretion of the court to allow the state to present testimony of 2 experienced narcotics officers concerning the delivery and sale of methamphetamine generally and the significance of the way in which the drugs seized from the defendant were packaged since the testimony did not mandate a legal conclusion and did not tell the jury what to do. *Marts v. State*, 332 Ark. 628, 968 S.W.2d 41 (1998).

#### **Ultimate Issue.**

It was not intended that all opinions would be admissible under this rule; the line must be drawn between opinion testimony that merely embraces the ultimate issue and opinion testimony that tells the jury which result to reach. *Gramling v. Jennings*, 274 Ark. 346, 625 S.W.2d 463 (1981).

Where both the defendant doctor in a malpractice suit and his expert witness testified that it was their opinion that the doctor had not acted negligently in severing the plaintiff's ureter, such opinion testimony constituted bald statements of an opinion as to the ultimate issue in the case and were inadmissible under this rule. *Gramling v. Jennings*, 274 Ark. 346, 625 S.W.2d 463 (1981).

The use of the word "embraces" as a word of limitation in this rule suggests that opinion testimony which simply tells the jury what to do is not permitted; however, it also means that opinion testimony should not be rejected simply because it touches upon the ultimate



issue, as expert testimony does frequently. *Gramling v. Jennings*, 274 Ark. 346, 625 S.W.2d 463 (1981).

This rule does not allow an expert to give an opinion on an ultimate fact issue, but rather it merely states that testimony in the form of an opinion "otherwise admissible" is not objectionable because it embraces an ultimate issue; accordingly, in a manslaughter prosecution where the question for the jury was whether the defendant driver caused the policeman's death by a gross deviation from the standard of care that a reasonable person would have observed in the same situation, the trial court erred when it allowed a state police investigator to testify that in his opinion the death could have been prevented if the defendant had been alert and practicing reasonable safety. *Ethridge v. State*, 9 Ark. App. 111, 654 S.W.2d 595 (1983).

The unmistakable trend of authority is not to exclude opinion testimony because it amounts to an opinion on the ultimate issue; while the opinion testimony of a police officer who testified that defendant was intoxicated embraced the ultimate issue, it did not mandate a legal conclusion, and there was no error in its admission. *Long v. State*, 284 Ark. 21, 680 S.W.2d 686 (1984).

In a prosecution for rape, the physician who examined the victim was properly allowed to testify that the victim's history and examination were consistent with intercourse with an adult or a 14-year-old, depending on the maturity of the male, even though the defense was that the victim's 14-year-old half-brother had had sexual intercourse with the victim; the opinion given by the physician was not the ultimate issue to be decided, that being whether the defendant was guilty. *Jennings v. State*, 289 Ark. 39, 709 S.W.2d 69 (1986).

Opinion of expert that child had been sexually abused was not objectionable on basis that it was an opinion on the ultimate issue, but it was nonetheless inadmissible where based only on the child's testimony. *Johnson v. State*, 292 Ark. 632, 732 S.W.2d 817 (1987).

It was not error to allow police to testify that confessions were voluntary. *Fairchild v. Lockhart*, 675 F. Supp. 469 (E.D. Ark. 1987), aff'd 857 F.2d 1204 (8th Cir. 1988).

Where physician's testimony in a rape case embraced the ultimate issue of forced sex, but did not mandate a legal conclusion because the testimony did not exclude other causes for the victim's injuries, it was not inadmissible opinion testimony on the ultimate issue. *Davlin v. State*, 320 Ark. 624, 899 S.W.2d 451 (1995).

In the prosecution of the defendant for the murder of her two year old son, who died as the result of being burned when he was dipped in hot water, it was not error for the court to allow a doctor to state his opinion

that the manner of death was homicide since, by so testifying, the doctor did no more than offer an opinion that the child's life was ended by the act of another person. *Brown v. State*, 66 Ark. App. 215, 991 S.W.2d 137 (1999).

Testimony by one of the state's witnesses should have been excluded where the witness, while a bona fide expert on domestic abuse, exceeded her expertise by profiling batterers who would kill and by conveying to the jury that the defendant fell within that profile. *Brunson v. State*, 349 Ark. 300, 79 S.W.3d 304 (2002).

Testimony from a police officer, who had specialized training in DWI arrests, that the officer believed a defendant was intoxicated was admissible at defendant's DWI trial because the jury was specifically instructed that it was not bound to accept an expert opinion as conclusive and although the testimony embraced an ultimate issue, the testimony did not mandate a legal conclusion. *Clay v. State*, 2009 Ark. App. 740, 361 S.W.3d 286 (2009).

Denial of the class member's motion to strike in an action against cellular providers was inappropriate, in part because expert testimony focused on one provider's damages and how other costs might increase if the early termination fees were invalidated; thus, the expert's opinion was concerned with the underlying merits of the case and it was improper to consider the underlying merits at the class-certification stage of proceedings. Moreover, the expert opinion contained conclusions that invaded the role of the circuit court. *Rosenow v. Alltel Corp.*, 2010 Ark. 26, 358 S.W.3d 879 (2010).

Circuit court abused its discretion by applying too rigid a standard in excluding the testimony of a company's experts because the expert witnesses possessed greater-than-ordinary knowledge of floor-plan lending and banking in general and could have assisted a fact-finder in interpreting the ambiguous interest-rate clause, both witnesses were veteran bankers with practical experience in commercial lending and floor-plan financing, and they were no strangers to Arkansas banking practices; although neither witness professed to be an expert in contract interpretation, that did not disqualify their testimony, and because they had superior knowledge to offer the jury, gained from their experience in the commercial banking industry, it remained the jury's prerogative to interpret the contract, with the aid of the experts. *Tri-Eagle Enters. v. Regions Bank*, 2010 Ark. App. 64, — S.W.3d —, 2010 Ark. App. LEXIS 58 (Jan. 20, 2010).

#### **Workers' Compensation Proceeding.**

Where in a workers' compensation proceeding the opinion of the treating physician, that the claimant was permanently and totally

disabled and that an arm injury was the final factor in creating the total disability, was received without objection and the factors upon which the opinion was predicated were detailed, such opinion was not objectionable because it went beyond functional impairment nor because it embraced an ultimate issue to be decided by the commission. *Revere Copper & Brass, Inc. v. Birdsong*, 267 Ark. 922, 593 S.W.2d 54 (1979).

**Cited:** *Clark v. Peabody Testing Serv.*, 265

Ark. 489, 579 S.W.2d 360 (1979); *Hay v. Scott*, 276 Ark. 46, 631 S.W.2d 841 (1982); *Whaley v. State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984); *Carton v. Missouri Pac. R.R.*, 303 Ark. 568, 798 S.W.2d 674 (1990); *Thompson v. Perkins*, 322 Ark. 720, 911 S.W.2d 582 (1995); *J. E. Merit Constructors, Inc. v. Cooper*, 345 Ark. 136, 44 S.W.3d 336 (2001); *Williams v. First Unum Life Ins. Co.*, 358 Ark. 224, 188 S.W.3d 908 (2004); *Strong v. State*, 372 Ark. 404, 277 S.W.3d 159 (2008).

### Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

#### RESEARCH REFERENCES

**Ark. L. Rev.** Arkansas Adopts a Second Admissibility Test for Novel Scientific Evidence: Do Two Tests Equal One Standard?, 56 Ark. L. Rev. 21.

Note, *Confronting the Rules: Needed Changes to the Arkansas Rules of Evidence After Crawford v. Washington*, 59 Ark. L. Rev. 973.

**U. Ark. Little Rock L.J.** Impeachment of One's Own Witness by Prior Inconsistent Statements Under the Federal and Arkansas Rules of Evidence, Perroni, 1 U. Ark. Little Rock L.J. 277.

#### CASE NOTES

##### ANALYSIS

Based on hearsay.  
Support.

##### Based on Hearsay.

When an expert's testimony is based on hearsay, the lack of personal knowledge on the part of the expert does not mandate the exclusion of the opinion but, rather presents a jury question as to the weight which should be assigned the opinion. *Arkansas State Hwy. Comm'n v. Schell*, 13 Ark. App. 293, 683 S.W.2d 618 (1985).

##### Support.

Evidence Rules 702 through 705 emphasize the function of cross-examination, with the burden being placed upon the opponent of the testimony to show that the expert's conclusion lacks adequate support and is subject to being stricken by the trial court. *Collins v. Hinton*, 327 Ark. 159, 937 S.W.2d 164 (1997).

**Cited:** *Hay v. Scott*, 276 Ark. 46, 631 S.W.2d 841 (1982).

### Rule 706. Court appointed experts.

(a) *Appointment.* The court, on motion of any party or its own motion, may enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party;



and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) *Compensation.* Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation for the taking of property. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) *Disclosure of Appointment.* In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) *Parties' Experts of Own Selection.* Nothing in this rule limits the parties in calling expert witnesses of their own selection.

### CASE NOTES

#### ANALYSIS

**Applicability.**

Appointment proper.

#### **Applicability.**

This rule is not applicable where there is no indication that a report or recommendation was prepared at the direction of the trial court. *Trammell v. Isom*, 25 Ark. App. 76, 753 S.W.2d 281 (1988).

#### **Appointment Proper.**

Where, although the trial judge did not specifically state the basis for his suspicion

that will was forged, it appeared from the report of the expert that such suspicion had a reasonable basis since the trial judge had before him the proffered will and numerous known specimens of the deceased's signature and handwriting and, during the trial, the judge freely exercised his prerogative to interrogate the witnesses, the trial judge did not abuse his discretion in exercising his right under this rule to appoint a handwriting expert to examine the will. *Wilson v. Kemp*, 7 Ark. App. 44, 644 S.W.2d 306 (1982).

## ARTICLE VIII. HEARSAY

### **Rule 801. Definitions.**

The following definitions apply under this Article:

(a) *Statement.* A "statement" is

(1) An oral or written assertion; or

(2) Nonverbal conduct of a person, if it is intended by him as an assertion.

(b) *Declarant.* A "declarant" is a person who makes a statement.

(c) *Hearsay.* "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements Which Are Not Hearsay.* A statement is not hearsay if:

(1) *Prior Statement By Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony and, if offered in a criminal proceeding, was given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a disposition [deposition], or (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving him; or

(2) *Admission By Party-opponent.* The statement is offered against a party and is (i) his own statement, in either his individual or a representa-

tive capacity, (ii) a statement of which he has manifested his adoption or belief in its truth, (iii) a statement by a person authorized by him to make a statement concerning the subject, (iv) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

**Publisher's Notes.** The word in brackets was added by the Publisher as the word possibly intended by the Court in lieu of "disposition."

## RESEARCH REFERENCES

**Ark. L. Rev.** Evidentiary Aspects of Manufacturer Recommendations in Establishing Physicians' Standard of Care, 31 Ark. L. Rev. 477.

Case Note, *Roberts v. State: A Limitation on the Impeachment of Witnesses by Extrinsic Evidence of Prior Inconsistent Statements*, 37 Ark. L. Rev. 688.

Case Notes, *McGuire v. State: Arkansas Child Abuse Videotape Deposition Laws, Etc.*, 41 Ark. L. Rev. 155.

**U. Ark. Little Rock L.J.** Impeachment of One's Own Witness by Prior Inconsistent Statements Under the Federal and Arkansas Rules of Evidence, Perroni, 1 U. Ark. Little Rock L.J. 227.

Derden, *Survey of Arkansas Law: Evidence*, 2 U. Ark. Little Rock L.J. 232.

*Survey of Arkansas Law: Evidence*, 4 U. Ark. Little Rock L.J. 203.

*Survey of Arkansas Law, Evidence*, 5 U. Ark. Little Rock L.J. 139.

*Arkansas Law Survey, Schneider, Evidence*, 7 U. Ark. Little Rock L.J. 219.

Sullivan, *The Need for a Business or Payroll Records Affidavit for Use in Child Support Matters*, 11 U. Ark. Little Rock L.J. 651.

## CASE NOTES

### ANALYSIS

In general.  
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### In General.

That hearsay is objectionable, does not necessarily mean that it is incompetent; absent an objection, hearsay, if relevant, is competent and entitled to consideration by the trial court and by a reviewing court in support of its findings. *Wilson v. Kemp*, 7 Ark. App. 44, 644 S.W.2d 306 (1982).

A statement is not hearsay when the statement is offered not for its truth but merely to show the fact of the assertion. *Owens v. State*, 318 Ark. 61, 883 S.W.2d 471 (1994).

### Construction.

The requirement of authentication in ARE 901 is separate from the requirement that a hearsay document must satisfy an applicable hearsay exception for admissibility. *Columbia Mut. Ins. Co. v. Patterson*, 320 Ark. 584, 899 S.W.2d 61 (1995).



It is evident that each subdivision in subdivision (d)(2) of this rule, connected by the conjunction “or,” is an alternative way of demonstrating statements that are admissible as admissions by party opponents. *Webb v. State*, 327 Ark. 51, 938 S.W.2d 806 (1997).

Inmate who was convicted of murder argued that he received ineffective assistance of counsel in that counsel failed to impeach testimony by his stepmother on account of bias; however, although the court agreed with defendant that Ark. R. Evid. 806 did not have to be read in conjunction with subdivision (d)(2) of this rule, the argument failed because defendant did not present evidence that the stepmother was, in fact, angry or biased. *Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004), cert. denied 543 U.S. 932, 125 S.Ct. 326, 160 L. Ed. 2d 235 (2004).

#### **Admission by Party-Opponent.**

In a personal injury action arising from an accident involving the plaintiff's son and an employee of defendant employer, a statement made by another employee as to whether the employee involved in the accident was within the scope of his employment did not constitute an admission that could be introduced by the plaintiff because the defendant employer never denied the facts contained in the statement. *Ashmore v. Ford*, 267 Ark. 854, 591 S.W.2d 666 (1979), limited *Druckemiller v. Cluff*, 316 Ark. 517, 873 S.W.2d 526 (1994).

This rule insures the trustworthiness and reliability of the admission of a party-opponent by providing that such statements are admissible only if made during the existence of the agency or employment relationship since an employee is unlikely to jeopardize his job by making false statements which are costly to his employer. *Houston Gen. Ins. Co. v. Arkansas La. Gas Co.*, 267 Ark. 544, 592 S.W.2d 445 (1980).

Where an employee of the defendant gas company allegedly made several statements to the plaintiff's insured, prior to an explosion and fire in an alley which damaged the insured's property, that there was “one helluva leak in that alley” and that he was “checking for a gas leak,” the trial court erred in refusing to admit the statements on the ground they were hearsay, since the proffer was sufficient to establish that the statements were made during the existence of the employment relationship and related to a matter within the scope of the employment, and therefore should have been admitted as an admission of a party-opponent. *Houston Gen. Ins. Co. v. Arkansas La. Gas Co.*, 267 Ark. 544, 592 S.W.2d 445 (1980).

Where the plaintiff, who was struck by a cabinet that fell from its display in a store, returned to the store the following day with her husband and an in-store security guard questioned them about the circumstances

surrounding the accident and told the husband that the cabinet display was unsafe, the security guard had the apparent authority to investigate the accident since the store subsequently ratified his investigation by paying the plaintiff's medical bills; and, therefore, the statements made by the security guard to the plaintiff's husband concerning the guard's investigation of the accident were admissible under subdivision (d)(2)(iv) of this rule in an action brought against the store. *Fleming v. Wal-Mart, Inc.*, 268 Ark. 559, 595 S.W.2d 241 (1980).

Testimony of creditor's employee as to managing partner's directions for application of partnership funds to his personal account was not hearsay, where partner was agent of partnership, statement was made while agency existed, and statement was against the interest of the other partner. *Inmon v. Southwest Auto Supply, Inc.*, 268 Ark. 1140, 599 S.W.2d 420 (1980).

In case involving conversion of escrow funds by bank president, where defendant president also acted as real estate broker in purchase of farm financed by his bank, the testimony of purchasers, without objection, that they had never agreed to the real estate commission and that defendant had disclaimed any interest in a commission prior to closing the sale of the farm, was not hearsay, since defendant was a party-opponent in the action and the statement attributed to him was clearly admissible as an admission under this rule, and further, even if he had not been a party-opponent, defendant's statement would be permitted as a statement which at the time it was made was contrary to defendant's pecuniary or proprietary interest and thus an exception to the hearsay rule under subdivision (b)(3) of Rule 804. *First Nat'l Bank v. Nash*, 2 Ark. App. 135, 617 S.W.2d 24 (1981).

Where landowner testified that railroad claims agent told him that it was less expensive to settle landowners' claims than to prevent fires from starting by mowing rights-of-way, such statements were not hearsay but fell within the definition of an admission of a party opponent under subdivision (d)(2)(iv) of this rule. *Missouri Pac. R.R. v. Arkansas Sheriff's Boys' Ranch*, 280 Ark. 53, 655 S.W.2d 389 (1983).

The statement made by the defendant, which was overheard by the policemen through the body mike, to a confidential informant, who was not made available for trial, was an admission of a party-opponent under subdivision (d)(2) of this rule; therefore, the statement was admissible. *Russell v. State*, 18 Ark. App. 45, 709 S.W.2d 825 (1986).

The statements of the president of a corporation made in reference to business of the corporation that he was authorized to man-

age, were admissible against the corporation. *American Pioneer Life Ins. Co. v. Allender*, 18 Ark. App. 234, 713 S.W.2d 249 (1986).

The statements by the employee which were signed by him and furnished to the employment security agency in the course of applying for unemployment compensation were clearly admissible, even in a court of law, as admissions by a party. *Haynes v. Director of Labor*, 19 Ark. App. 71, 719 S.W.2d 437 (1986).

Statement was hearsay and not an admission by a party-opponent. *Dean v. State*, 293 Ark. 75, 732 S.W.2d 855 (1987).

Statements made during the recorded conversation were properly admitted into evidence as admissions of a party opponent under subdivision (d)(2) of this rule. *Mock v. State*, 20 Ark. App. 72, 723 S.W.2d 844 (1987).

If the defendant takes the stand, a statement given to the police is not admissible under subdivision (d)(1) of this rule but is admissible under subdivision (d)(2)(i) as an admission by a party-opponent. *Edwards v. State*, 315 Ark. 126, 864 S.W.2d 866 (1993).

Statement held admissible as an admission of a party-opponent. *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995), cert. denied 517 U.S. 1226, 116 S. Ct. 1861, 134 L. Ed. 2d 960 (1996).

Statements by a decedent indicating that decedent's spouse would be the sole beneficiary of certain annuities were admissible, in suit by decedent's heir, under subdivision (d)(2) of this rule as statements against the interest of decedent's estate. *Easterling v. Weedman*, 54 Ark. App. 22, 922 S.W.2d 735 (1996).

Statement by nurse taking a court-ordered blood sample from defendant, that defendant commented on how painless the procedure was and that he would like for her to be the one to give his lethal injection, found to be an admission under subdivision (d)(2) of this rule; it was up to the jury to decide whether the statement was made seriously, indicating some guilty knowledge of the homicides, or as a joke. *Webb v. State*, 327 Ark. 51, 938 S.W.2d 806 (1997).

Where the patient brought a medical negligence suit against a doctor and a medical center, the trial court did not err by permitting defendants to admit at trial the video-deposition testimony of the patient as an admission against a party opponent under subdivision (d)(2) of this rule. *Nelson v. Stubblefield*, 2009 Ark. 256, 308 S.W.3d 586 (2009).

Trial court did not abuse its discretion in admitting computer printouts of defendant's internet conversations with an alleged 14 year old, who was really an undercover officer, into evidence during defendant's trial for internet stalking of a child because defendant's

statements were not hearsay under subdivision (d)(2) of this rule. *Dirickson v. State*, 104 Ark. App. 273, 291 S.W.3d 198 (2009).

#### **Adoptive Admission.**

The sole question in determining whether statements made by another person are admissible against a party as an admission by silence or acquiescence is whether a reasonable person, under the circumstances, would naturally have been expected to deny them, if the statements were untrue. *Thomas v. State*, 10 Ark. App. 294, 663 S.W.2d 745 (1984).

Before hearsay evidence of an adoptive admission can fit within the exception of subdivision (d)(2)(ii) of this rule, it must have been shown that the accused heard the statement, that he understood it, and that he failed to deny it. *Thomas v. State*, 10 Ark. App. 294, 663 S.W.2d 745 (1984).

Where, in a prosecution for the theft of cigarettes valued at more than \$100, the testimony indicated that the defendant was present, and was standing within four feet of a person when that person said that the defendant had cigarettes for sale, and the defendant failed to object to the statement or otherwise deny that he was attempting to sell the cigarettes, adequate foundational facts were presented so as to render the statement admissible as an adoptive admission under subdivision (d)(2)(ii) of this rule. *Thomas v. State*, 10 Ark. App. 294, 663 S.W.2d 745 (1984).

Before admitting certain evidence as an adoptive admission pursuant to subdivision (d)(2)(ii) of this rule, a trial court must find that sufficient foundational facts have been introduced so that the jury can reasonably infer that the accused heard and understood the statement and the statement was such that, under the circumstances, if the accused did not concur in the statement, he would normally respond. Once such a foundation has been established, the question is left to the jury to determine whether the accused acquiesced in the statement. *Morris v. State*, 302 Ark. 532, 792 S.W.2d 288 (1990); *United S. Assurance Co. v. Beard*, 320 Ark. 115, 894 S.W.2d 948 (1995).

Where victim told defendant's parents, while defendant was present, that defendant had "put his pee pee in her pee pee," and defendant responded by saying, "Mother, do you know what you are doing to me?" he had not adopted victim's statement as his own nor had he believed in its truth; therefore, the trial court erred in admitting parents' hearsay testimonies. *United S. Assurance Co. v. Beard*, 320 Ark. 115, 894 S.W.2d 948 (1995).

The utterer of words which have been adopted as an admission by the defendant, pursuant to this rule, is subject to impeachment under Rule 806. *Lewis v. Gubanski*, 50 Ark. App. 255, 905 S.W.2d 847 (1995).



Testimony by a witness that he was told by a third party that the defendant was involved in a robbery and shot the victim was properly introduced where such statement was made in the defendant's presence, but he did not deny the truthfulness of the statement. *Box v. State*, 74 Ark. App. 82, 45 S.W.3d 415 (2001), *aff'd in part, rev'd in part* 348 Ark. 116, 71 S.W.3d 552 (2002).

#### **Basis for Determination.**

Where the defendant argued that his conversation with a confidential informant was hearsay, the fact that the confidential informant did not testify at trial did not have any effect on the characterization of these statements. *Russell v. State*, 18 Ark. App. 45, 709 S.W.2d 825 (1986).

Statements that would be inadmissible if offered for the truth of the matter asserted in the statement are admissible when offered to show the basis of an officer's action. *Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997).

Judgment for hog farmer was reversed and dismissed where hog farmer relied on inadmissible hearsay evidence to prove that a hog food producer caused a hog purchaser to reject a hog shipment, causing hog farmer's damages; there was no direct evidence on the issue, only an inadmissible hearsay memo and conversation. *Archer-Daniels-Midland Co. v. Beadles Enters.*, 92 Ark. App. 462, 215 S.W.3d 675 (2005).

#### **Coconspirator's Statements.**

Where the actual sales of heroin were made by the defendant's accomplice, the accomplice's statements made during the transactions were admissible as statements of a coconspirator. *Foxworth v. State*, 263 Ark. 549, 566 S.W.2d 151 (1978).

Where the witness was being tied up by the defendant during a store robbery when she observed an unidentified woman who came into the store, reached over the counter and took the money out of the cash register, the evidence strongly implicated the unidentified woman as a coconspirator and therefore the witness was properly allowed to testify about the unidentified woman's actions. *Jackson v. State*, 267 Ark. 891, 591 S.W.2d 685 (1979).

There need not be a conspiracy count in the defendant's indictment to make the provisions of subdivision (d)(2)(v) of this rule applicable, and it is irrelevant whether the state uses the word "conspire" or not in the indictment; a coconspirator's statements are admissible where the conspiracy is not contained in the indictment but is proved at the trial through independent evidence. *Smithey v. State*, 269 Ark. 538, 602 S.W.2d 676 (1980).

Where an individual had no knowledge that two other persons were police officers, and he willingly participated in the scheme to sell marijuana to defendants, assisting in intro-

ducing the officers to the defendants and in maintaining communications between them, he came within the definition of a coconspirator, and therefore his statements were an exception to the hearsay rule. *Sweat v. State*, 5 Ark. App. 284, 635 S.W.2d 296 (1982), *cert. denied*, 469 U.S. 1172, 105 S. Ct. 933, 83 L. Ed. 2d 944 (1985).

Admissions and statements of a codefendant are admissible as against the other defendant even in the absence of a conspiracy charge where there is independent evidence of a concert of action, and the rule is not confined to those who are codefendants at the same trial; accordingly, where, without considering any statement or admission of coconspirator, there was evidence that defendant asked third person to take him and coconspirator to cash a check, that they rode together to store where coconspirator tried to cash a check made out to a woman who testified she never received the check and never signed it, and that, when the clerk in the store became suspicious, the defendant and coconspirator left together, statement by coconspirator was supported by other evidence establishing conspiracy. *Williams v. State*, 7 Ark. App. 151, 645 S.W.2d 697 (1983).

Coconspirator's statements that the defendant had "put her up" to cashing forged check, although made to store manager during course of conspiracy, could not help further the attempt to cash the check, divide the proceeds, conceal the crime, help the escape, or enlist the store manager in the conspiracy and, accordingly, was not made in furtherance of the conspiracy and was not admissible. *Williams v. State*, 7 Ark. App. 151, 645 S.W.2d 697 (1983).

The absence of a conspiracy charge has no bearing on the competency of a coconspirator's testimony. *Spears v. State*, 280 Ark. 577, 660 S.W.2d 913 (1984).

Testimony concerning statements by coconspirators about their activities after completion of a burglary and armed robbery were admissible since neither coconspirator implicated the other so that the statements were admissions and since the conspiracy was not complete at the time the statements were made in that the stolen goods had not yet been sold nor the proceeds distributed. *Spears v. State*, 280 Ark. 577, 660 S.W.2d 913 (1984).

A coconspirator's testimony that the defendant had told him that he wished to extend an existing operation involving the purchase and sale of stolen goods as long as it was profitable, and to establish a similar one in another county after defendant was elected sheriff were admissions against penal interest by defendant as to his participation in the acts complained of in the charge and intent to continue them and were admissible under

subdivision (d)(2)(i) of this rule. *Woodward v. State*, 16 Ark. App. 18, 696 S.W.2d 759 (1985).

Subdivision (d)(2) of this rule provides that a declaration is not hearsay if made by a coconspirator of a party during the course and in furtherance of the conspiracy and the taped statements fall clearly within that exception. *Mock v. State*, 20 Ark. App. 117, 725 S.W.2d 1 (1987).

Coconspirator's statements made to police officers and recorded on tape were clearly within the scope of this rule, where they were made during the course of criminal conduct, which occurred within a brief interval in time, and they were designed to further the specific objective of such conduct, i.e., a purchase by police officers of some 15 rocks of crack cocaine and by his statements the coconspirator was both promoting the product of his confederate and abetting a completion of the sale. *Dixon v. State*, 310 Ark. 460, 839 S.W.2d 173 (1992).

Trial court's finding that statements made by coconspirator to his wife were "in furtherance of a conspiracy" was erroneous, and wife's testimony was therefore inadmissible against defendant as hearsay. *Leach v. State*, 38 Ark. App. 117, 831 S.W.2d 615 (1992), *aff'd* 311 Ark. 485, 845 S.W.2d 11 (1993).

Defendant's Sixth Amendment rights were not violated when the court allowed the state to play undercover tapes containing statements by a go-between without calling the go-between as a witness; because the taped out-of-court statement is that of a coconspirator, it is not hearsay. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993), *cert. denied* 510 U.S. 1197, 114 S. Ct. 1306, 127 L. Ed. 2d 657 (1994).

Where an actual criminal act is performed by an alleged accomplice, the accomplice's statements made during the transactions are admissible as a statement of a coconspirator. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993), *cert. denied* 510 U.S. 1197, 114 S. Ct. 1306, 127 L. Ed. 2d 657 (1994).

Because statements by a coconspirator derive exemption from the hearsay rule under the definition of "admission by a party opponent," they must in effect be vicarious admissions. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993), *cert. denied* 510 U.S. 1197, 114 S. Ct. 1306, 127 L. Ed. 2d 657 (1994).

A coconspirator's testimony can be deemed competent even without a criminal charge, but the alleged coconspirator must be connected to the conspiracy by evidence independent of the statement. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993), *cert. denied* 510 U.S. 1197, 114 S. Ct. 1306, 127 L. Ed. 2d 657 (1994).

Statements by a coconspirator are not hearsay, if made during the course of and in furtherance of a conspiracy; moreover, subdivi-

sion (d)(2)(v) of this rule applies when a conspiracy is proved at trial by evidence independent of the statement regardless of whether the declarant is charged as a conspirator. *Henderson v. State*, 329 Ark. 526, 953 S.W.2d 26 (1997).

Statements were admissible as evidence both of the furtherance of a conspiracy and probative of defendant's existing state of mind which the state contended was an intent to commit robbery. *Haire v. State*, 340 Ark. 11, 8 S.W.3d 468 (2000).

In a prosecution for murder, there was prima facie evidence of a conspiracy between the defendant and a deceased coemployee, to murder the defendant's husband; therefore, the court properly allowed the introduction into evidence of statements made by the coemployee to his wife and son that they would receive some money as payment for his role as a hit man. *Dyer v. State*, 343 Ark. 422, 36 S.W.3d 724 (2001).

A witness's testimony of what the shooter told him defendant said failed to meet the requirements of subdivision (d)(2)(v) of this rule as the testimony was not a statement of a coconspirator of the party; however, defendant failed to show he was prejudiced by the inadmissible testimony where there was overwhelming evidence that defendant was doing precisely what the hearsay evidence was offered to prove. *Cook v. State*, 350 Ark. 398, 86 S.W.3d 916 (2002).

Trial court properly admitted that portion of a written statement in which a witness told police that defendant admitted being involved in a robbery because the statement qualified as a recorded recollection under ARE 803(5) where the witness told police that the statement was true at the time it was made and an officer testified that the statement was accurately recorded; it was, however, error to admit that portion of the written statement in which a third party implicated both himself and defendant in the robbery because the statement was not made in furtherance of the conspiracy, as required by subdivision (d)(2)(v) of this rule, and was not a statement against the declarant's interest within the meaning of ARE 804(b)(3). *Lawrence v. State*, 81 Ark. App. 390, 104 S.W.3d 393 (2003).

Pursuant to subdivision (d)(2)(v) of this rule, the co-conspirator's recitation of another co-conspirator's statements explaining the robbery plan would not be hearsay if the co-conspirator was a co-conspirator of defendant and if the co-conspirator made these statements during the course and in furtherance of the conspiracy; overwhelming evidence supported the conclusion that defendant conspired with the others, and the statements made by the co-conspirator to which another testified were clearly offered against defendant and were made during the



course and in furtherance of that conspiracy. *Moore v. State*, 372 Ark. 579, 279 S.W.3d 69 (2008).

In an aggravated robbery and capital murder case, the circuit court did not err by admitting a witness's statement to another person about the crime because the witness was a coconspirator; thus, her statements were not hearsay pursuant to subdivision (d)(2)(v) of this rule. *Ventry v. State*, 2009 Ark. 300, 318 S.W.3d 576 (2009).

### **Deposition.**

Once one party has used part of a deposition at trial, an opposing party may introduce any other parts regardless of that declarant's availability, subject, of course, to the rules of evidence. *Ouachita Mining & Exploration, Inc. v. Wigley*, 318 Ark. 750, 887 S.W.2d 526 (1994).

### **Evidence of Bias.**

Where the defendant wished to show that an undercover policeman had attempted to recruit him as an informer, promising to get all charges dismissed if he agreed, but vowing to see that he went to prison if he did not, it was reversible error to exclude it, as this testimony had a bearing on possible bias, but it was necessary that the officer first deny his bias. *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978).

### **Exact Quotation Unnecessary.**

It is not permissible for a witness to relate information he obtained from someone else rather than by his own observation, and counsel cannot avoid the rule by asking a witness for the substance of an out-of-court statement by someone else rather than for an exact quotation. *Morrison v. Lowe*, 267 Ark. 361, 590 S.W.2d 299 (1979).

### **Extrajudicial Identification.**

Where neither court nor prosecutor could remember any agreement made with the defense at a suppression hearing not to allow the prosecution to mention a line-up identification of defendant unless it was first mentioned by the defense, the victim was, under subdivision (d)(1) of this rule, properly allowed to testify on direct examination that she had previously identified the defendant and could relate where and when such identification took place; thus, it was not error to allow the prosecuting attorney to offer original testimony by the victim that she had made extrajudicial identification of the defendant. *Conley v. State*, 272 Ark. 33, 612 S.W.2d 722 (1981), questioned *Clay v. State*, 290 Ark. 54, 716 S.W.2d 751 (1986).

Where there is no defect in the identification procedure used, and where each of the persons making the extrajudicial identification is present at the trial and subject to cross-examination, recall or subject to being

called as a hostile witness by the defense, then a witness to the extrajudicial identification may testify as to the existence and circumstances of the extrajudicial identification; accordingly, where police officer testified at trial that two weeks after the crime he had shown a six-photograph lineup to five bank tellers and that each had picked defendant as the person who passed forged checks, such testimony as to extrajudicial identifications was proper under subdivision (d)(1)(iii) of this rule even where the tellers themselves could have testified as to their identification. *Martin v. State*, 272 Ark. 376, 614 S.W.2d 512 (1981).

Under subdivision (d)(1)(iii) of this rule, a police officer can properly testify as to the existence and circumstances of an extrajudicial identification by witnesses if there is no defect in the identification procedure used, and if the person making the extrajudicial identification is present at trial and subject to cross-examination, recall, or is subject to being called as a hostile witness by the defense. *Hilton v. State*, 278 Ark. 259, 644 S.W.2d 932 (1983).

### **Fabrication of Evidence.**

The principle that testimony rebutting an implied charge of recent fabrication is not hearsay applies when there is a charge that the witness has fabricated a statement he is now making under oath and permits a showing that the same statement was made before there was a motive for fabrication, but where the statement sought to be admitted as rebuttal was made when the motive for fabrication already existed, the statement was self-serving hearsay and not admissible. *Brown v. State*, 262 Ark. 298, 556 S.W.2d 418 (1977).

A party's attempt to fabricate evidence is admissible, not merely as an admission under subdivision (d)(2) of this rule but as proof relevant to show his own belief that his case is weak. *Kellensworth v. State*, 276 Ark. 127, 633 S.W.2d 21 (1982).

Testimony of a rebuttal witness called by the state, that at an earlier trial of the same case, which ended in a mistrial, he had appeared as a defense witness and had given a false alibi for the defendant, that the defendant had asked him to tell the story, that they had made it up together, and that he had lied to help a friend, the witness' testimony was not inadmissible as improperly putting defendant's character in issue or as constituting proof of a specific instance of misconduct, but was clearly admissible. *Kellensworth v. State*, 276 Ark. 127, 633 S.W.2d 21 (1982).

Ordinarily, evidence of prior consistent statements is not admissible to bolster credibility because it is hearsay; however, subdivision (d)(1)(ii) of this rule provides an exception to that rule where there has been a charge of recent fabrication or improper influ-

ence. *Todd v. State*, 283 Ark. 492, 678 S.W.2d 345 (1984); *Terrell v. State*, 26 Ark. App. 8, 759 S.W.2d 46 (1988).

Statement by parole officer to the defendant that he could not possess a firearm while on parole fits within the definition of hearsay under subsection (c) of this rule; the “matter asserted” was that he had been told that he could not possess a firearm while on parole. *Fisher v. State*, 290 Ark. 490, 720 S.W.2d 900 (1986).

An out of court statement is not hearsay if it is offered to show the basis of action. *Dandridge v. State*, 292 Ark. 40, 727 S.W.2d 851 (1987).

Statements not offered to prove the truth of the matters asserted, but rather offered to put into context and explain defendant’s statement, were not hearsay as defined in subsection (c) of this rule. *Mock v. State*, 20 Ark. App. 72, 723 S.W.2d 844 (1987).

Pursuant to subdivision (d)(1)(ii) of this rule, when there is an express or implied charge that a witness has fabricated a statement that he is making under oath during a trial, it is proper, and not hearsay, to show that he made the same statement before the motive for fabrication came into existence. *Henderson v. State*, 311 Ark. 398, 844 S.W.2d 360 (1993).

When there is an express or implied charge that a witness has fabricated a statement that he is now making under oath, it is then proper, and not hearsay, to show that he made the same statement before the motive for fabrication came into existence; for this rule to apply, the prior consistent statement must be made before a motive to falsify has arisen or before the witness would forsee its effect upon the fact issue. *Beavers v. State*, 345 Ark. 291, 46 S.W.3d 532 (2001).

### **Grand-Jury Testimony.**

Accomplice’s grand-jury testimony did not violate the Confrontation Clause of the Sixth Amendment of the United States Constitution because it was given under oath and was subject to the penalty of perjury at another proceeding and, because the accomplice was subject to cross-examination at defendant’s trial, the testimony did not qualify as hearsay under subdivision (d)(1) of this rule. *Jackson v. State*, 359 Ark. 297, 197 S.W.3d 468 (2004), cert. denied 544 U.S. 1039, 125 S. Ct. 2266, 161 L. Ed. 2d 1070 (2005).

### **Harmless Error.**

Defendant’s conviction for capital-felony murder was appropriate because the supreme court did not need to decide whether testimony was hearsay because any error in its admission was harmless under subsection (c) of this rule. The availability of a declarant for cross-examination rendered harmless any error caused by the admission of hearsay. *Dixon*

*v. State*, 2011 Ark. 450, — S.W.3d —, 2011 Ark. LEXIS 537 (Oct. 27, 2011).

### **Identification Testimony.**

In a prosecution for robbery six years after the event, where the only evidence linking the defendant to the crime was the store manager’s identification of the defendant at a line up, the manager’s testimony by way of video taped deposition due to his being stationed at a distant military post was not hearsay, and was sufficient to support a conviction. *Davis v. State*, 284 Ark. 557, 683 S.W.2d 926 (1985).

Police officer’s testimony, that witness identified defendant, was admissible under subdivision (d)(1)(iii) of this rule. *Jacobs v. State*, 316 Ark. 698, 875 S.W.2d 52 (1994).

Detective’s identification of defendant in a photo array was admissible, because it was not hearsay offered for the truth of the matter asserted, but was offered to show the reason for furthering the investigation of defendant. *Keister v. State*, 2011 Ark. App. 71, — S.W.3d —, 2011 Ark. App. LEXIS 81 (Feb. 2, 2011).

### **Interrogatories.**

Answers to interrogatories may qualify as admissions by a party-opponent which are not hearsay, as defined, and therefore may constitute substantive evidence and be admissible in a party’s case-in-chief; if an objection to such answers is raised on foundational or other grounds, it then becomes a matter for the trial court’s discretion. *Piercy v. Wal-Mart Stores, Inc.*, 311 Ark. 424, 844 S.W.2d 337 (1993).

In a fraud case, the circuit court did not err by admitting a party’s responses to interrogatories into evidence because they qualified as admissions by a party-opponent; they constituted substantive evidence and were admissible during the case-in-chief. *Archer-Daniels-Midland Co. v. Beadles Enters.*, 367 Ark. 1, 238 S.W.3d 79 (2006).

### **Medical Records.**

While it could be inferred that police officer was basing his opinion regarding a party’s injury in part on hospital medical records, his statement was not one made by other than the declarant, and was admissible. *Piercefield v. State*, 316 Ark. 128, 871 S.W.2d 348 (1994).

### **Nonverbal Conduct.**

Parole officer’s silence on the question of whether the defendant could lawfully possess a firearm after the completion of his parole was a “statement” only if it was nonverbal conduct intended as an assertion under subdivision (a)(2) of this rule. *Fisher v. State*, 290 Ark. 490, 720 S.W.2d 900 (1986).

### **Objections.**

Where the same evidence was introduced by another witness without objection, it was properly before the jury for consideration, and



subsequent hearsay testimony about the evidence by a police officer constituted harmless error. *Hopes v. State*, 306 Ark. 492, 816 S.W.2d 167 (1991).

In a negligence action involving a propane explosion, the exclusion of evidence that the homeowner had left messages on the propane company's answering machine before the explosion was not error; although the messages were not hearsay because they were offered only to show that the propane company had notice of a possible problem, the homeowner's counsel failed to object to their exclusion on that ground and made a state of mind objection, under Ark. R. Evid. 803(3), which lacked merit. *Miller v. Hometown Propane Gas, Inc.*, 86 Ark. App. 189, 167 S.W.3d 172 (2004).

#### **Other Proceeding.**

Where state at manslaughter trial sought to introduce a prior inconsistent statement by a witness, given under oath to the deputy prosecuting attorney, such statement was admissible for its substantive content and a limiting instruction was not required since it was given to the prosecuting attorney as provided in § 16-43-212, in an official proceeding as defined by § 5-53-101, and the witness was subject to perjury penalties under § 5-53-102; thus, it met all of the requirements for an "other proceeding" under subdivision (d)(1)(i) of this rule. *Slavens v. State*, 1 Ark. App. 245, 614 S.W.2d 529 (1981).

#### **Physical Objects.**

The hearsay rule has no application to physical objects; it applies to out-of-court statements only. *Redman v. State*, 265 Ark. 774, 580 S.W.2d 945 (1979).

In a criminal case, a witness may testify concerning tangible objects which are involved without producing the articles, and this is not a violation of the best evidence rule, which applies only to writings, photographs and recordings, nor does it violate the hearsay rule. *Johnson v. State*, 289 Ark. 589, 715 S.W.2d 441 (1986).

In a check forgery case, a store employee who accepted a forged check was permitted to testify, over hearsay objections, that he recognized appellant from a yearbook picture; because the yearbook was a physical object and not a statement, it was not subject to the hearsay rule. *Taylor v. State*, 88 Ark. App. 269, 197 S.W.3d 31 (2004).

#### **Prior Statement of Witness.**

Where a witness had made a written statement at the request of the prosecuting attorney two or three days before the trial, and this statement was introduced into evidence and copies furnished to the jury, the statement was hearsay since the state offered it for the purpose of proving the guilt or innocence of defendant. *Patterson v. State*, 267 Ark. 436, 591 S.W.2d 356 (1979), cert. denied 447 U.S.

923, 100 S. Ct. 3014, 65 L. Ed. 2d 1115 (1980).

Where in a worker's compensation action the only evidence, that the trip on a motorcycle driven by the employee with the employer's son as a rider was business-connected, was the testimony of an attorney and the deceased employee's brother as to prior statements made by the employer's son, to the effect that the son had told the attorney that he had asked the employee to take him to a certain destination to look at some cattle for his father's slaughterhouse operations, their testimony was not inadmissible as hearsay since the statements by the son fall within the definition of a prior statement by a witness as set forth in subdivision (d)(1)(i) of this rule. *Hawthorne v. Davis*, 268 Ark. 131, 594 S.W.2d 844 (1980).

Where witness claimed not to recollect defendant's participation in crime, he became unavailable, and thus his prior inconsistent statement was admissible as substantive evidence for the state; nevertheless, the witness was entitled to an opportunity to explain or deny his former statement and it was an abuse of the trial court's discretion to refuse the defendant the right to make a proffer of testimony during the in-chambers hearing. *David v. State*, 269 Ark. 498, 601 S.W.2d 864 (1980).

For a prior consistent statement to be admissible under the exception of subdivision (d)(1)(ii) of this rule, the statement must predate the motive to fabricate and where any improper motive attributable to witness in murder trial would likely flow from her close relationship with the decedent which predated her prior written statement as well as her testimony under oath at trial, the statement would be no more trustworthy than her in-court testimony and was not admissible. *George v. State*, 270 Ark. 335, 604 S.W.2d 940 (1980).

Where defendant's sister had made detailed statements to sheriff investigating murder case but only acknowledged principal one and did not sign any of them, then at trial professed not to remember what she had told the sheriff, the state properly used the statements since they were admissible under Rule 613 to impeach the sister, despite her asserted lack of memory, and such statements were admissible as substantive evidence under subdivision (d)(1) of this rule even though the prior statement was not under oath. *Chisum v. State*, 273 Ark. 1, 616 S.W.2d 728 (1981).

Unsworn out-of-court pretrial statements made by a witness in a criminal case could not be a part of the proof in the criminal prosecution because they were hearsay and expressly excluded as substantive evidence under subdivision (d)(1)(i) of this rule. *Roberts v. State*, 278 Ark. 550, 648 S.W.2d 44 (1983).

The trial court, in a prosecution for capital murder, erred when it allowed the prosecution to read a witness' prior written statement to the jury over the objection of the defense, where the prior statement was not given under oath or subject to the penalty of perjury and was therefore inadmissible hearsay and where it was manifest from the record that the statement was read to the jury, not for purposes of impeachment, but as substantive evidence to prove the truth of the matters asserted in it. *Smith v. State*, 279 Ark. 68, 648 S.W.2d 490 (1983).

Where accomplice had twice denied under oath that she had heard any noises indicating police mistreatment of defendant during interrogation, but defense counsel wanted her to state her denial a third time before the jury so that he could show by a defense investigator that she had made a contrary unsworn statement to him, the court properly denied request to call accomplice for limited testimony; the inconsistent out-of-court statement was not admissible as substantive evidence in a criminal case, because it was not under oath, nor was it admissible for impeachment, because counsel did not want accomplice to give any testimony except the bare denial so her credibility would not have been in issue. *Allen v. State*, 281 Ark. 1, 660 S.W.2d 922 (1983), cert. denied, 472 U.S. 1019, 105 S. Ct. 3482, 87 L. Ed. 2d 617 (1985).

Where two defendants were jointly charged with burglary and aggravated robbery but were tried separately, trial court did not abuse its discretion in permitting the use of prior testimony of first defendant in trial of second defendant, where first defendant refused to testify at second trial professing he was unable to remember second defendant's part in the crime and thus his testimony was inconsistent, and where first defendant was subject to cross-examination at second trial. *Jones v. State*, 283 Ark. 308, 675 S.W.2d 825 (1984).

In a prosecution for capital murder where, in order to impeach testimony of police officer, defendant called witness who testified that officer had previously made a different statement and then sought to introduce a prior consistent statement by such witness, since such statement met neither of the criteria set out in subdivision (d)(1) of this rule and was cumulative of the oral testimony, trial court did not err in refusing its admission. *McDaniel v. State*, 283 Ark. 352, 676 S.W.2d 732 (1984).

In civil cases subdivision (d)(1) of this rule effectively allows all prior inconsistent statements to be introduced as substantive evidence in addition to any impeachment value they may have. *Flynn v. McIlroy Bank & Trust Co.*, 287 Ark. 190, 697 S.W.2d 114 (1985).

Confession could be admitted as a prior statement under subdivision (d)(1) of this rule. *Spears v. State Farm Fire & Cas. Ins.*, 291 Ark. 465, 725 S.W.2d 835 (1987).

While there was no basis for admitting the statements in transcript of plea hearing in another county under URE 803, the evidence would come in substantively under subdivision (d)(1) of this rule as an admission. *McDaniel v. State*, 291 Ark. 596, 726 S.W.2d 679 (1987).

Where codefendant was a witness for the defense, it is reasonable to assume that counsel was aware that he had pleaded guilty in the case, and it was not improper for the state to inquire as to whether the codefendant had made a prior statement inconsistent with his testimony pursuant to subdivision (d)(1)(i) of this rule. *Howard v. State*, 291 Ark. 633, 727 S.W.2d 830 (1987).

Out-of-court statement, though notarized, does not meet the requirements of subdivision (d)(1)(i) of this rule that it must be subject to the penalty of perjury. Accordingly, the statement would not be admissible at trial as substantive evidence. *Ford v. State*, 296 Ark. 8, 753 S.W.2d 258 (1988).

The theory underlying subdivision (d)(1)(ii) of this rule is that evidence which counteracts a suggestion that the witness has changed his story in response to some threat, scheme, bribe, or other motive for fabrication, by showing that his story was the same prior to the external pressure being applied, is highly relevant in shedding light on the witness's credibility at trial. *Pennington v. State*, 24 Ark. App. 70, 749 S.W.2d 680 (1988).

The exception under subdivision (d)(1)(ii) of this rule had no application where the victim had the same motive for fabrication when she made the allegation as she had when she testified in the case. *Cole v. State*, 307 Ark. 41, 818 S.W.2d 573 (1991).

Although the witness's statement in question was signed, it was not given under oath and subject to the penalty of perjury, therefore, it was hearsay and inadmissible as substantive evidence. *Harris v. State*, 36 Ark. App. 120, 819 S.W.2d 30 (1991).

Where unavailable witnesses' statements during a phone conversation were inconsistent with his deposition testimony, and he was subject to cross-examination about these statements at the deposition, there was error in the substantive admission of witnesses' prior statements under subdivision (d)(1) of this rule, when utilized at trial pursuant to ARCP 32. *Truck Ctr. of Tulsa, Inc. v. Autrey*, 310 Ark. 260, 836 S.W.2d 359 (1992).

Because defense counsel cast doubt on the veracity of victim's allegations against defendant and since victim was subject to cross-examination concerning the statement at trial, the trial judge correctly ruled that the



prosecutor could ask witness about victim's prior consistent statement. *Cooper v. State*, 317 Ark. 485, 879 S.W.2d 405 (1994).

Where defense counsel made every attempt to show state witness's trial testimony was inconsistent with his earlier statements, fairness dictated that the prosecutor be allowed to explore this area of inquiry to clarify any confusion or misapprehension that may have lingered in the jury's mind from defense counsel's examination; thus, it was proper to allow into evidence a transcribed, pretrial statement by such witness. *Frazier v. State*, 323 Ark. 350, 915 S.W.2d 691 (1996).

In prosecution for rape, victim's prior inconsistent statements were not admissible for purposes of impeachment since the victim admitted making them, and the statements were not admissible as substantive evidence because they were not made under oath as required by this rule. *Hinzman v. State*, 53 Ark. App. 256, 922 S.W.2d 725 (1996).

A prior consistent statement by a robbery and kidnapping victim was properly introduced into evidence in order to rehabilitate her testimony after defense counsel questioned the victim about whether her prior statement was inconsistent with her testimony. *Harris v. State*, 339 Ark. 35, 2 S.W.3d 768 (1999).

Where defendant, on cross-examination, had questioned the witness about the witness's felony record in order to imply that the witness had recently fabricated his denial that defendant shot the decedent in self-defense, the state was certainly entitled, under subdivision (d)(1)(ii) of this rule, to rebut the allegation with evidence that the witness had made the same statement about the shooting being in "cold blood" immediately after the offense and before the motive for fabrication came into existence. *Anderson v. State*, 354 Ark. 102, 118 S.W.3d 574 (2003).

Because counsel failed to object on hearsay grounds to the use of the written police report as substantive evidence of guilt, the issue was waived on appeal, but in any event, given the substantial evidence to support defendant's conviction for assault on a family member, there was not a meritorious argument to be made. *Nelson v. State*, 84 Ark. App. 373, 141 S.W.3d 900 (2004).

Although defendant argued that a witness's two prior statements should not have been read into the evidence, because defendant had made an allegation of recent fabrication in relation to those prior statements, the entire prior statements were properly read into evidence pursuant to subdivision (d)(1)(ii) of this rule. *Hudson v. State*, 85 Ark. App. 85, 146 S.W.3d 380 (2004).

During defendant's rape trial, the court properly refused to allow defendant to cross-examine a witness, who was allegedly raped

by defendant in a prior incident, using a police case summary because the proffered statement made by the witness did not fall within the hearsay exception of subsection (d) of this rule; the statement that defendant had threatened the witness during the incident was made by a police detective, not the witness. *Fells v. State*, 362 Ark. 77, 207 S.W.3d 498 (2005).

Defendant's first-degree murder conviction was overturned and the case was remanded for a new trial where a witness's prior inconsistent statement, taken by a detective, was not taken during an "official proceeding" contemplated by subdivision (d)(1)(i) of this rule; hence, the statement was improperly admitted during defendant's trial. *Stephens v. State*, 98 Ark. App. 196, 254 S.W.3d 1 (2007).

Trial court did abuse its discretion in admitting a victim's prior consistent testimony so that the state could clarify any confusion or misapprehension that could have lingered in the jury's mind because defense counsel repeatedly attempted to show that the victim's current trial testimony was inconsistent with her earlier statements given during defendant's federal trial. *Winkle v. State*, 374 Ark. 128, 286 S.W.3d 147 (2008).

#### **Proper Exclusion.**

Where a party denied at trial the basic facts upon which statements contained in a letter were made, the letter was properly excluded as hearsay. *Duke v. Lovell*, 262 Ark. 290, 556 S.W.2d 416 (1977).

Where, in will contest, it was stipulated that the testatrix was fully competent, but it was alleged that the principal beneficiary exerted undue influence over the testatrix, the testatrix' statement that "my will isn't the way I want it, but it is the only way (the principal beneficiary) will have it" could only be offered to prove the truth of the matter asserted rather than merely to show that the statement was made, and thus was excluded as hearsay under this rule. *Gautney v. Rapley*, 2 Ark. App. 116, 617 S.W.2d 377 (1981).

Where testimony was obviously an attempt to prove the truth of the matter asserted, it was error for the court to allow this hearsay testimony. *Missouri Pac. R.R. v. Mackey*, 297 Ark. 137, 760 S.W.2d 59 (1988), cert. denied 490 U.S. 1067, 109 S. Ct. 2067, 104 L. Ed. 2d 632 (1989).

Reviewing court overruled defendant's assertion that the trial court erred in excluding the letter which his mother sought to read for him at the sentencing hearing, because defendant sought to have his mother read his words for him, which was classic hearsay and fell well within the definition set in the Arkansas Rules of Evidence; defendant refused to take the stand and read his own letter. *Perry v. State*, 371 Ark. 170, 264 S.W.3d 498 (2007).

**Proper Inclusion.**

In an action to recover for personal injuries, the testimony of an orthopedic specialist that he had been notified by a reviewing committee of the state medical society that his charges were three times the maximum charge of the average orthopedist was relevant to the credibility of the specialist's assertion that his bill for treatment of the plaintiff was reasonable. *Hubbard v. Sharpe*, 261 Ark. 829, 552 S.W.2d 21 (1977).

In the prosecution of a food store employee for theft, the testimony of the store supervisor concerning statements made to him by a customer who claimed she had paid defendant for certain groceries, was not hearsay since the out-of-court statements the supervisor testified the customer made to him were not offered to prove the truth of the statements. *Williams v. State*, 270 Ark. 513, 606 S.W.2d 75 (1980).

In a hearing to determine whether exigent circumstances existed which would validate a warrantless and nonconsensual entry into the defendant's home to make a routine arrest, testimony by a police officer about the information he relied upon to justify the warrantless arrest and seizure of evidence was admissible to show the basis of his action, rather than to prove its truthfulness; accordingly, such evidence was not hearsay. *Jackson v. State*, 274 Ark. 317, 624 S.W.2d 437 (1981).

Where state's witness testified concerning a conversation between herself and a woman who was in the car with defendant's husband when defendant shot and killed him, which conversation concerned the woman's intention of purchasing a weapon from the victim as a gift for her husband, the testimony was not hearsay under this rule since the obvious intent of eliciting the statement was to corroborate the woman's testimony as to her reason for meeting the victim rather than to prove the truth of the matter asserted. *Worring v. State*, 2 Ark. App. 27, 616 S.W.2d 23 (1981).

Where a gasoline station owner testified that, after defendant paid him for towing his car to the station and left in the car, he heard over a police scanner that a store had been robbed and that a stolen car fitting the description of the defendant's had been used, such testimony was not hearsay under subsection (c) of this rule since it was not offered to prove that the car was stolen; accordingly, it was admissible in defendant's robbery trial. *Robinson v. State*, 3 Ark. App. 153, 623 S.W.2d 534 (1981).

The informant's statement that he wanted to "buy some weed" was not offered for the truth of the matter asserted, i.e., that the informant actually wanted to buy marijuana, but was offered to explain and put in context the defendant's statement that he had some

and would go and get it; therefore, the informant's statements were not hearsay under the definition of subsection (c) of this rule. *Russell v. State*, 18 Ark. App. 45, 709 S.W.2d 825 (1986).

Trial court did not err in allowing the introduction of witness testimony because the testimony was offered to explain why the officers were investigating the parked car and not for the truth of the matter asserted; because it was introduced for the purpose of showing the basis for their actions and was relevant to the issue of probable cause, the testimony was not hearsay. *West v. State*, 82 Ark. App. 165, 120 S.W.3d 100 (2003).

Evidence that defendant flirted with a guard after he killed his ill live-in companion was not unfairly prejudicial as it was a statement against interest under subdivision (d)(2)(i) of this rule; the guard's testimony suggested that defendant's state of mind hours after the murder was not one of grief, but of relief. *Boyle v. State*, 363 Ark. 356, 214 S.W.3d 250 (2005).

Circuit court properly allowed car manufacturer to introduce Japanese and Canadian reports on sudden acceleration into evidence in mother's defective design action as the reports were not hearsay; they were not offered for their truth but were offered to support the car manufacturer's position that it did not act with malice. *Chapman v. Ford Motor Co.*, 368 Ark. 328, 245 S.W.3d 123 (2006).

In a capital murder trial, a trial court did not err in admitting statements that were made at an accident scene because the statements explained why a witness, who had to stopped to render aid, left the scene and called 911. *Flowers v. State*, 373 Ark. 127, 282 S.W.3d 767 (2008).

In an aggravated robbery and capital murder case, the circuit court did not err in admitting into evidence a police officer's statement, "I know what happened," because it was not offered to prove the truth of the matter asserted, but was rather part of the officer's interrogation technique. Even if there were merit to defendant's argument that the police officer's statement was hearsay, he failed to show that he was prejudiced by the statement. *Ventry v. State*, 2009 Ark. 300, 318 S.W.3d 576 (2009).

In a termination of parental rights hearing, a caseworker's affidavit was not inadmissible hearsay under subsection (c) of this rule because a prior adjudication order contained specific factual findings that the allegations in the affidavit were true, and in any event, there was no prejudice since statements in the affidavit were cumulative of other evidence at the hearing. *Stedman v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 805, — S.W.3d —, 2009 Ark. App. LEXIS 991 (2009).



In a divorce and custody hearing, the admission of a newspaper article and the wife's testimony that the husband and a companion had been arrested for drugs, although hearsay, was not an abuse of discretion because it did not prejudice the husband where the husband admitted that he had been charged with drug crimes and had been acquitted of those crimes. *Poole v. Poole*, 2009 Ark. App. 860, — S.W.3d —, 2009 Ark. App. LEXIS 1021 (2009).

In a divorce and custody hearing, the admission of a videotape and the wife's testimony that the husband's nephew placed a harassing note on the wife's car during work, although hearsay, was not an abuse of discretion because the evidence was cumulative to the wife's extensive testimony about the husband's pattern of harassment and, thus, the husband suffered no prejudice from its admission. *Poole v. Poole*, 2009 Ark. App. 860, — S.W.3d —, 2009 Ark. App. LEXIS 1021 (2009).

In a divorce and custody hearing, although hearsay testimony by the parties' daughter was allowed stating that the father told the daughter it was acceptable to smoke marijuana, any harm from its admission was later cured when the daughter was subject to cross-examination by the father. *Poole v. Poole*, 2009 Ark. App. 860, — S.W.3d —, 2009 Ark. App. LEXIS 1021 (2009).

Termination of the mother's parental rights to two of her sons was appropriate because, although recording of phone conversations between a religious leader and women at the ministry did not qualify as business records under Ark. R. Evid. 803(6), the recordings were admissible since they were not hearsay under subsection (c) of this rule. The portion of the conversations played for the court essentially pertained to the day-to-day operations of the ministry and what the members of the ministry would or would not be allowed to do, in some instances even dictating what the members should be eating; those conversations were not offered for the truth of what was actually asserted by those being recorded but instead were being offered to illustrate the leader's continued control of the ministry. *Myers v. Ark. Dep't of Human Servs.*, 2011 Ark. 182, — S.W.3d —, 2011 Ark. LEXIS 175 (Apr. 28, 2011).

### **Psychologist Report.**

In a trial for termination of the mother's parental rights, where the psychologist did not testify, but the psychologist's report contained information based on interviews with the mother, the children, and others, it was impossible to determine which conclusions relied upon by the trial court were based on hearsay, or even double-hearsay, and because the trial judge relied upon the report to reach conclusions concerning the mother before the report was even admitted into evidence, the

trial court's judgment was reversed. *Rodriguez v. Ark. Dep't of Human Servs.*, 84 Ark. App. 177, 137 S.W.3d 432 (2003).

### **Rebuttal Evidence.**

Motel register which showed defendant's use of a fictitious name and reference to a Buick automobile, which was the same make of car that confidential informant drove, was admissible as its purpose was to illustrate that the room was registered under an assumed name — a fact which confidential informant denied. *Henderson v. State*, 322 Ark. 402, 910 S.W.2d 656 (1995).

### **Recent Fabrication.**

As subdivision (d)(1)(ii) of this rule indicates, a charge of recent fabrication may be either express or implied. *Jones v. State*, 318 Ark. 704, 889 S.W.2d 706 (1994).

The word "recent" in subdivision (d)(1)(ii) of this rule, describing the fabrication, is merely a relative term meaning that the challenged testimony was supposedly fabricated to meet the exigencies of the case, but the principle has no application when a witness had the same motive for fabrication when the statement was made as he had when he testified in the case. *Jones v. State*, 318 Ark. 704, 889 S.W.2d 706 (1994).

### **Statement by Agent.**

It is no longer necessary that an agent be authorized by his principal to make a statement. *Missouri Pac. R.R. v. Arkansas Sheriff's Boys' Ranch*, 280 Ark. 53, 655 S.W.2d 389 (1983).

Where it is undisputed that statements were made by an agent during the existence of the agency relationship, in order to determine if the statements fall within the exception to the hearsay rule and would be admissible evidence, it is only necessary to make a preliminary determination concerning whether the statements involved a matter within the scope of that agency relationship. Such decision does not involve a question of fact; rather, it involves a question of law based upon the facts that have been presented. *Dixie Ins. Co. v. Joe Works Chevrolet, Inc.*, 298 Ark. 106, 766 S.W.2d 4 (1989).

One spouse is not necessarily the agent of the other solely by virtue of the marital relationship. *Parrish v. Newton*, 298 Ark. 404, 768 S.W.2d 17 (1989).

Documents were not hearsay because they were memos from an employee of plaintiff; thus, they were statements against interest by a party. *Potlatch Corp. v. Missouri Pac. R.R.*, 321 Ark. 314, 902 S.W.2d 217 (1995).

### **Statement by Child.**

In deciding the admissibility of out-of-court statements made by a child to a Department of Human Services employee concerning sexual abuse, the trial court erred in allowing the

child's statements into evidence against the father under subdivision (d)(2) of this rule, where the father and child, although nominally parties in an action to remove custody and declare the child to be dependant-neglected, have interests that are in reality adverse, and, moreover, the child's statements went to the heart of the dispute and the father never acquiesced in or adopted them. *Cochran v. Arkansas Dep't of Human Servs.*, 43 Ark. App. 116, 860 S.W.2d 748 (1993).

In defendant's prosecution under § 5-14-103(a)(3)(A), it was not an abuse of discretion to admit an anatomical chart completed at the child victim's direction with defendant's name on the chart because (1) the name was not hearsay, under subsection (c) of this rule, as the name was not offered to prove defendant abused the victim, (2) if hearsay, the name was admissible, as Ark. R. Evid. 803(4) permitted statements in a medical exam identifying a perpetrator in a child's household, and (3) Ark. R. Evid. 403 did not exclude the exhibit as the victim identified defendant as the victim's abuser at trial, and any error was harmless, as the exhibit was cumulative. *Elliot v. State*, 2010 Ark. App. 810, — S.W.3d —, 2010 Ark. App. LEXIS 860 (Dec. 8, 2010).

#### **Statement by Decedent.**

Testimony of two defense witnesses who offered statements of party deceased at the time of trial, which were self-serving as to such party, was properly excluded as hearsay. *L.L. Cole & Son v. Hickman*, 282 Ark. 6, 665 S.W.2d 278 (1984), criticized *Quinn Cos. v. Herring-Marathon Group, Inc.*, 299 Ark. 431, 773 S.W.2d 94 (1989).

Testimony, the only purpose of which was to show that decedent had made a written statement on check or stub that he had bought tenant-in-common's interest in the land, fell squarely within the statutory definition of hearsay and was properly excluded. *Hill v. Brown*, 283 Ark. 185, 672 S.W.2d 330 (1984).

#### **Statement by Defendant.**

Plaintiff properly objected to defense counsel's request on cross-examination that the police officer repeat a statement defendant gave him at the scene about the way the accident occurred. *Luedemann v. Wade*, 323 Ark. 161, 913 S.W.2d 773 (1996).

In defendant's capital murder trial arising out of the beating death of the two-year-old child of defendant's girlfriend, the trial court did not err in refusing to declare a mistrial when the state in its opening statement referred to a witness's testimony that defendant tried to awaken the child and stated that he could not go back to jail because the statement was not hearsay but was an admission or statement by a party-opponent under subdivision (d)(2)(i) of this rule. Because defendant's statement was admissible at trial, the

state was entitled to refer to it during opening statement. *Smith v. State*, 2009 Ark. 453, 343 S.W.3d 319 (2009).

#### **Statement by Informant.**

Any statement made by informant, or in the presence of defendant, indicative of the fact that informant was using persuasion or other means to induce a normally law-abiding person to deliver controlled substances was admissible, not to show the truth of informant's statements, but to show that they were made. *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978); *Hill v. State*, 314 Ark. 275, 862 S.W.2d 836 (1993).

In a proceeding to revoke the defendant's suspended sentence based, *inter alia*, on his possession of methamphetamine with the intent to deliver, a statement by a narcotics officer that a confidential informant told him that the defendant was selling methamphetamine at a specified location was not hearsay as the statement was not offered for truth and, instead, was offered to explain the officer's conduct in contacting the defendant at that location, which contact led to the discovery that the defendant was in possession of methamphetamine. *Brock v. State*, 70 Ark. App. 107, 14 S.W.3d 908 (2000).

#### **Statement by Victim.**

Testimony concerning statement made by the victim over his police radio that the defendant and his companion were "acting squirrely" was hearsay but, even though the statement should have been inadmissible in capital murder case, its admission was not prejudicial. *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, cert. denied 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983).

Since statement that victim was too emotionally unstable to testify at time of report was introduced only for the purpose of overcoming a charge of prosecutorial delay, it was not introduced to prove the matter stated, and it was not prejudicial error to introduce the letter at a hearing on motion to dismiss for prosecutorial delay. *Bliss v. State*, 282 Ark. 315, 668 S.W.2d 936 (1984), *aff'd*, 288 Ark. 546, 708 S.W.2d 74 (1986).

Testimony concerning victim's statement made after alleged incident held admissible. *Bing v. State*, 23 Ark. App. 19, 740 S.W.2d 156 (1987).

Witness' conversation with homicide victim, who informed him that he and the defendant had had an argument, and that the victim was planning to attack defendant, was not hearsay under subsection (c) of this rule in that it was not offered for the truth of the matter asserted; the testimony was admissible under Evid. Rule 405(b) as an essential element of defendant's claim of self-defense. *Simpkins v. State*, 48 Ark. App. 14, 889 S.W.2d 37 (1994).



Murder victim's statements to detective regarding his being robbed by defendant's cousin did not constitute hearsay under subsection (c) of this rule and their admission in defendant's trial for murder was not barred by the Confrontation Clause where they were admitted to demonstrate the basis of detective's actions in seeking an arrest warrant for defendant's cousin and to establish defendant's motive for killing the victim, rather than for the truth of the matter asserted in the statements. *Dednam v. State*, 360 Ark. 240, 200 S.W.3d 875 (2005).

During defendant's capital murder trial, the court erred in admitting written recordings from a notebook found in the victim's apartment after the victim's death because the diary entries were offered to prove that defendant did and said what was recorded in the notebook; the notebook was offered to prove the truth of the matters asserted within it and constituted inadmissible hearsay under subsection (c) of this rule. *Wedgeworth v. State*, 2012 Ark. 63, — S.W.3d —, 2012 Ark. LEXIS 78 (Feb. 16, 2012).

#### **Statement by Witness.**

Where a handwritten statement was not offered for the truth of the matter asserted, but was offered to show that items contained in witness' trial testimony were not included in the statement she made to the sheriff's investigator shortly after the homicide she witnessed, the argument supported by admission of the statement into evidence was that she did not include the facts tending to exculpate defendant when her memory of the event must have been quite fresh, and the jury was properly instructed not to consider it as being offered for the truth of the matter asserted, no error was committed with respect to admitting the statement into evidence. *Buchanan v. State*, 315 Ark. 227, 866 S.W.2d 395 (1993).

Uncontradicted testimony by a child support enforcement office employee that he believed defendant's child turned 17 did not meet the definition of hearsay under subsection (c) of this rule because it was merely an opinion. *Hampton v. State*, 357 Ark. 473, 183 S.W.3d 148 (2004).

Trial court did not err by allowing two witnesses to testify during sentencing that they had seen defendant "acting suspiciously" in the neighborhood park on the day of his initial contact with police because the trial court specifically instructed the jury that the testimony was only to be considered to show why the witnesses called the police and was not offered for the truth of the matter asserted, the testimony was not unduly prejudicial, and the testimony went to defendant's character. *Adkins v. State*, 371 Ark. 159, 264 S.W.3d 523 (2007).

In a second-degree murder case under § 5-10-103, defendant's rights under the federal

and state Confrontation Clauses were violated by the admission of an incriminating testimonial statement made by defendant's sister relating to his motive and statement of mind; although the sister was unavailable, defendant did not have an opportunity for cross-examination. Moreover, the statement was not offered for a non-hearsay purpose, and the admission of such was not harmless. *Seaton v. State*, 101 Ark. App. 201, 272 S.W.3d 854 (2008).

Trial court did not abuse its discretion in overruling defendant's hearsay objection, because at trial, the neighbor testified that the men he observed coming out of the residence were not supposed to be there. *Lewis v. State*, 2009 Ark. App. 504, 323 S.W.3d 640 (2009).

Termination of the father's parental rights to his child was appropriate even though the admission of testimony from the child's foster mother was erroneously admitted and was not admissible; the foster mother testified that hospital personnel said that the child was a high-risk and failure-to-thrive baby and that they were concerned about whether the child would make it. The erroneous admission of that testimony was harmless and took nothing away from the remaining evidence that supported the termination; the hearsay evidence was actually somewhat cumulative to the foster mother's own observations about the child's low weight and his appearing to have been a premature baby. *Tadlock v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 821, — S.W.3d —, 2009 Ark. App. LEXIS 1040 (2009).

#### **Testimony Proper.**

Where witness's statement to his mother was consistent with his testimony at trial and was made before he had contact with the police or the prosecutors, it was admissible as elicited in testimony from the mother under subdivision (d)(1)(ii) of this rule to rebut the implied charges of recent fabrication or improper influence or motive. *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000).

Trial court did not err in denying defendant's objection because the witness could testify to hearsay to explain why she went to the police. *Howard v. State*, 348 Ark. 471, 79 S.W.3d 273 (2002), cert. denied 537 U.S. 1051, 123 S. Ct. 606, 154 L. Ed 2d 528 (2002).

Trial court did not err in allowing a statement into evidence because it was not offered to show the truth of the matter asserted but was offered to explain the victim's actions and, thus, the statement was not hearsay. *Moore v. State*, 362 Ark. 70, 207 S.W.3d 493 (2005).

#### **Truth of the Matter Asserted.**

Statement about a fence line being the boundary line was not offered to prove the truth of the matter asserted, and thus was not hearsay. *Laster v. Williams*, 2012 Ark. App.

282, — S.W.3d —, 2012 Ark. App. LEXIS 398 (Apr. 25, 2012).

As testimony was offered to prove the truth of the matter asserted, it was hearsay. *Laster v. Williams*, 2012 Ark. App. 282, — S.W.3d —, 2012 Ark. App. LEXIS 398 (Apr. 25, 2012).

#### Use of Statement Contents.

Testimony by police officers of the description of the robber given by witnesses to a robbery, given to show what information the police had acted on and not for the truth of the statements therein, was not hearsay. *Jones v. State*, 15 Ark. App. 283, 692 S.W.2d 775 (1985).

Testimony is not hearsay where it is admitted solely to prove the fact that the words were said, not to prove that they were true. *Wal-Mart Stores, Inc. v. Dolph*, 308 Ark. 439, 825 S.W.2d 810 (1992).

Where police officer was working undercover at the request of a sheriff and the information given to him by the sheriff relating to defendant's description and name was necessary in conducting the investigation, the admission of these statements to show the basis of the officer's action was not error. *White v. State*, 39 Ark. App. 52, 837 S.W.2d 479 (1992).

Trial court did not abuse its discretion by allowing the state to introduce the transcript of police interviews with the victim, which included parts of the statement that were not introduced by the state, because the defense expressly referred to selective portions of the interviews while attempting to show that the investigator coerced or cajoled the victim into giving incriminating testimony; thus, the entire transcript of the two interviews were properly admitted to refute a charge of improper influence and to provide context. *Hamm v. State*, 365 Ark. 647, 232 S.W.3d 463 (2006).

Store owner properly based her calculation of the amount stolen on business records, under Ark. R. Evid. 803(6) when she pulled the register receipts showing the total amount of sales made by the store on the date of the theft, then subtracted the credit-card sales and the amount collected during the second shift. Thus, although the store owner did not personally count the money before the theft, the testimony was not inadmissible hearsay under this rule. *Scott v. State*, 2010 Ark. App. 114, — S.W.3d —, 2010 Ark. App. LEXIS 97 (Feb. 3, 2010).

**Cited:** *Marrow v. State Farm Ins. Co.*, 264 Ark. 227, 570 S.W.2d 607 (1978); *Haseman v. Union Bank*, 268 Ark. 318, 597 S.W.2d 67 (1980); *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980); *Urquhart v. State*, 273 Ark. 486, 621 S.W.2d 218 (1981); *Morrison v. Lowe*, 274 Ark. 358, 625 S.W.2d 452 (1981); *Hackett v. State*, 2 Ark. App. 228, 619 S.W.2d 687 (1981); *Gross v. State*, 8 Ark. App. 241,

650 S.W.2d 603 (1983); *Wilson v. State*, 9 Ark. App. 213, 657 S.W.2d 558 (1983); *Walker v. Lockhart*, 598 F. Supp. 1410 (E.D. Ark. 1984), rev'd en banc 763 F.2d 942 (8th Cir. 1985); *Jackson v. State*, 284 Ark. 478, 683 S.W.2d 606 (1985); *Hendrickson v. State*, 285 Ark. 462, 688 S.W.2d 295 (1985), criticized *Mackey v. State*, 289 Ark. 265, 711 S.W.2d 462 (1986); *Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985), cert. denied 475 U.S. 1036, 106 S. Ct. 1245, 89 L. Ed 2d 354 (1986); *Lewis v. State*, 288 Ark. 595, 709 S.W.2d 56 (1986); *Howard v. State*, 291 Ark. 633, 727 S.W.2d 830 (1987); *Pemberton v. State*, 292 Ark. 405, 730 S.W.2d 889 (1987); *Womack v. First State Bank*, 21 Ark. App. 33, 728 S.W.2d 194 (1987); *Carmichael v. State*, 296 Ark. 479, 757 S.W.2d 944 (1988); *Brazel v. State*, 296 Ark. 563, 759 S.W.2d 28 (1988); *Teas v. State*, 23 Ark. App. 154, 744 S.W.2d 739 (1988); *Pearrow v. Feagin*, 300 Ark. 274, 778 S.W.2d 941 (1989); *Guinn v. State*, 27 Ark. App. 260, 771 S.W.2d 290 (1989); *Lopez v. State*, 29 Ark. App. 145, 778 S.W.2d 641 (1989); *Farmers Bank v. Perry*, 301 Ark. 547, 787 S.W.2d 645 (1990); *Richmond v. State*, 302 Ark. 498, 791 S.W.2d 691 (1990); *Butler v. State*, 303 Ark. 380, 797 S.W.2d 435 (1990); *Turley v. State*, 32 Ark. App. 89, 796 S.W.2d 851 (1990); *Elliott v. Hurst*, 307 Ark. 134, 817 S.W.2d 877 (1991); *McArthur v. State*, 309 Ark. 196, 830 S.W.2d 842 (1992); *Evans v. State*, 38 Ark. App. 42 (1992); *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993), appeal dismissed 316 Ark. 249, 871 S.W.2d 372 (1994); *Cloird v. State*, 314 Ark. 296, 862 S.W.2d 211 (1993); *Hall v. State*, 315 Ark. 385, 868 S.W.2d 453 (1993); *Wilburn v. State*, 317 Ark. 73, 876 S.W.2d 555 (1994); *Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994), criticized *Jones v. State*, 329 Ark. 62, 947 S.W.2d 339 (1997); *Jones v. State*, 45 Ark. App. 28, 871 S.W.2d 403 (1994); *Diffie v. State*, 319 Ark. 669, 894 S.W.2d 564 (1995); *Spears v. State*, 321 Ark. 504, 905 S.W.2d 828 (1995); *Griffin v. State*, 322 Ark. 206, 909 S.W.2d 625 (1995); *Robson v. Tinnin*, 322 Ark. 605, 911 S.W.2d 246 (1995); *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995); *Weber v. State*, 326 Ark. 564, 933 S.W.2d 370 (1996); *Miles v. State*, 59 Ark. App. 97, 954 S.W.2d 286 (1997); *Sanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998); *Windsor v. State*, 338 Ark. 649, 1 S.W.3d 20 (1999); *Haire v. State*, 340 Ark. 11, 8 S.W.3d 468 (2000); *Columbia Nat'l Ins. Co. v. Freeman*, 347 Ark. 423, 64 S.W.3d 720 (2002); *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003); *Brown v. State*, 85 Ark. App. 382, 155 S.W.3d 22 (2004); *Primerica Life Ins. Co. v. Watson*, 362 Ark. 54, 207 S.W.3d 443 (2005); *Hutcherson v. State*, 92 Ark. App. 307, 213 S.W.3d 25 (2005); *Baker v. State*, 2009 Ark. App. 788, — S.W.3d —, 2009 Ark. App. LEXIS 928 (2009); *Rye v. State*, 2009 Ark. App. 839, — S.W.3d —,



2009 Ark. App. LEXIS 1055 (2009); Lacy v. State, 2010 Ark. 388, — S.W.3d —, 2010 Ark. LEXIS 484 (Oct. 21, 2010); Pace v. State, 2010

Ark. App. 491, — S.W.3d —, 2010 Ark. App. LEXIS 535 (June 16, 2010).

## Rule 802. Hearsay rule.

Hearsay is not admissible except as provided by law or by these rules.

### RESEARCH REFERENCES

**Ark. L. Rev.** Case Note, Roberts v. State: A Limitation on the Impeachment of Witnesses by Extrinsic Evidence of Prior Inconsistent Statements, 37 Ark. L. Rev. 688.

**U. Ark. Little Rock L.J.** Legislative Survey, Evidence, 8 U. Ark. Little Rock L.J. 573.

### CASE NOTES

#### ANALYSIS

Evidence admissible.

Evidence inadmissible.

Harmless error.

Question calling for hearsay answer.

#### Evidence Admissible.

Accomplice's grand-jury testimony did not violate the Confrontation Clause of the Sixth Amendment of the United States Constitution because it was given under oath and was subject to the penalty of perjury at another proceeding and, because the accomplice was subject to cross-examination at defendant's trial, the testimony did not qualify as hearsay under Ark. R. Evid. 801(d)(1). Jackson v. State, 359 Ark. 297, 197 S.W.3d 468 (2004), cert. denied 544 U.S. 1039, 125 S. Ct. 2266, 161 L. Ed. 2d 1070 (2005).

In a check forgery case, a store employee who accepted a forged check was permitted to testify, over hearsay objections, that he recognized appellant from a yearbook picture; because the yearbook was a physical object and not a statement, it was not subject to the hearsay rule. Taylor v. State, 88 Ark. App. 269, 197 S.W.3d 31 (2004).

Trial court did not err in overruling defendant's objections during a deputy's testimony when the deputy told the trial court about a call he received regarding suspects because such testimony was not hearsay when it was offered to show the basis of the deputy's actions. Holley v. State, 2010 Ark. App. 47, — S.W.3d —, 2010 Ark. App. LEXIS 50 (2010).

#### Evidence Inadmissible.

Testimony properly excluded as hearsay. Ward v. State, 293 Ark. 88, 733 S.W.2d 728 (1987), overruled MacKintrush v. State, 334 Ark. 390, 978 S.W.2d 293 (1998), criticized Colbert v. State, 304 Ark. 250, 801 S.W.2d 643 (1990), questioned MacKintrush v. State, 60 Ark. App. 42, 959 S.W.2d 404 (1997).

Admission of hearsay evidence was not harmless error. Davis v. State, 38 Ark. App. 115, 828 S.W.2d 863 (1992).

Testimony of murder victim's cousin that accomplice told him defendant shot the victim held inadmissible. Lanes v. State, 53 Ark. App. 266, 922 S.W.2d 349 (1996), overruled Bradford v. State, 325 Ark. 278, 927 S.W.2d 329 (1996).

A party's recollection of the contents of a letter written in 1975 constituted hearsay evidence, which was properly excluded under this rule. Hopper v. Daniel, 72 Ark. App. 344, 38 S.W.3d 370 (2001).

Where injured person was hit from behind by an employee in a tractor-trailer rig and the jury held in favor of the employee, the injured person contended that the trial court erroneously allowed the investigating trooper to testify that he gained information from another police officer who tried to chase down the third vehicle that abruptly stopped or slowed in front of the injured person's vehicle; the appellate court agreed that the testimony resulted in prejudice because it gave the impression that the authorities thought the driver of the third vehicle was responsible for the accident. Dovers v. Stephenson Oil Co., 81 Ark. App. 92, 98 S.W.3d 462 (2003).

#### Harmless Error.

Although an officer's testimony regarding an altercation between defendant and a victim constituted hearsay, an appellate court did not reverse a conviction for murder in the first degree because there was overwhelming evidence of defendant's guilt. Winbush v. State, 82 Ark. App. 365, 107 S.W.3d 882 (2003).

Although it was a Confrontation Clause error to admit a videotaped interview of defendant's former wife to police as an excited utterance under this rule, the error was harmless because the offenses were proven by testimonial and physical evidence that was completely independent from the evidence contained in the interview. Snider v. State, 2009 Ark. App. 472, 323 S.W.3d 635 (2009).

Termination of the father's parental rights

to his child was appropriate even though the admission of testimony from the child's foster mother was erroneously admitted and was not admissible; the foster mother testified that hospital personnel said that the child was a high-risk and failure-to-thrive baby and that they were concerned about whether the child would make it. The erroneous admission of that testimony was harmless and took nothing away from the remaining evidence that supported the termination; the hearsay evidence was actually somewhat cumulative to the foster mother's own observations about the child's low weight and his appearing to have been a premature baby. *Tadlock v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 821, — S.W.3d —, 2009 Ark. App. LEXIS 1040 (2009).

**Question Calling for Hearsay Answer.**

Question calling for a hearsay answer was properly excluded. *McGee v. State*, 280 Ark. 347, 658 S.W.2d 376 (1983).

**Cited:** *Womack v. First State Bank*, 21 Ark. App. 33, 728 S.W.2d 194 (1987); *Griswold v. State*, 304 Ark. 168, 801 S.W.2d 270 (1990); *George v. State*, 306 Ark. 360, 813 S.W.2d 792, amended 306 Ark. 374A, 818 S.W.2d 951 (1991), questioned *Vann v. State*, 309 Ark. 303, 831 S.W.2d 126 (1992); *Silvicraft, Inc. v. Southeast Timber Co.*, 34 Ark. App. 17, 805 S.W.2d 84 (1991); *Hall v. State*, 315 Ark. 385, 868 S.W.2d 453 (1993); *Weber v. State*, 326 Ark. 564, 933 S.W.2d 370 (1996); *Miles v. State*, 59 Ark. App. 97, 954 S.W.2d 286 (1997); *Wyles v. State*, 357 Ark. 530, 182 S.W.3d 142 (2004); *Brown v. State*, 85 Ark. App. 382, 155 S.W.3d 22 (2004); *Primerica Life Ins. Co. v. Watson*, 362 Ark. 54, 207 S.W.3d 443 (2005); *Hutcheson v. State*, 92 Ark. App. 307, 213 S.W.3d 25 (2005); *Rye v. State*, 2009 Ark. App. 839, — S.W.3d —, 2009 Ark. App. LEXIS 1055 (2009); *Plessy v. State*, 2012 Ark. App. 74, — S.W.3d —, 2012 Ark. App. LEXIS 168 (Jan. 18, 2012).

**Rule 803. Hearsay exceptions — Availability of declarant immaterial.**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) *Excited Utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for Purposes of Medical Diagnosis or Treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded Recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of Regularly Conducted Business Activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses [sic], made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of



that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) *Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6).* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) *Public Records and Reports.* To the extent not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the government in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; and (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

(9) *Records of Vital Statistics.* Records or data compilations, in any form, of birth, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) *Absence of Public Record or Entry.* To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) *Records of Religious Organizations.* Statements of births, marriages, divorces, death, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Marriage, Baptismal, and Similar Certificates.* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) *Family Records.* Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) *Records of Documents Affecting an Interest in Property.* The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and applicable statute authorizes the recording of documents of that kind in that office.

(15) *Statements in Documents Affecting an Interest in Property.* A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents.* Statements in a document in existence twenty (20) years or more the authenticity of which is established.

(17) *Market Reports, Commercial Publications.* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) *Learned Treatises.* To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) *Reputation Concerning Personal or Family History.* Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) *Reputation Concerning Boundaries or General History.* Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) *Reputation as to Character.* Reputation of a person's character among his associates or in the community.

(22) *Judgment of Previous Conviction.* Evidence of a final judgment, (entered after a trial or upon a plea of guilty,) adjudging a person guilty of a crime punishable by death or imprisonment in excess of one (1) year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgment as to Personal, Family or General History, or Boundaries.* Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of



trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

(25) *Child Hearsay When Declarant is Available at Trial and Subject to Cross-examination.* A statement made by a child under the age of ten (10) years concerning any type of sexual offense, or attempted sexual offense, with, on, or against that child, which is inconsistent with the child's testimony and offered in a criminal proceeding, provided:

(A) The trial court conducts a hearing outside the presence of the jury and finds that the statement offered possesses a reasonable guarantee of trustworthiness considering the competency of the child both at the time of the out of court statement and at the time of the testimony.

(B) The proponent of the statement gives the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(C) This section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of evidence. (Amended May 11, 1992.)

**Publisher's Notes.** Prior to adoption of the Arkansas Rules of Evidence by the Supreme Court in 1986, this rule, as enacted by Acts 1975 (Extended Sess., 1976), No. 1143, § 1, was amended by Acts 1985, No. 405, § 1, which added subdivision (25). The 1985 amendment is set out above. Neither the court's opinion in *Ricarte v. State*, 290 Ark. 100, 717 S.W.2d 488 (1986), nor the accompanying per curiam of October 13, 1986, which adopted the Uniform Rules of Evidence "as set forth" in the 1976 act, refers specifically to this amendment and it is unclear whether the court intended to include it in its adoption of the pre-existing rules.

The former version of subsection (25)(A) was held unconstitutional in *George v. State*, 306 Ark. 360, 813 S.W.2d 792, modified, 306 Ark. 374-A, 818 S.W.2d 951 (1991).

Acts 1992 (1st Ex. Sess.), No. 66, § 1 amends § 16-41-101, Rule 803(25). There is no corresponding amendment of Rule 803(25) by the Supreme Court of Arkansas. See § 16-41-101, Rule 803.

Acts 1992 (1st Ex. Sess.), No. 66, § 1 amended § 16-41-101, Rule 803 (25). The Supreme Court of Arkansas amended subdivision (25) of this rule by Per Curiam dated May 11, 1992. The amendments to § 16-41-101, Rule 803(25) by Acts 1992 (1st Ex. Sess.), No. 66, § 1, and to subdivision (25) of this rule by the Per Curiam Order dated May 11, 1992 are not identical.

**Cross References.** Photographically reproduced records admissible in court, § 16-46-108.

## RESEARCH REFERENCES

**ALR.** Admissibility in state court proceedings of police reports as business records. 111 ALR 5th 1.

Admissibility in state court proceedings of police reports under official record exception to hearsay rule. 112 ALR 5th 621.

When is hearsay statement made to 911 operator admissible as "present sense impres-

sion" under Uniform Rules of Evidence 803(1) or similar state rule. 125 ALR 5th 357.

Construction and Application of Uniform Rule of Evidence 803(17), Providing Hearsay Exception for Market Reports, and Commercial Publications. 54 ALR 6th 593.

**Ark. L. Notes.** Gitelman and Watkins, No Requiem for *Ricarte*: Separation of Powers,

the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

**Ark. L. Rev.** Evidentiary Aspects of Manufacturer Recommendations in Establishing Physicians' Standard of Care, 31 Ark. L. Rev. 477.

Hall, The Prosecutor's Subpoena Power, 33 Ark. L. Rev. 122.

Note, Arkansas Rules of Evidence in Child Sexual Abuse: Vann v. State, 47 Ark. L. Rev. 239.

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**U. Ark. Little Rock L.J.** Impeachment of One's Own Witness by Prior Inconsistent Statements Under the Federal and Arkansas Rules of Evidence, Perroni, 1 U. Ark. Little Rock L.J. 277.

Derden, Survey of Arkansas Law: Evidence, 2 U. Ark. Little Rock L.J. 232.

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Sullivan, The Need for a Business or Payroll Records Affidavit for Use in Child Support Matters, 11 U. Ark. Little Rock L.J. 651.

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Note, Constitutional Law — Confrontation Clause — Arkansas Child Hearsay Exception Regarding Sexual Offenses, Abuse, Or Incest Is Unconstitutional. *George v. State*, 306 Ark. 360, 813 S.W.2d 792 (1991) [modified, 306 Ark. 374A, 818 S.W.2d 951 (1991)], 14 U. Ark. Little Rock L.J. 579.

Survey of Legislation, Evidence, 14 U. Ark. Little Rock L.J. 793.

Constitutional Law — Child Hearsay Exception in Sexual Abuse Cases — New Arkansas Supreme Court Rule Conflicts with New General Assembly Rule: Which Controls? *Vann v. State*, 309 Ark. 303, 831 S.W.2d 126 (1992), 15 U. Ark. Little Rock L.J. 143.

Jones, Lex, Lies & Videotape, 18 U. Ark. Little Rock L.J. 613.

## CASE NOTES

### ANALYSIS

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— Determination by court.

— Excited utterance.

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### Constitutionality.

Application of subdivision (25) of this rule to defendant who was charged prior to the 1985 amendment which added the subdivision did not violate constitutional prohibition against ex post facto laws. *Cogburn v. State*, 292 Ark. 564, 732 S.W.2d 807 (1987).

Former subdivision (25)(A)1./ held unconstitutional; the balance of subdivision (25) remained intact. *George v. State*, 306 Ark. 360, 813 S.W.2d 792, amended 306 Ark. 374A, 818 S.W.2d 951 (1991), questioned *Vann v. State*, 309 Ark. 303, 831 S.W.2d 126 (1992).

Subdivision (25) of this rule as it existed prior to the 1992 amendment violated the Confrontation Clause of U.S. Const., Amend. 6, in criminal cases. *Vann v. State*, 309 Ark. 303, 831 S.W.2d 126 (1992).

Subdivision (25) of this rule as it existed prior to the 1992 amendment denied the criminal defendant his right of confrontation since it provided that the hearsay statement of a child is admissible upon showing only that it



possesses a "reasonable likelihood of trustworthiness," which is a far lesser standard than is required by the Confrontation Clause of U.S. Const., Amend. 6. *Vann v. State*, 309 Ark. 303, 831 S.W.2d 126 (1992).

Hearsay evidence which does not fall within a firmly rooted hearsay exception and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, U.S. Const., Amend. 6, may nonetheless meet Confrontation Clause reliability standards if it is supported by a showing of particularized guarantees of trustworthiness. *Vann v. State*, 309 Ark. 303, 831 S.W.2d 126 (1992).

#### **In General.**

This rule requires that certain foundation requirements be established before records may be admitted into evidence. *Shipley v. State*, 25 Ark. App. 262, 757 S.W.2d 178 (1988).

Witnesses offering testimony under this rule must be available for cross-examination. *Nahlen v. State*, 330 Ark. 1, 953 S.W.2d 877 (1997).

#### **Construction.**

The phrase "other qualified witness" in subdivision (6) of this rule should be given the broadest interpretation; he need not be an employee of the entity so long as he understands the system. *Wilburn v. State*, 317 Ark. 73, 876 S.W.2d 555 (1994).

The requirement of authentication in ARE 901 is separate from the requirement that a hearsay document must satisfy an applicable hearsay exception for admissibility. *Columbia Mut. Ins. Co. v. Patterson*, 320 Ark. 584, 899 S.W.2d 61 (1995).

Defendant's statement, made to police after defendant's arrest, that defendant was trying to find a place to sleep, was inadmissible hearsay, as it was not a present-sense impression under subdivision (1) of this rule, nor was it a statement of a then existing mental condition under subdivision (3). *Jones v. State*, 2011 Ark. App. 324, — S.W.3d —, 2011 Ark. App. LEXIS 365 (May 4, 2011).

#### **Business Records.**

Admission of city police radio logs was not error, where the logs were authenticated by testimony of the dispatcher who recorded them and the chief of police who identified the logs as official city records kept in the due course of business. *Dyas v. State*, 260 Ark. 303, 539 S.W.2d 251 (1976).

Under this rule, seven factors must be present for business records to be admissible: (1) record or other compilation, (2) of acts or events, (3) made at or near the time the act occurred, (4) by a person with knowledge (or from information transmitted by such a person), (5) kept in the course of a regularly conducted business, (6) which has a regular practice of recording such information, (7) all

as shown by the testimony of the custodian or other qualified witness. *Cates v. State*, 267 Ark. 726, 589 S.W.2d 598 (Ct. App. 1979); *Hooper v. State*, 311 Ark. 154, 842 S.W.2d 850 (1992).

Where the microfilm copies of bank records were adequately identified by the bank's officer as being copies of records kept in the normal course of business, they were competent evidence. *Reed v. State*, 267 Ark. 1017, 593 S.W.2d 472 (Ct. App. 1980).

Party could not object to the introduction of report on the grounds that it was hearsay and not a business record in the sense of subdivision (6) of this rule since neither of these objections was made in the trial court, for error cannot be predicated on a ruling admitting evidence in the absence of a specific objection, if the specific objection was not apparent from the context. *Enterprise Sales Co. v. Barham*, 270 Ark. 544, 605 S.W.2d 458 (1980).

The trial court in a prosecution for the theft of some copper wire from the victim railroad did not err in allowing a railroad employee to testify as to the catalogue price of the copper wire, after the stock catalogue, customarily used by the railroad for replenishment purposes, was acquired. *Beard v. State*, 277 Ark. 35, 639 S.W.2d 52 (1982).

Hearsay testimony as to the contents of medical reports made by the insureds' doctors during the two years preceding the issuance of the insurance policy should not have been admitted since the reports were not compiled in the insurer's normal course of business but rather for the specific purpose of investigating the insureds' claim. *Ward v. Union Life Ins. Co.*, 9 Ark. App. 131, 653 S.W.2d 153 (1983), disapproved *Southern Farm Bureau Life Ins. Co. v. Cowger*, 295 Ark. 250, 748 S.W.2d 332 (1988).

Computer printouts were admissible as evidence of a store inventory. *Tandy Corp. v. Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984), limited *City of Green Forest v. Morse*, 316 Ark. 540, 873 S.W.2d 155 (1994).

Where bookkeeper did not testify concerning ledger cards, but managing partner testified extensively regarding the ledger cards, demonstrating a knowledge of and detailed familiarity with the itemized transactions chronologically listed on them, the trial judge did not abuse his discretion in admitting the cards and allowing partner to testify. *Smith v. Chicot-Life Ins. Agency*, 11 Ark. App. 49, 665 S.W.2d 907 (1984).

Testimony that pawnshop owner victim customarily made entries on the day they occurred, the absence of any alteration appearing in the records, and the requirement of the federal agency making the timely entry of such transactions mandatory satisfied the court that the elements of this rule were

substantially met. *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986), cert. denied 484 U.S. 872, 108 S. Ct. 202, 98 L. Ed. 2d 153 (1987).

It is the fact that regularly kept business records are relied upon for business decisions that makes them trustworthy enough to be admissible as an exception to the hearsay rule. *Wildwood Contractors v. Thompson-Holloway Real Estate Agency*, 17 Ark. App. 169, 705 S.W.2d 897 (1986).

In order to be admissible under subdivision (6) of this rule, audit report must be made at or near the time of the examination of the records upon which it is based and not necessarily when the activity shown in the audit records was performed. *Wildwood Contractors v. Thompson-Holloway Real Estate Agency*, 17 Ark. App. 169, 705 S.W.2d 897 (1986).

It is not necessary that the sponsoring witness have knowledge of the actual creation of the document in question; the personal knowledge of the sponsoring witness regarding preparation of the business record goes to the weight rather than the admissibility of the evidence. *Wildwood Contractors v. Thompson-Holloway Real Estate Agency*, 17 Ark. App. 169, 705 S.W.2d 897 (1986).

The business records exception does not mandate that the custodian be able to explain the record-keeping procedures in question. *Wildwood Contractors v. Thompson-Holloway Real Estate Agency*, 17 Ark. App. 169, 705 S.W.2d 897 (1986).

It is questionable whether a confession is a business record; the Court of Appeals has held that a public office is not a business. *Spears v. State Farm Fire & Cas. Ins.*, 291 Ark. 465, 725 S.W.2d 835 (1987).

Summary was admissible as a business record. *Ward v. Gerald E. Prince Constr., Inc.*, 293 Ark. 59, 732 S.W.2d 163 (1987).

Memos did not qualify as business records where evidence did not show that they were made at or near the time of transaction and there was no evidence identifying the custodian of the records or an otherwise qualified witness through whom the memos could be introduced. *Womack v. First State Bank*, 21 Ark. App. 33, 728 S.W.2d 194 (1987).

Although there is no prohibition against one company integrating records made by another into its own business records, party offering record must still establish by a competent witness that its content is worthy of belief. *Marshall Trucking Co. v. State*, 23 Ark. App. 110, 743 S.W.2d 16 (1988).

Merely fact that memorandum was retained in defendant's files did not supply required foundation for admission as business record. *Marshall Trucking Co. v. State*, 23 Ark. App. 110, 743 S.W.2d 16 (1988).

A foundation must be laid for the admission

of a business record, and the elements of the foundation must be shown by testimony of the custodian or another qualified witness. *Branscomb v. State*, 299 Ark. 482, 774 S.W.2d 426 (1989).

Foundation requirements of subdivision (6) of this rule were satisfied for hospital records. *Terry v. State*, 309 Ark. 64, 826 S.W.2d 817 (1992).

The length of a witness' prior employment at the business whose records were used at trial, coupled with his knowledge of how the work records were maintained, qualified him as a witness under subdivision (6) of this rule. *Mitchael v. State*, 309 Ark. 151, 828 S.W.2d 351 (1992).

The appellate court would not reverse defendant's conviction, where, although the testimony of the individuals who received or sent wire transfers of money may not have been proper to lay the foundation for the business record exception, the defendant had failed to show prejudice. *Hooper v. State*, 311 Ark. 154, 842 S.W.2d 850 (1992).

An independent chemical analysis test was a record acquired and maintained by a supplier in the regular course of business where the government required an independent test of the product used to fulfill military contracts by the purchasing parties. *Precision Steel Whse., Inc. v. Anderson-Martin Mach. Co.*, 313 Ark. 258, 854 S.W.2d 321 (1993).

Subdivision (6) of this rule indicates a foundation must be laid for the admission of a business record, and the elements of the foundation must be shown by testimony of the custodian or other qualified witness. *Wilburn v. State*, 317 Ark. 73, 876 S.W.2d 555 (1994).

The "chain of custody" requirement does not require every person who came in contact with scientific evidence to account for it at trial; it is only necessary that the trial court be satisfied that the evidence was not tampered with by anyone. *Caldwell v. State*, 319 Ark. 243, 891 S.W.2d 42 (1995).

Geneticist's testimony provided a sufficient foundation to establish the chain of custody for blood samples because he was the custodian of records which were kept in the normal course of business activity. *Caldwell v. State*, 319 Ark. 243, 891 S.W.2d 42 (1995).

Subdivision (6) of this rule does not require that a custodian or keeper of the record be the record's sponsoring witness; in addition to the custodian of the record, a "qualified witness" may provide the testimony required to lay the foundation for the admission of a business record. *Columbia Mut. Ins. Co. v. Patterson*, 320 Ark. 584, 899 S.W.2d 61 (1995).

Admission of invoice stating charge to repair broken glass was not harmless admission of hearsay evidence. *Eichelberger v. State*, 323 Ark. 551, 916 S.W.2d 109 (1996).

Expert testimony concerning DNA blood



testing by a lab supervisor using her supervisor's report held admissible under this rule and Evid. Rule 703. *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997).

In a tort action for inter alia, assault and battery, the court properly permitted the introduction into evidence of notes of a psychologist who counseled the defendant under the business-records exception where the foundation for such evidence was provided by testimony of the psychologist's office manager. *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998).

Trial court erred in admitting a partner's hearsay testimony regarding contributions made to a partnership; the compilation of the figures was not kept in the course of a regularly conducted business activity and did not fit within business records exception to hearsay rule. *Paine v. Walker*, 76 Ark. App. 217, 61 S.W.3d 925 (2001).

The fact that a piece of evidence falls within the business records exception to the hearsay rule does not equate to automatic admissibility; thus, the trial court properly excluded a home study report as too prejudicial in the absence of someone who could be cross-examined as to its contents. *Ark. Dep't of Human Servs. v. Huff*, 347 Ark. 553, 65 S.W.3d 880 (2002).

Trial court's decision not to include a father's gambling losses in the calculation of child support was not clearly erroneous because the father was unable to substantiate his losses by keeping a diary, as required by the Internal Revenue Service; moreover, the father's ATM withdrawal slips were not records of regularly conducted business activity under subdivision (6) of this rule. *McWhorter v. McWhorter*, 351 Ark. 622, 97 S.W.3d 408 (2003), cert. denied 540 U.S. 904, 124 S. Ct. 261, 157 L. Ed. 2d 189 (2003).

Finding in favor of the beneficiaries and against intestate heirs in a will-contest action was proper where the beneficiaries satisfied the requirements of subdivision (6) of this rule and proved that the bank's records were admissible as an exception to the hearsay rule and, even though the officer was not the custodian of the records, that did not bar their admission; further, the records were adequately authenticated under ARE 901 because the officer repeatedly testified that the copies were true and accurate copies of the records that they depicted. *Metzgar v. Rodgers*, 83 Ark. App. 354, 128 S.W.3d 5 (2003).

In a negligence suit relating to a vehicle collision, a driver's cell phone records were properly admitted to show his inattentiveness. *Jones v. Currans*, — Ark. App. —, 289 S.W.3d 506, 2008 Ark. App. LEXIS 860 (2008).

Trial court did not err in holding that a daughter's statements of preference as to custody contained in a therapist's business re-

cords, which were admitted without objection, could not be considered as evidence of preference because a father could not show that he was prejudiced by the exclusion of the records. *Stacks v. Stacks*, 2009 Ark. App. 862, — S.W.3d —, 2009 Ark. App. LEXIS 1028 (2009).

Although the circuit court abused its discretion in allowing intoxication testimony under the business-records exception to hearsay evidence, found in subdivision (6) of this rule, a father suffered no actual prejudice by the testimony, and its admission was harmless; the testimonies of the son's mother, a police officer, the son's therapist, and his caseworker, coupled with the father's driving while intoxicated convictions and his admissions about use of alcohol, were more than sufficient to substantiate findings that the father's neglect and parental unfitness arose from alcohol abuse and had a negative effect on the child. *Hays v. Ark. HHS*, 2009 Ark. App. 864, — S.W.3d —, 2009 Ark. App. LEXIS 1004 (2009).

Store owner properly based her calculation of the amount stolen on business records, under subdivision (6) of this rule when she pulled the register receipts showing the total amount of sales made by the store on the date of the theft, then subtracted the credit-card sales and the amount collected during the second shift. Thus, the testimony was not inadmissible hearsay under Ark. R. Evid. 801. *Scott v. State*, 2010 Ark. App. 114, — S.W.3d —, 2010 Ark. App. LEXIS 97 (Feb. 3, 2010).

Trial court did not err in convicting defendant of theft of property with a value less than \$2,500 but more than \$500 in violation of § 5-36-103(a)(1) and (b)(2)(A) for stealing merchandise from a department store because a manager's testimony, in conjunction with the testimony of another employee, who was also a manager, was sufficient to lay the foundation for the introduction of a register receipt under the business-records exception to the hearsay rule, subdivision (6) of this rule, as proof of the value of the stolen merchandise; the employee's testimony indicated that he knew the recovered items were stolen because they did not bear certain labels or electronic receipts that the store regularly places on all merchandise, the manager testified that he knew the value of the stolen merchandise by following the store's standard practice of adding up the value by ringing it up on the store's register, and the receipt bore an electronic date and time stamp, as well as other numeric information about the merchandise, including the label information from each item. *Pace v. State*, 2010 Ark. App. 491, — S.W.3d —, 2010 Ark. App. LEXIS 535 (June 16, 2010).

Termination of the mother's parental rights to two of her sons was appropriate because, although recording of phone conversations

between a religious leader and women at the ministry did not qualify as business records under subdivision (6) of this rule, the recordings were admissible since they were not hearsay under Ark. R. Evid. 801(c). The portion of the conversations played for the court essentially pertained to the day-to-day operations of the ministry and what the members of the ministry would or would not be allowed to do, in some instances even dictating what the members should be eating; those conversations were not offered for the truth of what was actually asserted by those being recorded but instead were being offered to illustrate the leader's continued control of the ministry. *Myers v. Ark. Dep't of Human Servs.*, 2011 Ark. 182, — S.W.3d —, 2011 Ark. LEXIS 175 (Apr. 28, 2011).

Defendant waived any error in admitting without a proper foundation photos of defendant using a victim's bank card because he failed to get a specific ruling that the photos were considered authenticated under Ark. R. Evid. 901 or under the hearsay exception in subdivision (6) of this rule for business records described by a custodian. *Settles v. State*, 2011 Ark. App. 241, — S.W.3d —, 2011 Ark. App. LEXIS 262 (Mar. 30, 2011).

#### **Child Abuse, Etc.**

Statements of child victims held admissible. *Poyner v. State*, 288 Ark. 402, 705 S.W.2d 882 (1986); *Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986); *Stallnacker v. State*, 19 Ark. App. 9, 715 S.W.2d 883 (1986); *Hughes v. State*, 292 Ark. 619, 732 S.W.2d 829 (1987); *Johnson v. State*, 292 Ark. 632, 732 S.W.2d 817 (1987).

Pretrial proceedings met the requirements of subdivision (25) of this rule. *Cogburn v. State*, 292 Ark. 564, 732 S.W.2d 807 (1987).

The instruction required by former subdivision (25)(A)3. of this rule should be given before the testimony is offered, in the nature of an admonition, rather than given at conclusion of case with packet of jury instructions. *Cogburn v. State*, 292 Ark. 564, 732 S.W.2d 807 (1987).

Former subdivision (25)(A) of this rule did not require declarant to be less than ten years old at the time of trial as opposed to time when statement was made. *Johnson v. State*, 292 Ark. 632, 732 S.W.2d 817 (1987).

Requirement that witness be unavailable as prerequisite to admission of out-of-court statements did not apply in child abuse case where there were sufficient indicia of reliability of victim's statements. *Johnson v. State*, 292 Ark. 632, 732 S.W.2d 817 (1987).

While it is true that the exception in former subdivision (25) of this rule was enacted to alleviate the trauma and distress of child victims by not requiring direct testimony from the child, there is nothing in this rule which prohibits a child from testifying. When

the legislature enacted this hearsay exception, it did not mean to create "an either/or situation," that is, the child may testify or the child's hearsay statements to others may be introduced at trial, but not both. *Smart v. State*, 297 Ark. 324, 761 S.W.2d 915 (1988).

Former subdivision (25)(A) of this rule was not applicable where the court was not asked to, and did not, hold a hearing outside the jury's presence to determine whether the evidence was reasonably trustworthy, the state did not give notice of its intent to offer the statement, and the jury was not instructed as to the manner in which it should determine the weight and credit to be given to the statement, all of which are required by that rule. *Pennington v. State*, 24 Ark. App. 70, 749 S.W.2d 680 (1988).

Trial court was required to give the instruction pursuant to former subdivision 25(A)3. of this rule and erred in failing to do so, but where defendant failed to ask for instruction or object to court's failure to give it and did not give court opportunity to correct its error at trial, matter could not be raised for first time on appeal. *St. Clair v. State*, 301 Ark. 223, 783 S.W.2d 835 (1990), questioned *State v. Sypult*, 304 Ark. 5, 800 S.W.2d 402 (1990).

Expert testimony concerning DNA blood testing by a lab supervisor using her supervisor's report held admissible under this rule and Evid. Rule 703. *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997).

The description of the defendant by a witness, within 30 minutes of the murder of her co-worker, was a description by a person under stress or excitement. *Hill v. State*, 344 Ark. 216, 40 S.W.3d 751 (2001), overruled in part *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002).

In a prosecution for rape of a five year old girl, it was error to allow the victim's mother to testify as to statements made by the victim on the day after the incident at issue in response to questioning by the mother since such statements did not constitute excited utterances. *Lewis v. State*, 74 Ark. App. 61, 48 S.W.3d 535 (2001).

Under subdivision (2) of this rule, the declarant's condition at the time had to be such that the statement was spontaneous, excited or impulsive rather than the product of reflection and deliberation. *Flores v. State*, 75 Ark. App. 397, 58 S.W.3d 417 (2001), aff'd in part and modified in part 348 Ark. 28, 69 S.W.3d 864 (2002).

Defendant's convictions for rape and sexual assault were appropriate because Ark. R. Evid. 804(b)(7)(A) was inapplicable since the trial court never declared the victim to have been unavailable as a witness. Rather, the trial court found that the victim's statements to his father and a doctor were hearsay exceptions under subdivisions (2) and (4) of this



rule, where the availability of the witness was immaterial; defendant did not challenge those determinations that the statements fell under those particular hearsay exceptions on appeal. *Stidam v. State*, 2010 Ark. App. 278, — S.W.3d —, 2010 Ark. App. LEXIS 280 (Mar. 31, 2010).

In defendant's prosecution under § 5-14-103(a)(3)(A), it was not an abuse of discretion to admit an anatomical chart completed at the child victim's direction with defendant's name on the chart because (1) the name was not hearsay, under Ark. R. Evid. 801(c), as the name was not offered to prove defendant abused the victim, (2) if hearsay, the name was admissible, as subdivision (4) of this rule permitted statements in a medical exam identifying a perpetrator in a child's household, and (3) Ark. R. Evid. 403 did not exclude the exhibit as the victim identified defendant as the victim's abuser at trial, and any error was harmless, as the exhibit was cumulative. *El-liott v. State*, 2010 Ark. App. 810, — S.W.3d —, 2010 Ark. App. LEXIS 860 (Dec. 8, 2010).

#### —Determination by Court.

Subdivision (25) of this rule does not require written findings, or specific oral findings, but rather requires the trial court to base its decision on the enumerated criteria. *Cogburn v. State*, 292 Ark. 564, 732 S.W.2d 807 (1987).

Subdivision (25) of this rule requires that trial judge must form his own conclusions of the trustworthiness of the statements by observing the child as a witness. *Hughes v. State*, 292 Ark. 619, 732 S.W.2d 829 (1987).

#### —Excited Utterance.

Even if there were no direct proof to the contrary, it would be inconceivable to believe that a four and six-year-old could remain some 24 to 30 hours alone with the body of their mother, dead on the living room floor from 144 knife wounds and regard their immediate account as unexcited, whatever the manifestations. *Suggs v. State*, 317 Ark. 541, 879 S.W.2d 428 (1994).

Where the testimony indicated that victim, the adult declarant, was assaulted and battered in his home on the day he was murdered by two men who threatened to return, which is without doubt a startling event as contemplated in subdivision (2) of this rule, and the testimony also indicated the victim answered the door of his home later that day armed with a pistol and a machete, which was evidence the victim was still under the stress and excitement of the startling event, then the declarant's statements to the witness satisfied the requirements of the excited utterance exception. *Moore v. State*, 317 Ark. 630, 882 S.W.2d 667 (1994).

Testimony by the mother and friend of the victim with respect to the statements made by

the victim in response to their questions when she returned to their residence shortly after the alleged rape fell within the "excited utterance" exception. *Latham v. State*, 318 Ark. 19, 883 S.W.2d 461 (1994).

Child's statement, made to her mother the morning after being molested by the babysitter, held admissible as an excited utterance. *Greenlee v. State*, 318 Ark. 191, 884 S.W.2d 947 (1994).

In a prosecution for the robbery of a store, the court properly permitted a witness to testify that the victim said, "He just robbed me. Don't leave me," as the witness arrived at the store since it was evident that the witness arrived at the store contemporaneously with the conclusion of the robbery and, therefore, the victim was still under the stress of the excitement of the robbery when she made the statement. *Skiver v. State*, 336 Ark. 86, 983 S.W.2d 931 (1999).

Five-year-old child's statement to her mother within seconds or minutes of an incident in the bathroom with her uncle, given while she appeared scared, that her uncle had put his pee-pee in her mouth, was properly admitted as an excited utterance under subdivision (2) of this rule. *Davis v. State*, 2011 Ark. App. 686, — S.W.3d —, 2011 Ark. App. LEXIS 722 (Nov. 9, 2011).

#### —Parent's Testimony.

Where court permitted mother to testify to statements minor made to her but minor refused to testify about statements on stand, the admission of the minor's statements was not error because the statements were corroborated by other evidence. *Peebles v. State*, 305 Ark. 338, 808 S.W.2d 331 (1991).

The victim's inability to testify effectively at trial did not presumptively invalidate the reliability of her statements to her parents. *George v. State*, 306 Ark. 360, 813 S.W.2d 792, amended 306 Ark. 374A, 818 S.W.2d 951 (1991), questioned *Vann v. State*, 309 Ark. 303, 831 S.W.2d 126 (1992).

Where the child-victim was in effect unavailable to testify at trial due to the judge's finding of lack of competency, sufficient guarantees of trustworthiness existed, such as spontaneity, consistency, and no motive to fabricate the story, to support the trial court's finding that the parents' testimony of the victim's statements did not violate the defendant's confrontation rights. *George v. State*, 306 Ark. 360, 813 S.W.2d 792, amended 306 Ark. 374A, 818 S.W.2d 951 (1991), questioned *Vann v. State*, 309 Ark. 303, 831 S.W.2d 126 (1992).

#### —Patient's Testimony.

Where victim made statements to treating physician concerning sexual abuse by stepfather, trial court properly admitted statements under the medical-treatment exception to

hearsay rule; the statements allowed physician to take steps to prevent further abuse, to treat the emotional and psychological injuries and allowed physician to fulfill her legislatively imposed duty of calling the child-abuse hotline and reporting the crime. *Hawkins v. State*, 348 Ark. 384, 72 S.W.3d 493 (2002).

#### **—Then Existing Condition.**

Testimony by a witness the effect that the seven-year-old rape victim told the witness that defendant had told the victim he would kill the victim if she told about the sexual acts held admissible under subdivision (3) of this rule. *Bradley v. State*, 327 Ark. 6, 937 S.W.2d 628 (1997).

#### **—Validity.**

Subdivision (25)(A) of this rule has not been preempted by rules of court and is not unconstitutional. *St. Clair v. State*, 301 Ark. 223, 783 S.W.2d 835 (1990), questioned *State v. Sypult*, 304 Ark. 5, 800 S.W.2d 402 (1990).

#### **—Videotape.**

Although subdivision (25) of this rule applies generally to any statement made by a child that meets the required criteria, specific statutory provisions must be met for such statements when they are videotaped. *Cogburn v. State*, 292 Ark. 564, 732 S.W.2d 807 (1987).

Trial court erred in receiving videotape of child's statement into evidence. *Cogburn v. State*, 292 Ark. 564, 732 S.W.2d 807 (1987).

#### **Confrontation Clause.**

When the declarant testifies at trial, the only Confrontation Clause issue which remains is whether the declarant could be effectively examined about out-of-court statements; it is only when the declarant is too young or too frightened when he does appear in court to be meaningfully examined about the out-of-court statements attributed to him that the Confrontation Clause remains unsatisfied, and the analysis then turns to whether the admitted statements bear sufficient indicia of reliability to withstand Confrontation Clause scrutiny. *Johnson v. Lockhart*, 71 F.3d 319 (8th Cir. 1995).

In a child sexual assault case, defendant's Sixth Amendment confrontation rights were not violated by admission of the child victim's videotaped statement to a detective because the victim appeared at trial, was placed under oath, and was subject to cross-examination by defendant; although defendant complained on appeal that he was unable to cross-examine the victim about her videotaped statement to police, he pointed to no ruling that prevented him from recalling her after the tape was admitted so that she could be questioned about the interview. *Brown v. State*, 96 Ark. App. 66, 238 S.W.3d 614 (2006).

#### **Discretion of Court.**

A trial judge has wide discretion to determine whether a business record lacks trustworthiness. *Wildwood Contractors v. Thompson-Holloway Real Estate Agency*, 17 Ark. App. 169, 705 S.W.2d 897 (1986).

Trial judge did not abuse his discretion in admitting the testimony offered by the state under subdivision (25) of this rule. *Harris v. State*, 295 Ark. 456, 748 S.W.2d 666 (1988); *Smart v. State*, 297 Ark. 324, 761 S.W.2d 915 (1988).

#### **Excited Utterance.**

Statement was admissible as evidence under the excited utterance exception to the hearsay rule as having been made under the stress of excitement caused by startling event or condition. *Weaver v. State*, 271 Ark. 853, 612 S.W.2d 324, cert. denied 452 U.S. 963, 101 S. Ct. 3113, 69 L. Ed. 2d 974 (1981); *Fountain v. State*, 273 Ark. 457, 620 S.W.2d 936 (1981); *Singleton v. State*, 274 Ark. 126, 623 S.W.2d 180 (1981), cert. denied 456 U.S. 938, 102 S. Ct. 1996, 72 L. Ed. 2d 458 (1982), cert. denied 459 U.S. 882, 103 S. Ct. 184, 74 L. Ed. 2d 149 (1982); *Jackson v. State*, 290 Ark. 375, 720 S.W.2d 282 (1986); *Barker v. State*, 21 Ark. App. 56, 728 S.W.2d 204 (1987).

The basis underlying the exception in subdivision (2) of this rule is that a person who experiences a startling event, and is still under the stress of the excitement of it when statements are made, will not make fabricated statements and their utterances are therefore trustworthy; in these situations the court must find that there was a startling event and that at the time the utterance is made the declarant is still under the stress of excitement resulting from that event when the utterances are made. *Tackett v. State*, 12 Ark. App. 57, 670 S.W.2d 824 (1984).

Under subdivision (2) of this rule, although the excited utterance must be made close in time to the startling event, the length of elapsed time is only one factor to be considered in determining whether the stress of the excitement has continued. *Tackett v. State*, 12 Ark. App. 57, 670 S.W.2d 824 (1984).

Statements made by child victim right after the occurrence were properly admitted as excited utterances under subdivision (2) of this rule, and it was not necessary to show that the victim was competent to testify; the probability of truth inherent in an excited utterance supplies a reliable safeguard. *Bryan v. State*, 288 Ark. 125, 702 S.W.2d 785 (1986).

Under subdivision (2) of this rule, it is for the trial court to determine if the statement was made under the stress of excitement, an excited utterance, or after the person had calmed down. *Marx v. State*, 291 Ark. 325, 724 S.W.2d 456 (1987).

Evidence properly excluded as not being



excited utterance where a substantial amount of time passed between the crime and making of utterances. *Barker v. State*, 21 Ark. App. 56, 728 S.W.2d 204 (1987).

The admissibility of an excited utterance is not to be measured by any precise number of minutes, hours, or days, but requires that the declarant is still under the stress and excitement caused by the traumatic occurrence. *Pennington v. State*, 24 Ark. App. 70, 749 S.W.2d 680 (1988); *Huls v. State*, 27 Ark. App. 242, 770 S.W.2d 160 (1989).

Evidence sufficient to find that statement was admissible as an excited utterance under this rule. *Smith v. State*, 303 Ark. 524, 798 S.W.2d 94 (1990).

The victim's statements to her mother qualify as an excited utterance under subdivision (2) of this rule, because they were made at an unusually late hour, following a nightmare that clearly terrified the victim. *George v. State*, 306 Ark. 360, 813 S.W.2d 792, amended 306 Ark. 374A, 818 S.W.2d 951 (1991), questioned *Vann v. State*, 309 Ark. 303, 831 S.W.2d 126 (1992).

The probability of truth in an excited utterance supplies a reliable safeguard. *Russell v. State*, 306 Ark. 436, 815 S.W.2d 929 (1991).

Court properly admitted statements as excited utterances from an eight-year-old girl who witnessed her uncle commit a violent attack upon her grandmother and two-year-old cousin, made in less than one hour to the ambulance driver. *Russell v. State*, 306 Ark. 436, 815 S.W.2d 929 (1991).

Statements did not fall within excited utterance exception to the hearsay rule, where declarant's utterances, four days after the incident could not be said to be considered a product of the stress of the excitement, rather than of intervening reflection and deliberation. *Cole v. State*, 307 Ark. 41, 818 S.W.2d 573 (1991).

Where the eight-year-old victim was sexually abused by her father the morning of the 29th, this abuse constitutes a "startling event" within the meaning of this rule and the statements made by the victim to her grandmother fit clearly within the excited utterance exception. *Killcrease v. State*, 310 Ark. 392, 836 S.W.2d 380 (1992).

For the statement made by a party involved in a car accident to the attending police officer to be an excited utterance, it is necessary to establish that the utterance was made soon enough after the accident for it to reasonably be considered a product of the stress of accident, rather than of intervening reflection or deliberation. *Luedemann v. Wade*, 323 Ark. 161, 913 S.W.2d 773 (1996).

Defendant's identification in a photo lineup by the victim's six-year-old daughter was inadmissible hearsay and not an excited utterance. *Johnson v. State*, 326 Ark. 430, 934

S.W.2d 179 (1996), cert. denied 520 U.S. 1242, 117 S. Ct. 1848, 137 L. Ed. 2d 1051 (1997).

Under subdivision (2) of this rule, the trial court properly admitted a witness's testimony about the statements made by a murder victim to the witness as an excited utterance; the victim made the statements after a night filled with terror such that the violence which the victim had experienced was clearly an excited or startling event. *Peterson v. State*, 349 Ark. 195, 76 S.W.3d 845 (2002).

In a capital murder trial, the victim's daughter was permitted to testify as to hearsay statement of the victim that defendant had hit her on prior occasions; the statement was admissible as an excited utterance under subdivision (2) of this rule because the victim was bruised and crying at the time she made the statement. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003).

In a sexual assault case, victim's statement to a fellow church member regarding an assault about 30 minutes after the incident took place was sufficient to establish the time-frame element for an excited utterance. *Davis v. State*, 362 Ark. 34, 207 S.W.3d 474 (2005).

Court properly admitted into evidence the statement of a child rape victim, "don't you hurt my sister the way you hurt me" when her sister got into the vehicle in which defendant was a passenger; the victim left her seat, she was shaking and crying and had to be comforted and, on those facts, there was no doubt that the victim's response was immediate and that it was made under the stress of the event of seeing her sister get into the vehicle with the alleged rapist. *Warner v. State*, 93 Ark. App. 233, 218 S.W.3d 330 (2005).

Victim called her mother on Sunday morning around 3:15 am stating that she and defendant had been fighting and that he raped and tried to strangle her; on Tuesday, the victim was killed. Regarding the mother's testimony about the phone call on Sunday morning, her testimony fell within the excited-utterance exception and was admissible because (1) the victim's statements to her mother occurred at the time of the startling event — the altercation with defendant; (2) the victim was extremely excited when she made the phone call to her mother, as defendant was still present in her home; and (3) all of her statements were in reaction to the altercation with defendant. *Wright v. State*, 368 Ark. 629, 249 S.W.3d 133 (2007).

Victim told three co-workers about an altercation with defendant in which he raped her and tried to strangle her; on Tuesday, the victim was killed. Testimony of the co-workers did not fall within the excited-utterance exception because (1) the victim told one of the co-workers that she was going to go home and then go to the police the next morning; (2) while the victim was understandably still

upset from the events that occurred between her and defendant, it did not appear that she was in a state of hysterics; (3) the victim's conversations with her co-workers appeared to be the product of some reflection and deliberation on those events; and (4) the victim's conversations with her co-workers took place about 36 hours after the altercation. *Wright v. State*, 368 Ark. 629, 249 S.W.3d 133 (2007).

In defendant's rape case, a young child's hearsay statement regarding the incident was properly admitted as an excited utterance because the child made the statement shortly after police officers arrived on the scene, and thus, the evidence suggested a short interval of time between the offense and the statement. Moreover, it was clear that the child made the statement while he was under the stress of excitement caused by watching his sister perform oral sex on defendant. *Bell v. State*, 371 Ark. 375, 266 S.W.3d 696 (2007).

Trial court abused its discretion under subdivision (2) of this rule in admitting an out-of-court statement of a murder victim's seven-year-old daughter under the excited-utterance exception to the hearsay rule where there was a passage of almost two days between the incident and the statement; the daughter also exhibited a calm demeanor in response to the detective's questions. *Rodriguez v. State*, 372 Ark. 335, 276 S.W.3d 208 (2008).

Trial court abused its discretion in allowing hearsay statements of a tractor-trailer driver under the excited-utterance exception, subdivision (2) of this rule, because there was no indication that the statements were spontaneous or that the driver was excited or under emotion's influence after a vehicle collision. *Jones v. Currans*, — Ark. App. —, 289 S.W.3d 506, 2008 Ark. App. LEXIS 860 (2008).

Despite being made after the lapse of some time and being made in response to her mother's questions, a child-victim's statements to her mother about a rape were admissible under the excited utterance exception to the hearsay rule, subdivision (2) of this rule, especially considering the brutality of the criminal event, the young age of the child, the upset demeanor of the child, and the subject matter of the statement. *Frye v. State*, 2009 Ark. 110, 313 S.W.3d 10 (2009).

On appeal from his conviction for second-degree murder, there was no abuse of discretion in finding that a witness's statements were admissible under subdivision (2) of this rule because they were made while he was still under the stress of the incident. Defendant's uncle testified that the witness was frantic, tired, and huffing; when asked about his behavior, the witness responded that defendant and the victim had just gotten into an argument and that defendant shot the victim.

*Diggins v. State*, 2010 Ark. App. 301, — S.W.3d —, 2010 Ark. App. LEXIS 295 (Apr. 7, 2010).

Victim's statement to another person was admissible as an excited utterance under subdivision (2) of this rule, where it was made mere minutes after the victim escaped from her assailant and was not sure whether the assailant and his confederates were still in the area, the individual described the victim as "frantic," and the victim made an emergency call to police. *Keister v. State*, 2011 Ark. App. 71, — S.W.3d —, 2011 Ark. App. LEXIS 81 (Feb. 2, 2011).

Because defendant's wife reported a physical assault and her 911 call came within a short time of the assault, a trial court did not err in finding that her statements made during the call were admissible as an "excited utterance" under subdivision (2) of this rule. *Mathis v. State*, 2012 Ark. App. 285, — S.W.3d —, 2012 Ark. App. LEXIS 400 (Apr. 25, 2012).

#### **Existing Intent.**

Testimony about statements testator made regarding his intent was admissible under subdivision (3) of this rule. *Greenwood v. Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979).

Testimony concerning statement by victim was admissible as showing victim's intent on day of murder. *Scherrer v. State*, 294 Ark. 227, 742 S.W.2d 877 (1988).

Statements concerning the decedent's intent when he executed his will, the family limited-partnership agreement, and the revocable trust were proper under this rule, because it showed the decedent's intent that his partnership interest be conveyed to the trust. *Ashley v. Ashley*, 2012 Ark. App. 236, — S.W.3d —, 2012 Ark. App. LEXIS 337 (Apr. 4, 2012).

#### **Existing State of Mind.**

The victim's quoted declarations are inadmissible as being statements of her memory about the past, not statements of an existing state of mind: the statements that her relationship with the defendant was sexual, that she thought him to be the father of her child, and that she had canceled appointments for an abortion. *State v. Abernathy*, 265 Ark. 218, 577 S.W.2d 591 (1979).

The trial court should have sustained the admissibility of the victim's statement that she was going to meet the defendant the night of the murder; that statement falls within subdivision (3) of this rule. *State v. Abernathy*, 265 Ark. 218, 577 S.W.2d 591 (1979).

Testimony is inadmissible under subdivision (3) of this rule where it concerns a mental or emotional condition that is purely subjective and irrelevant to the defense of duress. *Marx v. State*, 291 Ark. 325, 724 S.W.2d 456 (1987).

Testimony held proper under subdivision



(3) of this rule. *Honey v. Hickey*, 26 Ark. App. 99, 760 S.W.2d 81 (1988); *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993), appeal dismissed 316 Ark. 249, 871 S.W.2d 372 (1994).

Statements were not admissible as a state of mind exception under subdivision (3) of this rule, where three women's testimony of what the victim said, four days after the incident, about what defendant did to her, were statements of the victim's memory about the past, not statements of her then-existing state of mind. *Cole v. State*, 307 Ark. 41, 818 S.W.2d 573 (1991).

Where defendant's incriminating statement allegedly was uttered after a shooting murder occurred, it was not in furtherance of a crime, and was admissible because it tended to show the effect on the listener, i.e., instigating defendant's immediate response showing his approval of the shooting and tending to prove defendant's status as an accomplice. *Cole v. State*, 323 Ark. 8, 913 S.W.2d 255 (1996).

Statements by the defendant's parents to a witness that they were afraid of the defendant were properly admitted in the defendant's murder prosecution as statement of the declarants' present states of mind where one statement was made 3 weeks before the defendant murdered his parents and the other statement was made 2 months before the murder. *Hodge v. State*, 332 Ark. 377, 965 S.W.2d 766 (1998).

Testimony given by individuals regarding statements that deceased husband made to them indicating his new wife would have the proceeds of his life insurance to pay off the debts of his business was admissible under subdivision (3) of this rule. *Primerica Life Ins. Co. v. Watson*, 362 Ark. 54, 207 S.W.3d 443 (2005).

In a case where a child was determined to be dependent-neglected based on allegations of sexual abuse, it was unnecessary to decide if testimony from the father's mother about what the child said was admissible under subdivision (3) of this rule to show the child's then-existing mental, emotional, or physical condition because the testimony was excludable as cumulative under Ark. R. Evid. 403. The father was trying to show that the child had made statements denying the abuse had occurred, but other statements to this effect had been introduced. *Sparrow v. Ark. HHS*, 101 Ark. App. 193, 272 S.W.3d 846 (2008).

Trial court erred in excluding, as hearsay, testimony concerning a patient's complaints of cast tightness and pain because the complaints clearly fell within the hearsay exception set forth in subdivision (3) of this rule for a then-existing mental or physical condition. *Blankenship v. Kelly, M.D.*, 2010 Ark. App. 337, — S.W.3d —, 2010 Ark. App. LEXIS 361 (Apr. 21, 2010).

#### **Expert Opinion.**

Trial court did not err in permitting testimony concerning scientific tests by a person who neither performed them nor was actually present when they were performed since expert can base his opinion on facts learned from others even though the facts are themselves hearsay. *Morris v. State*, 21 Ark. App. 228, 731 S.W.2d 230 (1987).

#### **Familiarity with Record.**

In a prosecution for obtaining food stamps by false pretense, the trial court erred in failing to sustain defendant's hearsay objection to testimony by investigators that employment records, water department files, and social security revealed that persons to whom defendant had issued food stamps were nonexistent, since the investigators were not sufficiently familiar with the records about which they testified to state a fact as to what the records showed. *Poole v. State*, 262 Ark. 4, 552 S.W.2d 647 (1977).

#### **Firearm Transaction Record.**

While a firearm transaction record taken from a store would have been admissible if it had been made available to the defendant according to this rule, where such document was not made available to the defendant before trial and was not authenticated it was not admissible. *Scott v. State*, 263 Ark. 669, 566 S.W.2d 737 (1978).

#### **Improper Exclusion.**

Testimony that a patient told his doctor that his arm smelled like "catfish bait" should not have been excluded as hearsay because the statement qualified as a hearsay exception under subdivision (3) of this rule, a then-existing physical condition; subdivision (1), present sense impressions; and subdivision (4), a statement made for the purpose of medical diagnosis or treatment. *Blankenship v. Kelly, M.D.*, 2010 Ark. App. 337, — S.W.3d —, 2010 Ark. App. LEXIS 361 (Apr. 21, 2010).

#### **Intent or Motive.**

Testimony tending to show that one alleged to have been a government agent who had entrapped defendant was addicted to drugs and was trying to "set up" his acquaintances on distribution charges was relevant and not inadmissible as hearsay since they showed the informant's intent, plan, motive or design; therefore, this testimony should have been admitted. *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978).

Admissibility of statements of intent, plan, or motive are not limited to matters concerning the declarant's will; rather, only statements of memory or belief are limited by subdivision (3) of this rule concerning then existing mental, emotional, or physical condition. *Nicholson v. State*, 319 Ark. 566, 892 S.W.2d 507 (1995).

Oral statements from a decedent were an exception to the hearsay rule because the statements indicated the decedent's intent to change the beneficiary designation on her life insurance policy. *Conseco Life Ins. Co. v. Williams*, 620 F.3d 902 (8th Cir. 2010).

#### **Investigative Report by Police.**

Where beneficiaries sought to recover under a life insurance policy and an accidental death policy, both of which contained suicide exclusion clauses, and both defendant insurance companies asserted suicide as a defense, the admission of the deputy sheriff's report, which included statements by others concerning the mental state of the deceased, was error since the challenged statements were clearly hearsay under subdivision (8) of this rule and were not admissible as a business record under subdivision (6) of this rule. *Wallin v. Insurance Co. of N. Am.*, 268 Ark. 847, 596 S.W.2d 716 (1980).

The police incident/offense reports were inadmissible hearsay. *Bennett v. State*, 307 Ark. 400, 821 S.W.2d 13 (1991).

Even assuming that the circuit court erred in allowing defense counsel to pursue a line of questioning about the police report from a prior accident in which plaintiff sustained injuries, the impact was minimal at best because it referred to a prior accident and, although plaintiff and defendant disagreed over the inebriation of the other truck driver in the prior 1999 accident, the materiality of the police report to the issue of damages in relation to the 2001 accident appeared virtually nonexistent. *House v. Volunteer Transp., Inc.*, 365 Ark. 11, 223 S.W.3d 798 (2006).

#### **Lack of Personal Knowledge.**

Where in a prosecution for the possession of marijuana with intent to deliver, the state offered the testimony of a drug laboratory supervisor, a superior of the chemist who actually received and tested the contraband in issue, the supervisor's testimony was inadmissible hearsay and should have been excluded pursuant to subdivisions (8)(iii) and (iv) of this rule because the supervisor did not have any personal knowledge of the receipt or the testing of the substance. *Llewellyn v. State*, 4 Ark. App. 326, 630 S.W.2d 555 (1982).

#### **Learned Treatises.**

In prosecution for rape and sexual abuse in first degree where defendant's psychiatrist witness on cross examination, when asked if he was familiar with a certain book by a Mr. Coleman, replied that he was, and was then asked if he recognized the person as an expert in his field stated that he recognized him as an expert editor who compiled information from varied sources and is considered reliable, and further agreed with a statement from the book and when the prosecution appeared to ask another question as if he were

commencing another statement from the book, defendant's attorney objected on the ground that the state had not established that Coleman was a qualified psychiatrist, the court ruled that the particular witness considered Coleman reliable, there was no reversible error on an abuse of the trial court's discretion. *Shepherd v. State*, 270 Ark. 457, 605 S.W.2d 414 (1980).

It was error to allow the prosecutor to cross-examine a defense expert witness with a book about epilepsy obtained from a drug-store, where the expert was not familiar with either the author or the book; before a treatise may be used to cross-examine, proof that the treatise is a reliable authority must be established. *Davies v. State*, 286 Ark. 9, 688 S.W.2d 738 (1985).

In a medical malpractice action based on a physician's failure to administer a pregnancy test to the plaintiff prior to performing a hysterectomy on her, the trial court erred in permitting an expert witness for the defense to bolster his testimony by producing an authoritative treatise on gynecology and testifying that nowhere in the book did it state that physicians should routinely order a pregnancy test prior to a hysterectomy; subdivision (18) of this rule permits statements from learned treatises to be read into evidence if relied upon by an expert witness, but here there was no statement one way or the other in the book. *Haney v. DeSandre*, 286 Ark. 258, 692 S.W.2d 214 (1985).

Subdivision (18) of this rule applies to a particular statement from a particular treatise, not to a general opinion of another expert based upon a generalized familiarity with the expert; where no foundation was laid about a particular treatise to which the witness could refer, and no foundation was laid about the reliability of the expert on the subject, the treatise could not be used. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

The use of blowups of excerpted portions of medical treatises and periodicals did not convert them into exhibits, even though they were neither admitted into evidence nor allowed to go to the jury room with the jury. *Breslau v. McAlister*, 72 Ark. App. 124, 35 S.W.3d 321 (2000).

#### **Medical Diagnosis.**

Medical records offered by defendant were relevant. *Lee v. State*, 266 Ark. 870, 587 S.W.2d 78 (1979).

Social service history of the deceased incident to his admission to a psychiatric hospital was admissible under subdivisions (4) and (6) of this rule, since it was adequately identified by the associate medical director of the hospital as being part of the hospital record made for the purpose of medical diagnosis and



treatment. *Wallin v. Insurance Co. of N. Am.*, 268 Ark. 847, 596 S.W.2d 716 (1980).

Where the custodian of the hospital X-rays attached an affidavit to the X-rays and hospital records stating that the records were authentic, the trial court in a murder prosecution did not err in allowing the state medical examiner to use the X-rays in order to prove the identity of the murder victim. *Surridge v. State*, 279 Ark. 183, 650 S.W.2d 561 (1983).

Where blood alcohol test is not ordered by a defendant or an officer of the law, and it is not ordered to be used as evidence in a criminal case, but rather it is ordered by an emergency room physician for his own use in connection with his treatment of a patient, the question is not whether the test complied with the strict procedures of § 5-65-201 et seq. but whether the test results are admissible under subdivision (4) of this rule. *Weaver v. State*, 290 Ark. 556, 720 S.W.2d 905 (1986).

Where no evidence regarding blood test procedure was presented, result of test was not admissible under subdivision (4) of this rule. *Mosley v. State*, 22 Ark. App. 29, 732 S.W.2d 861 (1987).

With respect to statements made for the purposes of medical diagnosis or treatment, the crucial question is whether the out-of-court statement of the declarant was "reasonably pertinent" to diagnosis or treatment. *Huls v. State*, 27 Ark. App. 242, 770 S.W.2d 160 (1989).

Statement as to identity of defendant as the source of the declarant's injury was not reasonably pertinent to medical diagnosis or treatment, and thus not admissible under subdivision (4) of this rule. *Huls v. State*, 27 Ark. App. 242, 770 S.W.2d 160 (1989).

The basis for hearsay exception under subdivision (4) of this rule is the patient's strong motivation to be truthful in giving statements for diagnosis and treatment. *Carton v. Missouri Pac. R.R.*, 303 Ark. 568, 798 S.W.2d 674 (1990).

Pursuant to subdivision (4) of this rule, plaintiff's statement that her foot slipped and she fell was admissible, but her statement that she had "apparently accumulated some diesel fuel on her sole" was not admissible because it was not pertinent to diagnosis or treatment given by the physician, and, more importantly, the patient had no motivation to be truthful because it would not matter in her treatment whether she had snow or diesel fuel on her boot. *Carton v. Missouri Pac. R.R.*, 303 Ark. 568, 798 S.W.2d 674 (1990).

Circuit court did not err in overruling plaintiff's objection on hearsay grounds to testimony elicited by defendant from plaintiff that plaintiff's doctor had advised plaintiff that he would be able to walk on his injured leg, when the testimony was offered on cross-examination to prove why plaintiff sought a second

opinion from another doctor prior to trial to prove that plaintiff could walk in the future. *Piercy v. Wal-Mart Stores, Inc.*, 311 Ark. 424, 844 S.W.2d 337 (1993).

Testimony of the treating physician regarding the sexual abuse of a child was admissible under subdivision (4) of this rule, which provides for the admission of statements made for the purpose of medical diagnosis or treatment and describing medical history, past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. *Duvall v. State*, 41 Ark. App. 148, 852 S.W.2d 144 (1993).

Where the declarant of information in a hospital record is unknown, the reliability of the statement is highly suspect, and the record should not be admitted under the subdivision (4) or (6) exceptions under this rule. *Benson v. Shuler Drilling Co.*, 316 Ark. 101, 871 S.W.2d 552 (1994).

Statement made for purposes of medical diagnosis or treatment is a firmly rooted hearsay exception. *Clausen v. State*, 50 Ark. App. 149, 901 S.W.2d 35 (1995).

Because child's statements appeared to be spontaneous and consistent and since she did not use terminology unexpected of a child of her age, nor have any motive to fabricate, admission of her doctor's testimony as to child's statements did not violate defendant's rights under the Confrontation Clause of the Sixth Amendment. *Clausen v. State*, 50 Ark. App. 149, 901 S.W.2d 35 (1995).

Even if testimony by witness who interviewed child rape victim at hospital was inadmissible hearsay offered to bolster the victim's testimony as prior consistent statements, and not admissible under subdivision (4) of this rule, such admission was rendered harmless where the rape victim's own trial testimony independently evidenced her rape and the rape victim was available at trial for cross-examination by the defendant. *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996).

Although defendant argued that physician's opinion as to the cause or aggravation of plaintiff's knee injury was based entirely on plaintiff's statement, and that such a statement was hearsay and not included as an exception to the hearsay rule found in subdivision (4) of this rule because it was made to the doctor after litigation had begun and was, therefore, self-serving, there is no provision in subdivision (4) of this rule that prohibits statements given after litigation has begun; also, the statement was admissible under Evid. Rule 703. *Collins v. Hinton*, 327 Ark. 159, 937 S.W.2d 164 (1997).

Under subdivision (4) of this rule, the declarant's motive in making the statement had

to be consistent with the purposes of promoting treatment, and the content of the statement had to be such as reasonably relied on by a physician in treatment or diagnosis. *Flores v. State*, 75 Ark. App. 397, 58 S.W.3d 417 (2001), *aff'd in part and modified in part* 348 Ark. 28, 69 S.W.3d 864 (2002).

Where mother, when speaking to a doctor, admitted to abuse of child murder victim and then shifted blame for fatal blow to defendant, statement was not admissible as statement made for purposes of medical diagnosis or treatment hearsay exception. *Flores v. State*, 348 Ark. 28, 68 S.W.3d 864 (2002).

On appeal, defendant argued that the trial court erred in allowing the state's exhibit of the victim's medical records into evidence as business records under subdivision (6) of this rule because they were prepared in anticipation of criminal litigation; however, the court found that defendant's argument that the records were untrustworthy was merely conclusory and went to the weight of the evidence and not to its admissibility as defendant failed to specify the pages to which he objected or request that they be excised. *McClellan v. State*, 81 Ark. App. 361, 101 S.W.3d 864 (2003).

In a trial for termination of the mother's parental rights, where the psychologist did not testify, but the psychologist's report contained information based on interviews with the mother, the children, and others, it was impossible to determine which conclusions relied upon by the trial court were based on hearsay, or even double-hearsay, and because the trial judge relied upon the report to reach conclusions concerning the mother before the report was even admitted into evidence, the trial court's judgment was reversed. *Rodriguez v. Ark. Dep't of Human Servs.*, 84 Ark. App. 177, 137 S.W.3d 432 (2003).

Social worker did not qualified as a medical expert and her testimony was not admissible pursuant to subdivision (4) of this rule; however, the testimony was generally admissible under Ark. R. Evid. 703 where the social worker was an expert witness and the children's statements to the social worker about remarks their father made about their mother and stepfather helped form the basis of her opinion that the animosity between the parents caused the children to be stressed and that visitation exchanges should occur on neutral territory. *Meins v. Meins*, 93 Ark. App. 292, 218 S.W.3d 366 (2005).

Termination of the father's parental rights to his child was appropriate even though the admission of testimony from the child's foster mother was erroneously admitted and was not admissible under subdivision (4) of this rule; the foster mother testified that hospital personnel said that the child was a high-risk and failure-to-thrive baby and that they were

concerned about whether the child would make it. The erroneous admission of that testimony was harmless and took nothing away from the remaining evidence that supported the termination; the hearsay evidence was actually somewhat cumulative to the foster mother's own observations about the child's low weight and his appearing to have been a premature baby. *Tadlock v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 821, — S.W.3d —, 2009 Ark. App. LEXIS 1040 (2009).

Defendant's convictions for rape and sexual assault were appropriate because Ark. R. Evid. 804(b)(7)(A) was inapplicable since the trial court never declared the victim to have been unavailable as a witness. Rather, the trial court found that the victim's statements to his father and a doctor were hearsay exceptions under subdivisions (2) and (4) of this rule, where the availability of the witness was immaterial; defendant did not challenge those determinations that the statements fell under those particular hearsay exceptions on appeal. *Stidam v. State*, 2010 Ark. App. 278, — S.W.3d —, 2010 Ark. App. LEXIS 280 (Mar. 31, 2010).

During defendant's trial for raping his seven-year-old daughter, the court did not err in permitting a nurse to testify as to what the victim told the nurse because it fell within the exception to the rule against hearsay in subdivision (4) of this rule; the victim's hearsay statements about how the injury occurred were reasonably pertinent to the nurse's treatment and were substantiated by the nurse's finding of hypertrophic scarring in the victim's anal area. *Harlmo v. State*, 2011 Ark. App. 314, — S.W.3d —, 2011 Ark. App. LEXIS 339 (Apr. 27, 2011).

#### **Objections to Evidence.**

When appellants failed to renew their hearsay objection or make any other objection to the witness' testimony, the failure to renew an objection constituted a waiver of the matter. *Marvel v. Parker*, 317 Ark. 232, 878 S.W.2d 364 (1994).

Where defense counsel argued that there were a number of people who had not testified, as well as several unsigned documents in state's exhibit of medical records, and specifically called into question the trustworthiness of this portion of the records, counsel's objection was sufficient to preserve the issue for appeal. *McClellan v. State*, 81 Ark. App. 361, 101 S.W.3d 864 (2003).

#### **Orders of Prior Commitments.**

Where the proof of prior convictions submitted to support a "habitual offender" count in a burglary and theft trial consisted of copies of orders of commitment from a court of competent jurisdiction, duly certified under seal, which were clearly admissible under subdivision (1) of Rule 902 and competent to prove



the prior convictions, and the foundation for that admission was the docket entries of the court in those two cases, properly identified by the clerk of the court whose duty it was to keep and record such records, such records not being hearsay by virtue of subdivision (8) of this rule, there was substantial evidence by which the jury could find the prior convictions proved as required by § 5-4-504. *Thomas v. State*, 2 Ark. App. 238, 620 S.W.2d 300 (1981).

#### **Other Exceptions.**

Subdivision (24) of this rule and Evid. Rule 804(b)(5) do not spell out specific exceptions to the general prohibition against hearsay; instead, they list several matters to be considered as conditions to the admissibility of hearsay not falling within a recognized exception. Such provisions were not intended to throw open a wide door for the entry of judicially-created exceptions to the hearsay rule but are to be narrowly construed. *Hill v. Brown*, 283 Ark. 185, 672 S.W.2d 330 (1984).

The trial court has substantial latitude under subdivision (24) of this rule to admit evidence which it feels meets the spirit of the rule. *Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985), cert. denied 475 U.S. 1036, 106 S.Ct. 1245, 89 L. Ed 2d 354 (1986).

The residual hearsay exception was intended to be used very rarely, and only in exceptional circumstances. *Barnes v. Barnes*, 311 Ark. 287, 843 S.W.2d 835 (1992).

A statement may not be introduced under subdivision (24) of this rule unless the proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it. *Barnes v. Barnes*, 311 Ark. 287, 843 S.W.2d 835 (1992).

Defendant's request to introduce second, more exculpatory statement he made to deputy sheriff denied where defendant had every reason to make a self-serving statement to minimize his participation in crimes after he knew co-defendant had implicated him. *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997).

In a termination of parental rights matter, a caseworker's testimony that the mother was asked to leave rehabilitation was admissible where the caseworker obtained the information from the mother herself; the testimony fell within the hearsay exception in subdivision (d)(2) of this rule for statements by a party-opponent. *Cheney v. Ark. Dep't of Human Servs.*, 2012 Ark. App. 209, — S.W.3d —, 2012 Ark. App. LEXIS 311 (Mar. 14, 2012).

#### **Present Sense Impression.**

Lineup which occurred three days after the robbery could not have been a present sense impression of the robbery occurrence within the meaning of subdivision (1) of this rule.

*Tucker v. State*, 264 Ark. 890, 575 S.W.2d 684 (1979).

Where the witness was being tied up by the defendant during a store robbery when she observed an unidentified woman who came into the store, reached over the counter and took the money out of the cash register, the witness was properly allowed to testify as to what she observed as a present sense impression. *Jackson v. State*, 267 Ark. 891, 591 S.W.2d 685 (1979).

Under subdivision (1) of this rule, a present sense impression must describe or explain the event the declarant is perceiving, the statement must be made while the event or condition is being perceived by the declarant, and the statement is required to be contemporaneous or near contemporaneous with the event. *Marx v. State*, 291 Ark. 325, 724 S.W.2d 456 (1987).

Subdivision (1) of this rule was not applicable where description was given some time after event and not while witness was perceiving event, or immediately thereafter. *Halfacre v. State*, 292 Ark. 331, 731 S.W.2d 179 (1987).

Witness' statement to her husband that she believed the victim and defendant were having a war, qualified as a present sense impression. *Davis v. State*, 317 Ark. 592, 879 S.W.2d 439 (1994).

Witness' oral description of the license plate on robber's vehicle as it left the scene was admissible under subdivision (1) of this rule as a present sense impression. *Brown v. State*, 320 Ark. 201, 895 S.W.2d 909 (1995).

Evidence regarding a telephone conversation between a murder victim and his ex-wife in which the victim stated that the defendant, who was his current wife, had a gun pointed at him and was going to shoot him could be admitted into evidence either as a present sense impression or as a statement of then existing mental, emotional, or physical condition. *Thomas v. State*, 62 Ark. App. 168, 973 S.W.2d 1 (1998).

#### **Previous Convictions.**

Proof of defendant's two previous convictions was not inadmissible as hearsay where circuit clerks testimony about them was based upon docket entries and there was no suggestion that the docket entries did not correctly reflect the court's judgments. *Reeves v. State*, 263 Ark. 227, 564 S.W.2d 503, cert. denied 439 U.S. 964, 99 S. Ct. 450, 58 L. Ed. 2 422 (1978), criticized *Reeves v. Mabry*, 615 F.2d 489 (8th Cir. 1980).

#### **Private Investigator's Report.**

A special report prepared by a private investigator hired by the father in a custody contest regarding the morals of the child's mother was not admissible as hearsay exception as a recorded recollection or work product

inasmuch as it was not offered by an adverse party; nor was it admissible as a record maintained in the course of a regularly conducted business activity inasmuch as a proper foundation was not laid. *Walker v. Walker*, 262 Ark. 648, 559 S.W.2d 716 (1978).

### **Proper Exclusion.**

In an action for breach of fiduciary relationship, an unaudited financial statement prepared by an accountant was properly excluded, where it was not properly authenticated and no basis was laid for it being admitted as a business record. *Smith v. Citation Mfg. Co.*, 266 Ark. 591, 587 S.W.2d 39 (1979).

Where trial court allowed sheriff and his secretary to narrate statements made by sister of defendant during his investigation of murder case, and such statements had not been signed by her, although she had acknowledged the principal statement, it was error for the court to admit such evidence as recorded recollections under this rule since her statements were not within the rule as reviving present recollection through a contemporaneously made memorandum; however, since the statements could be used to impeach inconsistent out-of-court statements made by defendant's sister under Rule 613, where the state impeaches its own witness under Rule 607, the ruling of the trial judge was correct for the wrong reasons and thus was not reversed. *Chisum v. State*, 273 Ark. 1, 616 S.W.2d 728 (1981).

While there was no basis for admitting the statements in transcript of plea hearing in another county under this rule, the evidence would come in substantively under ARE 801(d)(1) as an admission. *McDaniel v. State*, 291 Ark. 596, 726 S.W.2d 679 (1987).

It was improper for chancellor to exclude evidence in affidavits of opponents to summary judgment motion which he suspected was inadmissible hearsay, without ruling on its admissibility under the present-intent exception to the hearsay rule. *Jones v. Abraham*, 58 Ark. App. 17, 946 S.W.2d 711 (1997).

### **Public Records and Reports.**

Where the witness testified that she was an employee in the clerk's office at the time the money was stolen, her tabulation of the amount missing came from the record of receipts regularly kept by the clerk's office in its daily course of business, and she stated that she made most of the entries she referred to and that she had equal access to the records as did the clerk or custodian, her testimony was clearly admissible pursuant to subdivision (8) of this rule and the trial court did not err in admitting this evidence. *LeFlore v. State*, 17 Ark. App. 117, 704 S.W.2d 641 (1986).

If a chemist's crime lab report fails to meet

the prerequisites of § 12-12-313, it is considered inadmissible hearsay under subdivision (8)(iii) of this rule; however, even when the state's report meets the statutory requirements and the state intends to introduce the report as an exception to the hearsay rule, a defendant may, under § 12-12-313(d)(2), still require the chemist's presence for the purpose of cross-examination, if the defendant requests the chemist's presence at least ten days prior to trial. *Lockhart v. State*, 314 Ark. 394, 862 S.W.2d 265 (1993).

A probate inventory filed in court is not admissible under this rule, as the inventory was not a record of or statement about anything that a public official or agency had done. *Easterling v. Weedman*, 54 Ark. App. 22, 922 S.W.2d 735 (1996).

The certified copy of the trial court's docket notation was a record of a public office setting forth its regularly conducted and regularly recorded activities, and was not hearsay. *Mulkey v. State*, 330 Ark. 113, 952 S.W.2d 149 (1997).

Finding of civil contempt was proper where the development corporation and its managing officer failed to turn over to the sheriff assembled planes and related equipment as specified in the order of delivery; further, inspection reports admitted into evidence were proper because they clearly fell within the exception in subdivision (8) of this rule and did not fall within any of the five exclusions to the rule. *Omni Holding & Dev. Corp. v. 3D.S.A., Inc.*, 356 Ark. 440, 156 S.W.3d 228 (2004).

In a case where the father alleged that the grandmother sexually abused his son and he was held in civil contempt for not abiding by the trial court's order granting the grandmother visitation rights, the investigator's supervisor was properly allowed to testify regarding a police report that was made following the father's call to the sexual abuse hotline because of her supervisory control over the reports and because her testimony did not run afoul of the hearsay rule. *Hunt v. Perry*, 357 Ark. 224, 162 S.W.3d 891 (2004).

In a fraud case, a document from the Federal Drug Administration (FDA) regarding the contamination of soybean feed for hogs was admissible because it was a warning sent out under the FDA's duty to protect the public from consuming adulterated food. *Archer-Daniels-Midland Co. v. Beadles Enters.*, 367 Ark. 1, 238 S.W.3d 79 (2006).

### **Recorded Recollection.**

Police officer may refresh his memory during trial testimony from notes as to what he observed at accident scene. *Townsend v. State*, 292 Ark. 157, 728 S.W.2d 516 (1987).

Trial court properly admitted that portion of a written statement in which a witness told police that defendant admitted being involved



in a robbery because the statement qualified as a recorded recollection under subdivision (5) of this rule where the witness told police that the statement was true at the time it was made and an officer testified that the statement was accurately recorded; it was, however, error to admit that portion of the written statement in which a third party implicated both himself and defendant in the robbery because the statement was not made in furtherance of the conspiracy as required by ARE 801(d)(2)(v) and was not a statement against the declarant's interest within the meaning of ARE 804(b)(3). *Lawrence v. State*, 81 Ark. App. 390, 104 S.W.3d 393 (2003).

In defendant's trial for possession of ephedrine, pseudoephedrine, or phenylpropylamine with intent to manufacture methamphetamine, in violation of § 5-64-1102(a), the trial court erred in allowing a witness to read a statement into the record because there was neither evidence that the recordation was adopted by the declarant nor evidence that the recordation was accurately recorded, as required under subdivision (5) of this rule. *Hancock v. State*, 2011 Ark. App. 174, — S.W.3d —, 2011 Ark. App. LEXIS 197 (Mar. 2, 2011).

#### **Records of Vital Statistics.**

In probate proceeding occurring after subsection (d) of § 28-9-209 was declared unconstitutional, but prior to its amendment, it was proper to allow testimony as to general reputation in the community on the issue of paternity under subdivision (19) of this rule and to admit woman's birth certificate under subdivision (9) of this rule in order to determine if the woman was the illegitimate daughter of decedent. *Lewis v. Petty*, 272 Ark. 250, 613 S.W.2d 585 (1981).

#### **Reputation as to Character.**

Since it cannot be said that a defendant's truthfulness has been attacked simply because he takes the witness stand, a defendant who takes the witness stand cannot support his testimony by offering evidence that shows his character for truthfulness among his associates or in the community. *Rios v. State*, 262 Ark. 407, 557 S.W.2d 198 (1977).

#### **Reputation Concerning Personal History.**

Admission of testimony as to general reputation in the community on the issue of paternity held proper. *Lewis v. Petty*, 272 Ark. 250, 613 S.W.2d 585 (1981).

#### **Res Gestae.**

Where the prosecutrix called her brother within 15 to 20 minutes after the occurrence, and said that she had been raped by the defendant, the statement was admissible as being part of what was formerly referred to as the *res gestae*. *Burris v. State*, 265 Ark. 604,

580 S.W.2d 204 (1979).

#### **Special Investigation.**

Where plaintiff, in a countersuit to collect unpaid overtime, sought to introduce the report by a compliance officer from the United States Department of Labor which was made about plaintiff's employer upon an anonymous request, but which deleted confidential financial information, the court properly rejected the report as hearsay, since it resulted from a special investigation of a particular complaint and was thus not excepted from the hearsay rule under subdivision (8)(iv) of this rule, and since there was no factual basis in the report to justify its conclusion on coverage of employees. *Swart v. Town & Country Home Ctr., Inc.*, 2 Ark. App. 211, 619 S.W.2d 680 (1981).

#### **State of Mind.**

Where court admitted into evidence a letter by murder victim, written on the day of her murder and concerning the weather and other small talk, through which the state intended to show the victim's state of mind on that day in order to refute the defendant's statements that the victim and her husband had been arguing, drinking and fighting just prior to their double murders, the letter may not have met the criteria for state-of-mind evidence under this rule, but the admission was only harmless error and the judgment against would not be reversed for harmless error. *Shaw v. State*, 271 Ark. 926, 611 S.W.2d 522 (1981).

In capital murder case, the trial court did not err in permitting a witness to offer hearsay testimony that the deceased told a friend, "Well, if grandma is a man, I'll leave" where the statement involved a proposed meeting between the deceased and the defendant's wife in the matter of negotiating for the sale and purchase of coins and where the state was allowed to introduce the statement for the purpose of showing the victim's state of mind; although the state misused the statement in closing argument it was nevertheless proper for the purpose for which the court allowed its introduction. *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983).

Where the evidence, which consisted of the testimony of defendant's cousin and son that they had told defendant of several conversations they had overheard, showed its effect on the listener, the defendant, and was not offered to prove the truth of the matter stated, such evidence was not hearsay and is admissible. *Hall v. State*, 286 Ark. 52, 689 S.W.2d 524 (1985).

Evidence of the state of mind of the victim, prior to a murder, is admissible; the witness' statement that the deceased appeared to be afraid after she received a phone call fell within an exception to the hearsay rule for

then existing mental, emotional, or physical condition where the statement was not accusatory but merely a statement that the victim was afraid. *Vasquez v. State*, 287 Ark. 468, 702 S.W.2d 411 (1986).

While statements of murder victim's child to the police were hearsay and it was error to admit them, as they did not fall within subdivision (3) of this rule exception governing statements of then existing states of mind, where the same evidence was introduced by other witnesses and was properly before the jury for its consideration, it was harmless error to allow the officers to testify as to the child's statements to them. *Orr v. State*, 288 Ark. 118, 703 S.W.2d 438 (1986).

The expressions of fear made on behalf of the victim should have been admissible under the state of mind exception in subdivision (3) of this rule. *Smith v. State*, 33 Ark. App. 37, 801 S.W.2d 655 (1990).

The poems and epitaph written by decedent's mother after the motorcycle accident presented by decedent's estate were admissible and relevant under subdivision (3) of this rule on the mental anguish issue because such exception has been recognized as being available to a plaintiff in a civil damage action as a means of establishing his or her mental anguish as an element of damages. *Warhurst v. White*, 310 Ark. 546, 838 S.W.2d 350 (1992).

Subdivision (3) of this rule is limited to statements of the declarant's then existing state of mind and does not include statements by the declarant describing the state of mind of someone else; thus, in an action involving an alleged oral contract to make a will by two sisters, it was error to allow the introduction into evidence of statements made by the sister who died first about statements made by the other sister concerning the latter's intention regarding bequests of her property. *Jones v. Abraham*, 67 Ark. App. 304, 999 S.W.2d 698 (1999), *aff'd*, 341 Ark. 66, 15 S.W.3d 310 (2000), overruled in part, *Lamontagne v. Ark. Dep't of Human Servs.*, 2010 Ark. 190, — S.W.3d — (2010).

Statements were admissible that were evidence both of the furtherance of a conspiracy and probative of defendant's existing state of mind which the state contended was an intent to commit robbery. *Haire v. State*, 340 Ark. 11, 8 S.W.3d 468 (2000).

In a murder case, the court did not err by allowing the victim's father to testify about statements the victim made regarding her plans to withdraw money from an investment account; the hearsay statements related to the victim's intent to save money in her investment account to buy her daughter a car, and saving money to buy a car certainly reflected an intent to do something in the future. *Wyles v. State*, 357 Ark. 530, 182 S.W.3d 142 (2004).

In a negligence action involving a propane explosion, the exclusion of evidence that the homeowner had left messages on the propane company's answering machine before the explosion was not error; although the messages were not hearsay under because they were offered only to show that the propane company had notice of a possible problem, the homeowner's counsel failed to object to their exclusion on that ground and made a state of mind objection under subdivision (3) of this rule, which lacked merit. *Miller v. Hometown Propane Gas, Inc.*, 86 Ark. App. 189, 167 S.W.3d 172 (2004).

Testimony as to deceased husband's intention and belief that he had changed the beneficiary on his life insurance policy to his new wife was relevant and the trial court did not err in allowing testimony about his statements under subdivision (3) of this rule; nor did the trial court err in allowing the wife to testify about husband's conversation to a representative of the insurer in which she heard him tell the representative that he was divorced and remarried and that he needed to change the beneficiary on his policy, as well as the spouse rider and child rider. *Primerica Life Ins. Co. v. Watson*, 362 Ark. 54, 207 S.W.3d 443 (2005).

In defendant's murder trial, the court did not err by admitting hearsay testimony under the state of mind exception; the testimony showed victim's fear of defendant, impeached defendant's original statement to police that he and the victim had a good relationship, and the fact that the victim made the statements to many people was a possible explanation for defendant having his wife commit the murder instead of doing it himself. *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006).

Trial court abused its discretion in allowing hearsay statements of a tractor-trailer driver under the excited-utterance exception, subdivision (2) of this rule, because there was no indication that the statements were spontaneous or that the driver was excited or under emotion's influence after a vehicle collision. *Jones v. Currens*, — Ark. App. —, 289 S.W.3d 506, 2008 Ark. App. LEXIS 860 (2008).

During defendant's trial for capital murder, the court did not err in overruling his objection to testimony of the victim's father that she came to him for help because her relationship with defendant was beyond her ability to handle and because there were "threats against her life;" the victim's expression of fear fell within the hearsay exception in subdivision (3) of this rule. *Wedgeworth v. State*, 2012 Ark. 63, — S.W.3d —, 2012 Ark. LEXIS 78 (Feb. 16, 2012).

#### **Taped Conversations.**

In a prosecution for criminal conspiracy to possess a controlled substance, the trial court



did not err in allowing taped and transcribed telephone conversations between an undercover officer and the defendant into evidence, even though positive identification of the defendant as the party calling could not be made, especially since the evidence clearly established that the defendant showed up at the time and place in furtherance of the proposed purchase pursuant to the prearranged telephone instructions. *Jackson v. State*, 12 Ark. App. 378, 677 S.W.2d 866 (1984).

#### Test results.

Medical test results could not be admitted under the business-record exception without laying a foundation; testimony concerning the chain of custody and the protocol followed in collecting the samples was required. *White v. State*, 330 Ark. 813, 958 S.W.2d 519 (1997).

#### Trustworthiness.

Any new exceptions to the hearsay rule under subdivision (24) of this rule must have circumstantial guarantees of trustworthiness equivalent to the guarantees supporting the common-law exceptions, necessity or some compelling reason for attaching more than average credibility to the hearsay. *Hill v. Brown*, 283 Ark. 185, 672 S.W.2d 330 (1984); *Blaylock v. Strecker*, 291 Ark. 340, 724 S.W.2d 470 (1987); *Barnes v. Barnes*, 311 Ark. 287, 843 S.W.2d 835 (1992).

In an action for partition of land on death of tenant in common, since testimony of decedent's wife and attorney for decedent's estate that decedent had told them that he had bought other tenant in common's interest would have been self-serving, he could not have been cross-examined about it, and it could have been readily fabricated, it was not a statement attended by inherent guarantees of trustworthiness as required by subdivision (24) of this rule and Evid. Rule 804(b)(5) and was thus properly excluded. *Hill v. Brown*, 283 Ark. 185, 672 S.W.2d 330 (1984).

Statement did not meet the standards for trustworthiness or reliability required by subdivision (24) of this rule. *Ward v. State*, 298 Ark. 448, 770 S.W.2d 109 (1989); *Leshe v. State*, 304 Ark. 442, 803 S.W.2d 522 (1991).

In determining trustworthiness under the residual-hearsay exception the Chancellor must determine that (1) the statement is offered as evidence of a material fact, (2) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts, and (3) the general purposes of the rules and the interests of justice will best be served by admission of the statements into evidence. *Barnes v. Barnes*, 311 Ark. 287, 843 S.W.2d 835 (1992).

Videotape of eyewitness's statement made by police carried the requisite circumstantial

guarantees of trustworthiness as statement was more probative of how the victim was murdered than any other available evidence, contained more details than any other evidence offered by the state, and the purpose of the rules of evidence and the interests of justice were served by introduction of the videotaped statement. *Martin v. State*, 346 Ark. 198, 57 S.W.3d 136 (2001).

**Cited:** *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978); *Hanna Lumber Co. v. Neff*, 265 Ark. 462, 579 S.W.2d 95 (1979), questioned *Hibbs v. Jacksonville*, 24 Ark. App. 111, 749 S.W.2d 350 (1988); *Parker v. State*, 268 Ark. 441, 597 S.W.2d 586 (1980); *Pilkington v. Riley*, 271 Ark. 746, 610 S.W.2d 570 (1981); *Morrison v. Lowe*, 274 Ark. 358, 625 S.W.2d 452 (1981); *First Nat'l Bank v. Nash*, 2 Ark. App. 135, 617 S.W.2d 24 (1981); *Hackett v. State*, 2 Ark. App. 228, 619 S.W.2d 687 (1981); *Walker v. Lockhart*, 598 F. Supp. 1410 (E.D. Ark. 1984), rev'd en banc 763 F.2d 942 (8th Cir. 1985); *Walt Bennett Ford, Inc. v. Brown*, 283 Ark. 1, 670 S.W.2d 441 (1984); *Hogue v. Ameron, Inc.*, 286 Ark. 481, 695 S.W.2d 373 (1985); *Chandler v. Baker*, 16 Ark. App. 253, 700 S.W.2d 378 (1985); *Griswold v. State*, 290 Ark. 79, 716 S.W.2d 767 (1986); *West v. State*, 290 Ark. 329, 719 S.W.2d 684 (1986); *Simpson v. Hurt*, 294 Ark. 41, 740 S.W.2d 618 (1987); *Bing v. State*, 23 Ark. App. 19, 740 S.W.2d 156 (1987); *Carmichael v. State*, 296 Ark. 479, 757 S.W.2d 944 (1988); *Johnson v. State*, 298 Ark. 617, 770 S.W.2d 128 (1989); *Ruiz v. State*, 299 Ark. 144, 772 S.W.2d 297 (1989); *Tillman v. State*, 300 Ark. 132, 777 S.W.2d 217 (1989); *Ross v. State*, 300 Ark. 369, 779 S.W.2d 161 (1989); *Hamm v. State*, 26 Ark. App. 217, 764 S.W.2d 456 (1989); *Cash v. State*, 301 Ark. 370, 784 S.W.2d 166 (1990); *Cozad v. State*, 303 Ark. 137, 792 S.W.2d 606 (1990); *Thomas v. State*, 303 Ark. 210, 795 S.W.2d 917 (1990); *Kester v. State*, 303 Ark. 303, 797 S.W.2d 704 (1990); *Nard v. State*, 304 Ark. 159, 801 S.W.2d 634 (1990), modified 304 Ark. 163A, 801 S.W.2d 634 (1991); *Ross v. Moore*, 30 Ark. App. 207, 785 S.W.2d 243 (1990); *Kendrick v. Peel, Eddy & Gibbons Law Firm*, 32 Ark. App. 29, 795 S.W.2d 365 (1990); *Sweat v. State*, 307 Ark. 406, 820 S.W.2d 459 (1991); *Skiver v. State*, 37 Ark. App. 146, 826 S.W.2d 309 (1992); *Register v. State*, 313 Ark. 426, 855 S.W.2d 320 (1993); *Beard v. Ford Motor Credit Co.*, 41 Ark. App. 174, 850 S.W.2d 23 (1993); *Myers v. State*, 317 Ark. 70, 876 S.W.2d 246 (1994); *Wilburn v. State*, 317 Ark. 73, 876 S.W.2d 555 (1994); *Jenkins v. State*, 321 Ark. 551, 905 S.W.2d 845 (1995); *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996); *Jones v. State*, 326 Ark. 61, 931 S.W.2d 83 (1996); *Foreman v. State*, 328 Ark. 583, 945 S.W.2d 926 (1997); *Smith v. Galaz*, 330 Ark. 222, 953 S.W.2d 576 (1997); *Peebles v. State*, 331 Ark. 188, 958 S.W.2d 533 (1998); *Haire v. State*,

340 Ark. 11, 8 S.W.3d 468 (2000); Taylor v. Taylor, 345 Ark. 300, 47 S.W.3d 222 (2001); Brown v. State, 85 Ark. App. 382, 155 S.W.3d 22 (2004); Archer-Daniels-Midland Co. v. Beadles Enters., 92 Ark. App. 462, 215 S.W.3d 675 (2005); Wooten v. State, 93 Ark. App. 178, 217 S.W.3d 124 (2005); Flanagan v. State, 368 Ark. 143, 243 S.W.3d 866 (2006); Goodsell v.

State, — Ark. App. —, 289 S.W.3d 534, 2008 Ark. App. LEXIS 857 (2008); Lacy v. State, 2010 Ark. 388, — S.W.3d —, 2010 Ark. LEXIS 484 (Oct. 21, 2010); Johnson v. State, 2010 Ark. App. 153, — S.W.3d —, 2010 Ark. App. LEXIS 167 (2010); Williams v. Liberty Bank of Ark., 2011 Ark. App. 220, — S.W.3d —, 2011 Ark. App. LEXIS 232 (Mar. 16, 2011).

### Rule 804. Hearsay exceptions — Declarant unavailable.

(a) *Definition of Unavailability.* “Unavailability as a witness” includes situations in which the declarant:

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement;
- (2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so;
- (3) Testifies to a lack of memory of the subject matter of his statement;
- (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) *Hearsay Exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement under belief of impending death.* A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offering to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not within this exception.

(4) *Statement of personal or family history.*

(i) A statement concerning the declarant’s own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, marriage, ancestry



[ancestry], or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (ii) a statement concerning the foregoing matters and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statements into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

(6) *Child hearsay in civil cases in which the Confrontation Clause of the Sixth Amendment of the Constitution of the United States is not applicable.* A statement made by a child under the age of ten (10) years concerning any type of sexual offense, or attempted sexual offense, with, on, or against the child, provided:

(A) The trial court conducts a hearing outside the presence of the jury and finds that the statement offered possesses a reasonable guarantee of trustworthiness. The trial court may employ any factor it deems appropriate including, but not limited to those listed below, in deciding whether the statement is sufficiently trustworthy.

1. The spontaneity of the statement.
2. The lack of time to fabricate.
3. The consistency and repetition of the statement and whether the child has recanted the statement.
4. The mental state of the child.
5. The competency of the child to testify.
6. The child's use of terminology unexpected of a child of similar age.
7. The lack of a motive by the child to fabricate the statement.
8. The lack of bias by the child.
9. Whether it is an embarrassing event the child would not normally relate.
10. The credibility of the person testifying to the statement.
11. Suggestiveness created by leading questions.
12. Whether an adult with custody or control of the child may bear a grudge against the accused offender, and may attempt to coach the child into making false charges.
13. Corroboration of the statement by other evidence.
14. Corroboration of the alleged offense by other evidence.

(B) The proponent of the statement gives the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(C) This section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of evidence.

(7) *Child hearsay in criminal cases.* A statement made by a child under the age of ten (10) years concerning any type of sexual offense against that child, where the Confrontation Clause of the Sixth Amendment of the United States is applicable, provided:

(A) The trial court conducts a hearing outside the presence of the jury, and, with the evidentiary presumption that the statement is unreliable and inadmissible, finds that the statement offered possesses sufficient guarantees of trustworthiness that the truthfulness of the child's statement is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility. The trial court may employ any factor it deems appropriate including, but not limited to those listed below, in deciding whether the statement is sufficiently trustworthy.

1. The spontaneity of the statement.
2. The lack of time to fabricate.
3. The consistency and repetition of the statement and whether the child has recanted the statement.
4. The mental state of the child.
5. The competency of the child to testify.
6. The child's use of terminology unexpected of a child of similar age.
7. The lack of a motive by the child to fabricate the statement.
8. The lack of bias by the child.
9. Whether it is an embarrassing event the child would not normally relate.
10. The credibility of the person testifying to the statement.
11. Suggestiveness created by leading questions.
12. Whether an adult with custody or control of the child may bear a grudge against the accused offender, and may attempt to coach the child into making false charges.

(B) The proponent of the statement gives the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(C) This section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of evidence. (Amended by Per Curiam dated May 11, 1992.)

**Publisher's Notes.** The words in parentheses in subdivision (a)(5) so appeared in the rule as enacted.

The bracketed word "ancestry" in subdivision (b)(4) was inserted by the publisher.

The spelling of the word "embarrassing" in subdivision (b)(7)(A) was corrected by the publisher.

## RESEARCH REFERENCES

**ALR.** Comment Note: Construction and Application of Supreme Court's Ruling in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 2004 U.S. LEXIS 1838, 63 Fed. R. Evid. Serv. 1077 (2004), with Respect to Confrontation Clause Challenges to Admissibility of Hearsay Statement by Declarant Whom Defendant Had No Opportunity to Cross-Examine. 30 ALR 6th 1.

**Ark. L. Rev.** Case Notes, *McGuire v. State: Arkansas Child Abuse Videotape Deposition Laws, Etc.*, 41 Ark. L. Rev. 155.

Note, *Arkansas Rules of Evidence in Child Sexual Abuse: Vann v. State*, 47 Ark. L. Rev. 239.

Note, *Confronting the Rules: Needed Changes to the Arkansas Rules of Evidence After Crawford v. Washington*, 59 Ark. L. Rev. 973.

**U. Ark. Little Rock L.J.** Survey of Arkansas Law: Evidence, 4 U. Ark. Little Rock L.J. 203.

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Arkansas Law Survey, Schneider, Evidence, 7 U. Ark. Little Rock L.J. 219.

Sullivan, The Need for a Business or Pay-roll Records Affidavit for Use in Child Support Matters, 11 U. Ark. Little Rock L.J. 651.

Note, Constitutional Law — Confrontation Clause — Arkansas Child Hearsay Exception Regarding Sexual Offenses, Abuse, Or Incest Is Unconstitutional. *George v. State*, 306 Ark.

360, 813 S.W.2d 792 (1991) [modified, 306 Ark. 374A, 818 S.W.2d 951 (1991), 14 U. Ark. Little Rock L.J. 579].

Landreneau, Evidence — Former Testimony Exception to the Hearsay Rule Poses Unexpected Hazards to Parents Who Testify in Juvenile Court Probable Cause Hearings. *Hamblen v. State*, 44 Ark. App. 54 (1993), 18 U. Ark. Little Rock L.J. 181.

## CASE NOTES

### ANALYSIS

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### In General.

All the common-law exceptions to the hearsay rule are based either upon necessity or upon some compelling reason for attaching more than average credibility to the hearsay, and any new exception must have circumstantial guarantees of trustworthiness equivalent to those supporting the common-law exceptions. *Blaylock v. Strecker*, 291 Ark. 340, 724 S.W.2d 470 (1987).

Under this rule, two requirements must be met for admissibility: (1) subsection (a) requires that the declarant be unavailable; and (2) subsection (b) requires that one of the hearsay exceptions be met. *Register v. State*, 313 Ark. 426, 855 S.W.2d 320 (1993).

### Applicability.

Where witness was paralyzed from the neck down and incapable of moving his legs or controlling the movement of his arms, and at the time of the hearing, he had a blood clot in his left leg and was being treated at Arkansas Children's Hospital in Little Rock, this rule was inapplicable. *Beck v. State*, 317 Ark. 154, 876 S.W.2d 561 (1994).

### Burden of Proof.

The burden of proving unavailability is on the party who offers the prior testimony. *Register v. State*, 313 Ark. 426, 855 S.W.2d 320 (1993).

### Child Hearsay.

Subdivision (b)(7)(A) of this rule does not require a child victim to testify at the pretrial hearing. *Gadberry v. State*, 46 Ark. App. 121, 877 S.W.2d 941 (1994).

It was not error under subdivision (b)(7)(A) of this rule to allow the criminal investigator to testify at trial as to statements made by the victim, even though the child-victim was available and in fact testified at the trial, where the child-victim was unable to remember everything which occurred in the same detail as when she spoke to the investigator. *Gadberry v. State*, 46 Ark. App. 121, 877 S.W.2d 941 (1994).

In defendant's rape case, the court did not err when it denied his motion to determine the ability of the child victim to testify and when it denied his motion in limine to exclude the transcript of the interview with the victim because the child was only three at the time of the incident, her statement to the investigator was spontaneous, she did not have the ability to use time to fabricate her statement, the statement included terminology that would not typically be used by a child, the events described were not normally described by a child, and she repeated her statement several times without recanting the events described. *Pratt v. State*, 359 Ark. 16, 194 S.W.3d 183 (2004).

Testimony by a child victim's aunt was admissible in defendant's rape trial as within the child-hearsay exception of subdivision (b)(7) of this rule where the child's statements were spontaneous, the statements had not been recanted or recited, the child used striking terminology, and there was a lack of evidence of a motive to fabricate or of ill will. *Rye v. State*, 2009 Ark. App. 839, — S.W.3d —, 2009 Ark. App. LEXIS 1055 (2009).

Defendant's convictions for rape and sexual assault were appropriate because subdivision (b)(7)(A) of this rule was inapplicable since the trial court never declared the victim to have been unavailable as a witness. Rather,

the trial court found that the victim's statements to his father and a doctor were hearsay exceptions under Ark. R. Evid. 803(2) and (4), where the availability of the witness was immaterial; defendant did not challenge those determinations that the statements fell under those particular hearsay exceptions on appeal. *Stidam v. State*, 2010 Ark. App. 278, — S.W.3d —, 2010 Ark. App. LEXIS 280 (Mar. 31, 2010).

#### **Construction with Other Laws.**

There is no direct conflict between subdivision (b)(1) of this rule and § 5-4-616(a)(4) because the statute is limited specifically to resentencing in criminal trials, and the rule of evidence applies to all proceedings whether civil or criminal; thus, in a resentencing hearing in a murder prosecution, the trial court properly allowed the use of testimony from a prior sentencing hearing without evidence of unavailability. *Greene v. State*, 343 Ark. 526, 37 S.W.3d 579 (2001), cert. denied 534 U.S. 858, 122 S. Ct. 135, 151 L. Ed. 2d 88 (2001).

#### **Determination by Court.**

In the prosecution of the defendant for rape of a 5-year-old girl, the court did not abuse its discretion in allowing the introduction of statements made by the girl between 10 days and 2 weeks after the incident, in which she first stated that the defendant placed his penis in her mouth and ejaculated, where the court carefully considered, weighed, and detailed the factors enumerated in the rule. *Jameson v. State*, 333 Ark. 128, 970 S.W.2d 785 (1998).

#### **Discretion of Court.**

A trial judge does have some discretion in deciding if a good faith effort was made and whether a witness cannot be procured by process or other "reasonable means." In making its determination, a trial court has some discretion to accept or reject statements and representations of counsel, and a lesser standard of proof of unavailability is required in civil cases than in criminal cases. *Spears v. State Farm Fire & Cas. Ins.*, 291 Ark. 465, 725 S.W.2d 835 (1987).

#### **Dying Declaration.**

Where a stabbing victim was overheard during the stabbing, screaming that the defendant was killing her, where victim told the responding police officer that she was not going to make it because she had lost too much blood, and where she told the attending physician several times that she was dying and named the defendant as her attacker, testimony concerning all of these statements was admissible under the dying declaration exception contained in subdivision (b)(2) of this rule, since each of the statements was made concerning the cause or circumstances of what she believed to be her impending

death. *Singleton v. State*, 274 Ark. 126, 623 S.W.2d 180, cert. denied 456 U.S. 938, 102 S. Ct. 1996, 72 L. Ed. 2d 458 (1982), cert. denied 459 U.S. 882, 103 S. Ct. 184, 74 L. Ed. 2d 149 (1982).

In order to qualify as a dying declaration, the statement must be made by a witness, who believed at the time of the statement that his death was imminent and whose declaration referred to the cause of his death. *Boone v. State*, 282 Ark. 274, 668 S.W.2d 17 (1984).

For a statement to be admissible as a dying declaration, it must be shown that the declarant was possessed of a sense of imminent, inevitable death; this fact need not be shown by the declarant's express words alone, but can be supplied by inferences fairly drawn from his condition. *Boone v. State*, 282 Ark. 274, 668 S.W.2d 17 (1984); *Barker v. State*, 21 Ark. App. 56, 728 S.W.2d 204 (1987).

Where child abuse victim had vomited blood and asked his mother if he were going to die and made his statement declaring that mother's boyfriend had beaten him before his mother told him he was not going to die, there was substantial evidence to support a conclusion that the child believed he was about to die and the statement proffered as a dying declaration was erroneously suppressed. *Boone v. State*, 282 Ark. 274, 668 S.W.2d 17 (1984).

Where defendant was accused of murder, the trial court properly excluded victim's statement that he did not want anything to harm the defendant, as the statement did not fall within the hearsay exception because it in no way concerned or described the cause or circumstances of the declarant's impending death. *Thompson v. State*, 306 Ark. 193, 813 S.W.2d 249 (1991).

It is the declarant's belief in the nearness of death when he makes the statement, not the swiftness with which the death actually ensues, which is most important. *Bargery v. State*, 37 Ark. App. 118, 825 S.W.2d 831 (1992).

The fact that the declarant was possessed of a sense of imminent and inevitable death need not be shown by the deceased's express words, but may be supplied by inferences drawn from his condition, imminent danger, and other circumstances that indicated a sense of impending death. *Bargery v. State*, 37 Ark. App. 118, 825 S.W.2d 831 (1992).

The appellate court will reverse the determination of the trial court that evidence is admissible under subdivision (b)(2) of this rule only if there is an abuse of discretion. *Bargery v. State*, 37 Ark. App. 118, 825 S.W.2d 831 (1992).

Where the evidence showed that the deceased collapsed almost immediately after suffering a stab wound that severely damaged his heart, and his statement that the defen-



dant had stabbed him clearly referred to the cause and circumstances of his death, given the obvious severity of the wound the trial court did not abuse its discretion in admitting the testimony. *Simpkins v. State*, 48 Ark. App. 14, 889 S.W.2d 37 (1994).

Evidence regarding a telephone conversation between a murder victim and his ex-wife in which the victim stated that the defendant, who was his current wife, had a gun pointed at him and was going to shoot him could not be admitted into evidence as a dying declaration as there was no evidence that the victim was possessed of a sense of imminent and inevitable death. *Thomas v. State*, 62 Ark. App. 168, 973 S.W.2d 1 (1998).

A dying declaration by a murder victim that the defendant shot him was properly admitted into evidence, notwithstanding that drugs were present in the victim's urine, where drugs were not present in his blood and three persons who heard the dying declaration testified that he spoke clearly, made sense, and did not appear to be drunk. *Hammon v. State*, 338 Ark. 733, 2 S.W.3d 50 (1999).

Trial court did not abuse its discretion in determining that the victim's statement was a dying declaration under subdivision (b)(2) of this rule where the evidence showed that the victim's condition was grave and that she was no doubt aware of the severity of her injuries; there was enough proof to show a fear of imminent death. *Grant v. State*, 357 Ark. 91, 161 S.W.3d 785 (2004), appeal dismissed — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 282 (May 3, 2007), appeal dismissed, motion denied by — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 750 (Feb. 7, 2008), cert. denied — U.S. —, 129 S. Ct. 84, 172 L. Ed. 2d 73 (2008).

In a murder case, the trial court did not abuse its discretion in admitting as a dying declaration the victim's response, "Q," when he was asked who shot him. The statement clearly referred to and concerned the circumstances and cause of the victim's impending death, and qualified as a dying declaration. *Plessy v. State*, 2012 Ark. App. 74, — S.W.3d —, 2012 Ark. App. LEXIS 168 (Jan. 18, 2012).

### Effect of New Rule.

The repeal of the former Dead Man's Statute by the adoption of the Uniform Rules of Evidence was a rule of evidence or a "procedural" change and thus the new rule was applicable where the trial, as opposed to the operative facts, occurred after the change in the law. *Ashmore v. Ford*, 267 Ark. 854, 591 S.W.2d 666 (1979), limited *Druckenmiller v. Cluff*, 316 Ark. 517, 873 S.W.2d 526 (1994).

### Former Testimony.

Where the defendant's defense was that he did not rob the restaurant nor rape the female employees of the restaurant, and the doctor who had testified at the first trial only testi-

fied that the women had had sexual intercourse within the six hours prior to his examinations, nothing more could have been asked of the doctor and, therefore, the defendant was unsuccessful when he contended that it was improper under subdivision (b)(1) of this rule to admit the doctor's former testimony at the second trial because when it was given the defendant's counsel was representing two other codefendants and could not properly cross-examine the doctor. *Holloway v. State*, 268 Ark. 24, 594 S.W.2d 2 (1980), cert. denied, 474 U.S. 836, 106 S. Ct. 111, 88 L. Ed. 2d 90 (1985).

Where the state knew that a new trial would be necessary because the United States Supreme Court had reversed the defendant's convictions of rape and robbery, but the state waited for a year to obtain a subpoena for a doctor who had testified at the first trial, and then the state waited on a medical center to find the doctor until it was too late to obtain him under § 16-43-403, the state's efforts were not reasonable under subdivision (a)(5) of this rule; however, the state's misconduct in reading into the record the doctor's testimony given at the first trial was harmless error, since the doctor's testimony was not critical because a rape victim's testimony need not be corroborated. *Holloway v. State*, 268 Ark. 24, 594 S.W.2d 2 (1980), cert. denied, 474 U.S. 836, 106 S. Ct. 111, 88 L. Ed. 2d 90 (1985).

Where the defendant, in a civil action for assault and battery, requested that testimony, given by three witnesses at his previous criminal trials on the same assault and battery incident, be admitted into evidence in the civil action, the trial judge properly ruled that the former testimony was inadmissible in the civil action because the plaintiff in the civil action was not a party to the criminal trial, nor was the state a predecessor in interest to the civil plaintiff. *Bolden v. Carter*, 269 Ark. 391, 602 S.W.2d 640 (1980).

When the declarant is unavailable as a witness, his former testimony at another hearing of the same or different proceeding is not excluded by the hearsay rule if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. The burden of proving the unavailability of the witness is on the party who offers the prior testimony. *Spears v. State Farm Fire & Cas. Ins.*, 291 Ark. 465, 725 S.W.2d 835 (1987).

The testimony of a confidential informant held reliable and admissible under subdivision (b)(1) of this rule. *Scroggins v. State*, 312 Ark. 106, 848 S.W.2d 400 (1993).

Unavailable witness' testimony at second trial barred for lack of opportunity to develop her testimony under subdivision (b)(1) of this rule or as a violation of the appellant's right to

confront witnesses under the Sixth Amendment, even though first conviction overturned due to ineffective assistance of counsel. *Vick v. State*, 314 Ark. 618, 863 S.W.2d 820 (1993).

The trial court did not err in admitting into evidence at a criminal trial certain testimony which had been given at an earlier hearing in juvenile court, where the witness later invoked her Fifth Amendment right not to testify. *Hamblen v. State*, 44 Ark. App. 54, 866 S.W.2d 119 (1993).

Defendant's right under the Confrontation Clause was not violated when the testimony given by an officer at the first trial was allowed to be introduced and read at the second trial, where the officer died after the mistrial and before the second trial, because defendant had had sufficient opportunity and similar motive to develop his testimony as permitted under subdivision (b)(1) of this rule. *Espinosa v. State*, 317 Ark. 198, 876 S.W.2d 569 (1994).

A witness was unavailable so as to fall within the hearsay exception found in subdivision (b)(1) of this rule for former testimony where the state established that the witness was located outside the United States and not subject to subpoena or other process. *Hale v. State*, 343 Ark. 62, 31 S.W.3d 850 (2000), cert. denied 532 U.S. 1039, 121 S. Ct. 2001, 149 L. Ed. 2d 1003 (2001).

Court properly allowed the state to read an absent witness's prior sworn testimony from a suppression hearing into the record because defendant had a similar motive to develop the witness's cross-examination at both the suppression hearing and at trial. *Bertrand v. State*, 363 Ark. 422, 214 S.W.3d 822 (2005).

Pursuant to subdivision (b)(1) of this rule, the circuit court erred in admitting a witness's testimony from the bond-reduction hearing at trial because defendant did not have a similar motive to develop the witness's testimony at that hearing; the purpose of Ark. R. Crim. P. 8.5 was not solely to attack the state's proof; rather, the judicial officer's inquiry also included an assessment of defendant's connection to the community, familial relationships, and history of appearing in court after a pretrial release, and defendant's motive at the bond-reduction hearing was to obtain a pretrial release from jail. *Beasley v. State*, 370 Ark. 238, 258 S.W.3d 728 (2007).

#### **Full-Fledged Hearing.**

Where a preliminary hearing is held either under § 16-85-201, a discretionary procedure, or ARCrP 8, an informal, nonadversary hearing, neither is the full-fledged hearing involving extensive cross-examination from which a transcript can be admitted at trial under this rule. *Scott v. State*, 272 Ark. 88, 612 S.W.2d 110 (1981).

#### **Identification of Defendant.**

Where in a prosecution for attempted robbery, the defendant stated that she was with her brother at the scene of the incident, and where both the victim and another witness testified that only one female other than the victim was present at the scene of the incident, the victim was properly allowed to testify as to what she heard the "female" say while the victim was under attack, despite the fact that the victim could not positively identify the defendant as the "female" who had allegedly stated "give us some money" since the other evidence sufficiently identified the defendant as the declarant. *Holmes v. State*, 268 Ark. 601, 594 S.W.2d 267 (Ct. App. 1980).

No reversible error ensued from the trial court's admission of the victim's statement that the defendant shot him, even though the statement failed to meet the requirements of a dying declaration since the defendant admitted to shooting the victim. *Thompson v. State*, 306 Ark. 193, 813 S.W.2d 249 (1991).

#### **Lack of Corroboration.**

Where a written statement was not made until four years after the crime, on the eve of the trial, and where the declarant apparently made it to help the defendant, but he protected himself by not signing it and by asserting that he committed the rape at gunpoint, but where no other testimony suggested that anything of the kind took place, corroborating circumstances did not clearly indicate its trustworthiness. *Welch v. State*, 269 Ark. 208, 599 S.W.2d 717, cert. denied 449 U.S. 996, 101 S. Ct. 535, 66 L. Ed. 2d 294 (1980).

Where defendants in a burglary prosecution declined to testify, but sought to introduce statements each had given the police after their arrest which claimed they had brought the stolen articles from two men they met that morning and such statements were offered as an admission against penal interest on the theory that the statements exposed the defendants to a charge of receiving stolen property, the circumstances surrounding such statements failed decidedly to meet the test that corroborating circumstances must indicate their trustworthiness and the trial court was right to exclude them. *Tillman v. State*, 275 Ark. 275, 630 S.W.2d 5 (1982), cert. denied 459 U.S. 1201, 103 S. Ct. 1185, 75 L. Ed. 2d 432 (1983).

#### **Lack of Memory.**

Where witness claimed not to recollect defendant's participation in crime, he became unavailable, and thus his prior inconsistent statement was admissible as substantive evidence for the state; nevertheless, the witness was entitled to an opportunity to explain or deny his former statement and it was an abuse of the trial court's discretion to refuse the defendant the right to make a proffer of



testimony during the in-chambers hearing. *David v. State*, 269 Ark. 498, 601 S.W.2d 864 (1980).

If a witness has only a partial recollection, the witness may be partially unavailable. *Gadberry v. State*, 46 Ark. App. 121, 877 S.W.2d 941 (1994).

#### **Other Exceptions.**

Evid. Rule 803(24) and subdivision (b)(5) of this rule do not spell out a specific exception to the general prohibition against hearsay; instead, they list several matters to be considered as conditions to the admissibility of hearsay not falling within a recognized exception. Such provisions were not intended to throw open a wide door for the entry of judicially created exceptions to the hearsay rule but are to be narrowly construed. *Hill v. Brown*, 283 Ark. 185, 672 S.W.2d 330 (1984).

Where it was argued that the declarants were unavailable, though it was not shown what efforts were made to gain their presence, or why the state was not informed of their availability when the affidavits were taken, it was held that ordinary affidavits taken under oath do not carry the same trustworthiness as the exceptions to hearsay listed in subdivision (b)(5) of this rule and the trial court was correct in excluding the affidavits. *Poe v. State*, 291 Ark. 79, 722 S.W.2d 576 (1987).

Unsworn statement which did not contain the "equivalent circumstantial guarantees of trustworthiness" inherent in the other hearsay exceptions under subdivision (b) of this rule was not admissible under the residual hearsay exception. *Foreman v. State*, 321 Ark. 167, 901 S.W.2d 802 (1995).

#### **Right of Confrontation.**

The right of confrontation by a witness may be dispensed with when that witness is unavailable and has given testimony in a previous proceeding against the same defendant, provided the witness was subject to cross-examination in the first proceeding by that defendant. *Lewis v. State*, 288 Ark. 595, 709 S.W.2d 56 (1986).

Where a four-year-old rape victim was incompetent to testify and unavailable for trial under Arkansas' Child Hearsay Rule, subdivision (b)(7) of this rule, the child's mother and social worker were permitted to testify as to the child's hearsay statements of abuse. Because the child's statements were nontestimonial under the Crawford analysis, defendant's Sixth Amendment confrontation rights were not violated. *Seely v. State*, 373 Ark. 141, 282 S.W.3d 778 (2008), cert. denied — U.S. —, 129 S. Ct. 218, 172 L. Ed. 2d 169 (2008).

#### **Signed Statement Inadmissible.**

Signed statement of out-of-state witness to murder was not admissible under subdivision (b)(5) of this rule because it did not contain

the "equivalent circumstantial guarantees of trustworthiness" and because the record did not reflect that the witness' attendance was sought under § 16-43-401 et seq., so that she was not "unavailable" as required by subsection (a), and subdivision (b)(5) exception did not apply. *Doles v. State*, 275 Ark. 448, 631 S.W.2d 281 (1982); *Doles v. State*, 280 Ark. 299, 657 S.W.2d 538 (1983).

#### **Statement Against Interest.**

In case involving conversion of escrow funds by a bank president, where defendant president also acted as real estate broker in purchase of farm financed by his bank, the testimony of the purchasers, without objection, that they had never agreed to the real estate commission and that defendant had disclaimed any interest in a commission prior to closing the sale of the farm, was not hearsay, since defendant was a party-opponent in the action and the statement attributed to him was clearly admissible as an admission under Rule 801, and further, even if he had not been a party-opponent, defendant's statement would be permitted as a statement which at the time it was made was contrary to defendant's pecuniary or proprietary interest and thus an exception to the hearsay rule under subdivision (b)(3) of this rule. *First Nat'l Bank v. Nash*, 2 Ark. App. 135, 617 S.W.2d 24 (1981).

The trial court was correct in determining that the corroborating circumstances did not clearly indicate the trustworthiness of the declarant's statement and did not abuse its discretion in excluding the testimony of a witness under subdivision (b)(3) of this rule. *Williford v. State*, 300 Ark. 151, 777 S.W.2d 839 (1989); *Sanders v. State*, 305 Ark. 112, 805 S.W.2d 953 (1991).

Statement by defendant's girlfriend that implicated herself and defendant in criminal activity was sufficient to support the jury's verdict against defendant on the marijuana possession count; however, defendant's conviction reversed on the issue of the admissibility of the girlfriend's statement, since the statement was not within the hearsay exception, and its admission was prohibited under subdivision (b)(3) of this rule. *Burkett v. State*, 40 Ark. App. 150, 842 S.W.2d 857 (1992).

Statement was not admissible as a statement against social interest. *Foreman v. State*, 321 Ark. 167, 901 S.W.2d 802 (1995).

Statement was not admissible under subdivision (b)(3) of this rule as a statement against penal interest because § 5-54-122 does not punish the declarant who makes a true statement, only a false one. Admission of statement under subdivision (b)(3) was prejudicial error. *Foreman v. State*, 321 Ark. 167, 901 S.W.2d 802 (1995).

The trial court did not abuse its discretion

in admitting a decedent's statements concerning his intent to make a gift of a car to his son since the decedent was unavailable because he was deceased and the statements were declarations against the pecuniary interest of his estate. *O'Fallon v. O'Fallon*, 341 Ark. 138, 14 S.W.3d 506 (2000).

Trial court properly admitted that portion of a written statement in which a witness told police that defendant admitted being involved in a robbery because the statement qualified as a recorded recollection under ARE 803(5) because the witness told police that the statement was true at the time it was made and an officer testified that the statement was accurately recorded; it was, however, error to admit that portion of the written statement in which a third party implicated both himself and defendant in the robbery because the statement was not made in furtherance of the conspiracy as required by ARE 801(d)(2)(v) and was not a statement against the declarant's interest within the meaning of subdivision (b)(3) of this rule. *Lawrence v. State*, 81 Ark. App. 390, 104 S.W.3d 393 (2003).

During defendant's trial on charges of being an accomplice for two counts of rape and one count of second-degree sexual assault for acts committed against her daughter by two different men who had resided with defendant, the trial court did not err in admitting statements that one of the men, a co-defendant, made to the investigating detective; defendant's reliance on the last sentence of subdivision (b)(3) of this rule was unavailing. *Hutcheson v. State*, 92 Ark. App. 307, 213 S.W.3d 25 (2005).

In a case where a step-daughter conveyed a decedent's property to herself under a power of attorney, a trial court erred by finding that an agreement between the step-daughter and the decedent was the product of undue influence without hearing a neighbor's testimony; the decedent's statement of intent was admissible under subdivision (b)(3) of this rule. The statement from the decedent that he intended to give property to the step-daughter was against the pecuniary interest of the estate. *Duke v. Shinpaugh*, 101 Ark. App. 331, 276 S.W.3d 713 (2008), rehearing denied — Ark. App. —, — S.W.3d —, 2008 Ark. App. LEXIS 264 (Apr. 2, 2008).

Statement-against-interest hearsay exception in subdivision (b)(3) of this rule did not apply to permit the introduction of the testimony of an inmate of defendant's accomplice, who would have testified as to admissions that the accomplice made to the inmate, as the accomplice's statement did nothing to exculpate defendant. *Lacy v. State*, 2010 Ark. 388, — S.W.3d —, 2010 Ark. LEXIS 484 (Oct. 21, 2010).

### **Statement by Accomplice.**

In a prosecution for capital felony murder and aggravated robbery, the court did not err in excluding the testimony of an Arizona police officer who had interviewed the accused's accomplice, where the accomplice invoked the Fifth Amendment and was thus unavailable as a witness, but where the testimony of the officer relating to statements by the accomplice was offered on behalf of the accused. *Brewer v. State*, 271 Ark. 254, 608 S.W.2d 363 (1980).

Accomplice's statement that he committed the murder was not admissible unless it was proved trustworthy by corroboration and did not exclude defendant's accomplice liability, so it did not fall within the statement against interest exception in subdivision (b)(3) of this rule. *Cox v. State*, 345 Ark. 391, 47 S.W.3d 244 (2001), cert. denied 534 U.S. 1022, 122 S. Ct. 549, 151 L. Ed 2d 426 (2001).

### **Trustworthiness.**

Any new exceptions to the hearsay rule under subdivision (b)(5) of this rule must have circumstantial guarantees of trustworthiness equivalent to the guarantees supporting the common-law exceptions, necessity or some compelling reason for attaching more than average credibility to the hearsay. *Hill v. Brown*, 283 Ark. 185, 672 S.W.2d 330 (1984); *Tippitt v. State*, 294 Ark. 342, 742 S.W.2d 931 (1988).

In action for partition of land on death of tenant in common, since testimony of decedent's wife and attorney for decedent's estate that decedent had told them that he had bought other tenant in common's interest would have been self-serving, he could not have been cross-examined about it and it could have been readily fabricated, it was not a statement attended by inherent guarantees of trustworthiness as required by Evid. Rule 803(24) and subdivision (b)(5) of this rule and was thus properly excluded. *Hill v. Brown*, 283 Ark. 185, 672 S.W.2d 330 (1984).

Subdivision (b)(5) of this rule not applicable where statement did not have equivalent guarantees of trustworthiness, and defendant did not prove that witness was unavailable. *Halfacre v. State*, 292 Ark. 331, 731 S.W.2d 179 (1987).

### **Witness Not Unavailable.**

Where all that defendant's attorney did was to "make some phone calls" and "spoke to who I think is his family," such does not meet the requirement of a good faith effort to procure the attendance of the missing witness by process or other reasonable means. *Register v. State*, 313 Ark. 426, 855 S.W.2d 320 (1993).

When there is no attempt to serve process or other effort to obtain the attendance of the missing witness, there is no good faith effort to procure the attendance of the witness, and



he is not unavailable as defined by subdivision (a)(5) of this rule. *Register v. State*, 313 Ark. 426, 855 S.W.2d 320 (1993).

Subdivision (a)(2)'s exception under this rule did not apply because the trial court never ordered defense witness to testify, and defense witness never refused to do so. Rather, defense witness was available, and the trial court ruled the testimony would be hearsay. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995).

Witness was not unavailable where defendant stated only that he had spoken to some people about a witness and admitted that the witness could possibly have been located; the defendant failed in good faith to use "reasonable efforts" to locate the witness. *Jones v. State*, 326 Ark. 61, 931 S.W.2d 83 (1996).

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#### **Witness Unavailable.**

Where complaining witness testified briefly at preliminary hearing on possession of firearms, then moved to California and was unavailable to testify on the date of trial, the transcript of her testimony could not be admitted into evidence at the trial, since, although the witness was unavailable, the fact that the testimony was given at a hearing where defendants were unable to develop the testimony by direct, cross or redirect examination rendered it inadmissible under this rule and violated defendant's right to confrontation of the witness under the Sixth Amendment of the United States Constitution. *Scott v. State*, 272 Ark. 88, 612 S.W.2d 110 (1981).

A licensed physician who has known and treated a patient for ten years can testify as to whether that person is mentally competent to be a witness or whether the person has a mental infirmity so as to be unavailable as a witness; the physician need not necessarily be a psychologist or psychiatrist. *Gruzen v.*

*State*, 276 Ark. 149, 634 S.W.2d 92, cert. denied 459 U.S. 1020, 103 S. Ct. 386, 74 L. Ed. 2d 517 (1982).

Where the defendant's conviction for manslaughter was reversed and the case was remanded for a new trial, the trial court correctly ruled that a witness who had testified in the first trial was "unavailable" at the second trial, where she was pregnant and both her doctor and the court determined that her appearance in court would represent a considerable hazard to her health and her pregnancy; therefore, her prior recorded testimony was admissible under this rule. *Worring v. State*, 6 Ark. App. 64, 638 S.W.2d 678 (1982).

The burden of proving the unavailability of the witness is on the party who offers the prior testimony. *Worring v. State*, 6 Ark. App. 64, 638 S.W.2d 678 (1982).

The burden of proving the unavailability of a witness is on the party who offers the prior testimony, and on appeal the Supreme Court determines whether the trial court abused its discretion in ruling that the witness was unavailable. *Lewis v. State*, 288 Ark. 595, 709 S.W.2d 56 (1986).

Where the subpoena was served and the witness appeared on the date stated in the subpoena, there was nothing to alert the state to any likelihood that the witness would not return for the second day of the trial, and when he failed to appear, the prosecutor dispatched a deputy sheriff to search for him, the state made a good faith effort to obtain the presence of the witness, and his testimony from the first trial was properly admitted into evidence. *Lewis v. State*, 288 Ark. 595, 709 S.W.2d 56 (1986).

Trial court erred in finding witness, victim in rape prosecution, unavailable, where state made no effort whatever to serve a subpoena on its key witness at her Mississippi address, which was readily available. *Leshe v. State*, 304 Ark. 442, 803 S.W.2d 522 (1991).

Subdivision (a)(5) of this rule makes no distinction between the government and the defendant in defining the word "unavailable"; in order to satisfy the requirements of the Confrontation Clause, a witness in a criminal case is only unavailable if a good faith effort has been made to procure that witness. *Register v. State*, 313 Ark. 426, 855 S.W.2d 320 (1993).

State's considerable effort and thorough search for witness held good faith effort to procure witness under subdivision (a)(5) of this rule. *Vick v. State*, 314 Ark. 618, 863 S.W.2d 820 (1993).

Because what was at stake in a bond-revocation hearing was substantially different from what was at stake in a full-fledged hearing at trial, the state did not demonstrate that defendant had a similar motive in the

trial in order to make use of subdivision (b)(1) of this rule; thus, the unavailable officer's testimony from the bond-revocation hearing was erroneously admitted into evidence. *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002).

In defendant's murder trial, victim's prior statement to police officer, that defendant assaulted her, was admissible under the catch-all exception of subdivision (b)(5) of this rule with respect to her unavailability and state of mind; as to whether the statement was admissible as a prior bad act, defendant's confession alone overwhelmingly established the elements of murder in the first degree and, thus, any error as to admitting the hearsay statement was harmless. *Wooten v. State*, 93 Ark. App. 178, 217 S.W.3d 124 (2005).

Trial court did not err by allowing testimony of the victim's mother as none of the statements were hearsay; the mother did not testify as to what the victim said during a telephone conversation, but rather testified as to her perceptions of whether defendant and the victim would remarry, and the mother's testimony concerning her knowledge of a job offer that was extended to the victim was admissible because the mother testified as to her son's preparations to move to Texas and Alaska. *Vidos v. State*, 367 Ark. 296, 239 S.W.3d 467 (2006).

Although victim was unavailable because he was deceased, defendant's civil attorney chose not to cross examine victim during the deposition even though criminal charges had been filed against defendant; thus, the deposition testimony was properly admitted into evidence. *Simmons v. State*, 95 Ark. App. 114, 234 S.W.3d 321 (2006).

State's investigator's testimony showed that the state made a good-faith effort to

procure the attendance of the witness at trial, and there was no abuse of discretion in finding that the witness was unavailable pursuant to subdivision (a)(5) of this rule. *Beasley v. State*, 370 Ark. 238, 258 S.W.3d 728 (2007).

**Cited:** *State v. Glenn*, 267 Ark. 501, 592 S.W.2d 116 (1980); *Haseman v. Union Bank*, 268 Ark. 318, 597 S.W.2d 67 (1980); *Doles v. State*, 280 Ark. 299, 657 S.W.2d 538 (1983); *Catt v. State*, 285 Ark. 334, 691 S.W.2d 120 (1985); *Harrod v. State*, 286 Ark. 277, 691 S.W.2d 172 (1985); *Heffernan v. Lockhart*, 834 F.2d 1431 (8th Cir. 1987); *Wilmoth v. State*, 291 Ark. 233, 724 S.W.2d 148 (1987); *Ward v. State*, 293 Ark. 88, 733 S.W.2d 728 (1987), overruled *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998), criticized *Colbert v. State*, 304 Ark. 250, 801 S.W.2d 643 (1990), questioned *MacKintrush v. State*, 60 Ark. App. 42, 959 S.W.2d 404 (1997); *Ronning v. State*, 295 Ark. 228, 748 S.W.2d 633 (1988), cert. denied 489 U.S. 1020, 109 S. Ct. 1141, 103 L. Ed. 2d 201 (1989); *Garibaldi v. Dietz*, 25 Ark. App. 136, 752 S.W.2d 771 (1988); *Tillman v. State*, 300 Ark. 132, 777 S.W.2d 217 (1989); *Bussard v. State*, 300 Ark. 174, 778 S.W.2d 213 (1989); *Pearrow v. Feagin*, 300 Ark. 274, 778 S.W.2d 941 (1989); *Harris v. State*, 303 Ark. 233, 795 S.W.2d 55 (1990); *Cumberland Fin. Group, Ltd. v. Brown Chem. Co.*, 34 Ark. App. 269, 810 S.W.2d 49 (1991); *Burkett v. State*, 40 Ark. App. 150, 842 S.W.2d 857 (1992); *Warren v. State*, 314 Ark. 192, 862 S.W.2d 222 (1993); *Jones v. State*, 45 Ark. App. 28, 871 S.W.2d 403 (1994); *Dansby v. State*, 319 Ark. 506, 893 S.W.2d 331 (1995); *Lewis v. Gubanski*, 50 Ark. App. 255, 905 S.W.2d 847 (1995); *Primerica Life Ins. Co. v. Watson*, 362 Ark. 54, 207 S.W.3d 443 (2005); *Flanagan v. State*, 368 Ark. 143, 243 S.W.3d 866 (2006).

## Rule 805. Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

### CASE NOTES

#### Statement to Attorney.

Testimony that plaintiff's attorney had told plaintiff that defendant insurance company's agent had told him that the driver of a car with whom plaintiff had an accident had less coverage than he actually had, was double

hearsay, and since plaintiff's attorney was not an agent for the defendant insurance company, the testimony was inadmissible. *Marrow v. State Farm Ins. Co.*, 264 Ark. 227, 570 S.W.2d 607 (1978).

## Rule 806. Attacking and supporting credibility of declarant.

If a hearsay statement, or a statement defined in Rule 801 [d] (2) (iii), (iv), or (v), has been admitted in evidence, the credibility of the declarant may be



attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

**Publisher's Notes.** The bracketed designation "d" was inserted by the publisher.

### RESEARCH REFERENCES

**Ark. L. Rev.** On The Horns of an Evidentiary Dilemma: The Intersection of Federal Rules of Evidence 806 and 608(b), 56 Ark. L. Rev. 543 (2003).

### CASE NOTES

#### ANALYSIS

In general.  
Construction.  
Applicability.  
Testimony excluded.

#### In General.

Neither Evid. Rules 608, 609, 613, nor this rule permit impeachment by extrinsic evidence on a collateral matter. *Teas v. State*, 23 Ark. App. 154, 744 S.W.2d 739 (1988).

#### Construction.

The utterer of words which have been adopted as an admission by the defendant, pursuant to Rule 801, is subject to impeachment under this rule. *Lewis v. Gubanski*, 50 Ark. App. 255, 905 S.W.2d 847 (1995).

Inmate who was convicted of murder argued that he received ineffective assistance of counsel in that counsel failed to impeach testimony by his stepmother on account of bias; although the court agreed with defendant that this rule did not have to be read in conjunction with Ark. R. Evid. 801(d)(2), the argument failed because defendant did not present evidence that the stepmother was, in fact, angry or biased. *Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004), cert. denied 543 U.S. 932, 125 S. Ct. 326, 160 L. Ed. 2d 235 (2004).

#### Applicability.

Where question put to a rape victim's mother was not intended to prove the truth of the child's prior assertion, but only that the prior statement had in fact been made, it was not a hearsay statement, and this rule could have no application. *Teas v. State*, 23 Ark. App. 154, 744 S.W.2d 739 (1988).

#### Testimony Excluded.

Trial court did not err in excluding testimony as further impeachment of the victim's credibility where, for the purpose of eliciting testimony that the events mentioned in the rape victim's prior statement had never occurred, the defendant attempted to call to the stand a witness alleged to have been mentioned and identified in the prior statement. *Teas v. State*, 23 Ark. App. 154, 744 S.W.2d 739 (1988).

Defendant was not allowed to introduce second, more exculpatory statement he made to deputy sheriff to shore up his credibility, where inconsistencies between his two statements were not sufficient to show the state specifically attacked the credibility of his first statement. *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997).

**Cited:** *McArthur v. State*, 309 Ark. 196, 830 S.W.2d 842 (1992).

## ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

### Rule 901. Requirement of authentication or identification [identification].

(a) *General Provision.* The requirement of authentication or identification as a condition precedent to admissibility [admissibility] is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony of a witness with knowledge that a matter is what it is claimed to be.

(2) *Nonexpert opinion on handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public records or reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient documents or data compilation.* Evidence that a document or data compilation, in any form, (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in existence 20 years or more at the time it is offered.

(9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods provided by statute or rule.* Any method or [of] authentication or identification provided by [the Supreme Court of this State or by] a statute or as provided in the Constitution of this State.

**Publisher's Notes.** The bracketed material so appeared in the rule as enacted, with three exceptions; the bracketed words "iden-

tification" in the heading, "admissibility" in subsection (a) and "of" in subdivision (b)(10) were inserted by the publisher.



## RESEARCH REFERENCES

**ALR.** Construction and application of silent witness theory. 116 ALR 5th 373.

Authentication of Electronically Stored Evidence, Including Text Messages and E-mail. 34 ALR 6th 253.

Increase, or Promise of Increase or Withholding of Increase, of Wages as Unfair Labor Practice Under State Labor Relations Acts. 34 ALR 6th 327.

Authentication and Admission of Foreign Business Records in Federal Criminal Proceeding Pursuant to 18 USCS § 3505. 41 ALR Fed. 2d 537.

**Ark. L. Notes.** Gitelman and Watkins, No Requiem for Ricarte: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

**U. Ark. Little Rock L.J.** Derden, Survey of Arkansas Law: Evidence, 2 U. Ark. Little Rock L.J. 232.

Arkansas Law Survey, Schneider, Evidence, 7 U. Ark. Little Rock L.J. 219.

Jones, Lex, Lies & Videotape, 18 U. Ark. Little Rock L.J. 613.

## CASE NOTES

## ANALYSIS

Authentication by party proponent.

Chain of custody.

Controlled substances.

Dental records.

General provision.

Proof.

Proper authentication.

Proper foundation.

Voice identification.

Waiver of error.

Witness having knowledge.

**Authentication by Party Proponent.**

The fact that the party proponent supplied the authentication of the document sought to be introduced does not go to the admissibility of the document, although it may go to the weight of the evidence. *McDermott v. Strauss*, 283 Ark. 444, 678 S.W.2d 334 (1984).

**Chain of Custody.**

The purpose of the rule requiring a chain of custody is to guard against the introduction of evidence which is not authenticated; in establishing a chain of custody prior to the introduction of evidence at the trial, it is not necessary to eliminate every possibility that the evidence has been tampered with. *Meador v. State*, 10 Ark. App. 325, 664 S.W.2d 878 (1984).

The fact that the weapon allegedly used in an attempted robbery was not in the sheriff's possession at all times and also that there was no serial number on the receipt made at the sheriff's office, goes to the weight to be given the evidence, rather than its admissibility. *Meador v. State*, 10 Ark. App. 325, 664 S.W.2d 878 (1984).

The effect of minor discrepancies in the chain of custody are for the trial court to weigh. *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

The purpose of establishing the chain of custody is to prevent the introduction of evi-

dence which is not authentic. *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

When an object is subject to positive identification, proof of the chain of custody need not be as conclusive as it should be with respect to interchangeable items, such as blood samples or drugs. *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

Where the items in question were all identified by the police officer and forensic serologist, and there was no actual allegation of tampering, the chain of custody was sufficient. *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

Where the substance at issue was described differently by an undercover officer and the forensic chemist, the state was required to do more than trace the route of the envelope containing the substance. *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997), modified 328 Ark. 393, 945 S.W.2d 383 (1997).

Where the officer testified that, upon approaching defendant to score a rock, defendant gave him two rocks, while the chemist testified that "it was one plastic bag containing one white-off-white, rock-like substance," the appellate court viewed any difference in the descriptions as, at most, conflicts in evidence properly weighed by the finder of fact, rather than as a failure to prove the authenticity of the cocaine. *Hawkins v. State*, 81 Ark. App. 479, 105 S.W.3d 397 (2003).

Trial court did not abuse its discretion by admitting drug evidence over defendant's chain-of-custody objection, where the arresting officer testified that approximately fifteen grams of crack cocaine was found and tagged, but the forensic chemist testified that the weight was just over six grams, because the officer testified that the bags were weighed together with the drugs and the trial court merely had to be satisfied within a reasonable probability that no one had tampered with

the evidence. *Jackson v. State*, 2010 Ark. App. 359, — S.W.3d —, 2010 Ark. App. LEXIS 368 (Apr. 28, 2010).

Court did not abuse its discretion in admitting crime-scene evidence over defendant's chain-of-custody objections because, for each piece of evidence objected to, there was other testimony or evidence presented during trial that supported a finding that the items in question were what the state claimed they were. Much of that supporting evidence was from the statements made by defendant and his accomplice. *Laswell v. State*, 2012 Ark. 201, — S.W.3d —, 2012 Ark. LEXIS 230 (May 10, 2012).

### **Controlled Substances.**

In a prosecution for delivery of methamphetamine, the state failed to prove that the drug tested was properly authenticated. *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997), modified 328 Ark. 393, 945 S.W.2d 383 (1997).

### **Dental Records.**

In a prosecution for murder by drowning, the trial court did not abuse its discretion in admitting copies of two of the victim's dental charts, where the two dentists who compiled the original dental charts testified that the admitted charts were copies of the original dental charts, where the original charts were unavailable because they were being held by the clerk of the Arkansas Supreme Court as evidence in an earlier criminal case, and where the defendant never challenged the identification of the victim during the trial. *Wallace v. Lockhart*, 701 F.2d 719 (8th Cir.), cert. denied 464 U.S. 934, 104 S. Ct. 340, 78 L. Ed. 2d 308 (1983).

### **General Provision.**

The requirement of authentication in this rule is separate from the requirement that a hearsay document must satisfy an applicable hearsay exception for admissibility. *Columbia Mut. Ins. Co. v. Patterson*, 320 Ark. 584, 899 S.W.2d 61 (1995).

### **Proof.**

To prove authenticity, the state must demonstrate a reasonable probability that the evidence has not been altered in any significant manner. *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

Any error in the authentication of photographs of the injuries sustained by the victim was harmless because the witness who testified just after the officer who testified regarding the photographs was the victim, who testified that the photographs depicted her injuries as they existed in the ambulance and at the hospital on the day of the robbery. *Goodwin v. State*, 373 Ark. 53, 281 S.W.3d 258 (2008).

Defendant's conviction for murder in the

second degree was proper because admission of photographs taken at the crime scene of various items located in the front passenger seat of the victim's vehicle was proper since the evidence suggested that the crime scene was in a remote location that was secured by officers shortly after the victim's 911 call was made; the testimony presented was sufficient to support a finding that the matter in question was what its proponent claimed. The officer who took the photographs testified that he saw the items in the front passenger seat and that he did not touch them before photographing them, satisfying subsection (a) of this rule; moreover, even if the photographs were improperly admitted, no prejudice occurred because they were merely cumulative evidence. *Johnson v. State*, 2010 Ark. App. 153, — S.W.3d —, 2010 Ark. App. LEXIS 167 (2010).

### **Proper Authentication.**

In prosecution for theft of property where state's proof showed that burglary of the hardware was committed by four persons, three of whom were inside the store and a fourth outside in a car as lookout and they kept in touch with one another, during the process of the robbery, by CB walkie-talkie inside the store and CB radio in the car, testimony of police officer that he had listened on his radio to the burglars' conversation and that they had made certain statements which he quoted and which indicated that defendant was one of the men inside the store was admissible where it was shown that defendant was observed leaving a residence in a car in the company of three or four men shortly before the burglary, that the car was followed by the police to a point within a few blocks of the hardware, that defendant left the scene with another man in a truck loaded with stolen merchandise and returned to the residence where he was apprehended by police, that a CB walkie-talkie was found in a nearby yard set on Channel 12, which was the channel the suspected burglars used in their conversation, and that the truck was loaded with stolen merchandise. *Nabors v. State*, 263 Ark. 409, 565 S.W.2d 598 (1978), cert. denied 439 U.S. 1067, 99 S. Ct. 834, 59 L. Ed. 2d 32 (1979).

A document prepared by plaintiff's salesman may be admitted into evidence under this rule, since subdivision (b)(1) of this rule allows the document to be authenticated by the testimony of a witness with knowledge that a matter is what it is claimed to be, and this is true even where the defendants are the party proponents and supply the authentication, since this does not go to its admissibility, although it may go to the weight to be given the evidence. *United Bilt Homes, Inc. v. Elder*, 272 Ark. 496, 615 S.W.2d 367 (1981).

Where the murder victim's mother testified



that the shirt the state introduced at trial was, in fact, the shirt her son had worn on the night he was killed and that she had washed the shirt because it had a small grass stain on it and that it had no rips or tears in it, the shirt was properly authenticated under subdivision (b)(1) of this rule; the possibility that certain stains on the shirt had been washed away simply goes to the weight the jury was to accord the evidence. *Horne v. State*, 12 Ark. App. 301, 677 S.W.2d 856 (1984).

In determining the authenticity of taped statements, the trial court has some discretion, and in the absence of evidence indicating tampering with the evidence, the trial court's ruling will not be reversed absent an abuse of discretion; thus, where an undercover police officer, who was present when the tapes were recorded, testified as to their accuracy and authenticity, such testimony was sufficient to authenticate the tapes. *Walker v. State*, 13 Ark. App. 124, 680 S.W.2d 915 (1984).

Transcripts of recordings of drug transactions held properly authenticated. *Bunn v. State*, 320 Ark. 516, 898 S.W.2d 450 (1995).

Finding in favor of the beneficiaries and against the intestate heirs in a will-contest action was proper where the beneficiaries satisfied the requirements of ARE 803(6) and proved that the bank's records were admissible as an exception to the hearsay rule and, even though the officer was not the custodian of the records, that did not bar the admission; further, the records were adequately authenticated under this rule because the officer repeatedly testified that the copies were true and accurate copies of the records that they depicted. *Metzgar v. Rodgers*, 83 Ark. App. 354, 128 S.W.3d 5 (2003).

Where an eyewitness to the crime testified that the photographs were an accurate depiction of the events that took place on the evening of November 15, 2003, and further testified about his knowledge of the surveillance cameras and the types of images he frequently had observed on the monitors at the store, the state met its burden of proof required for authenticating the photographs and laid a proper foundation for admission of the photographs. *Owens v. State*, 363 Ark. 413, 214 S.W.3d 849 (2005).

E-mails used during defendant's trial for sexual assault were properly authenticated by the victim, who testified that he had either sent or received the e-mails from defendant, by defendant, who admitted having sent the e-mails, and by experts, who examined either the computers or the server through which the emails traveled. *Bobo v. State*, 102 Ark. App. 329, 285 S.W.3d 270 (2008).

In order to have chat room transcripts admitted during defendant's trial for internet stalking of a child, the state only needed to demonstrate a reasonable probability that the

evidence had not been altered in any significant manner; an undercover detective's testimony and defendant's signature on the transcripts satisfied that burden under subdivision (b)(1) of this rule. *Jackson v. State*, 2009 Ark. App. 466, 320 S.W.3d 13 (2009).

Trial court did not err in precluding defendant from admitting a movie ticket receipt into evidence as corroborating his alibi defense because the receipt was not self-authenticating and the testimony of defendant—a person who was not the receipt's creator—was not sufficient to authenticate the document. *Golden v. State*, 2009 Ark. App. 632, — S.W.3d —, 2009 Ark. App. LEXIS 799 (2009).

### Proper Foundation.

It cannot be argued that a proper foundation for the introduction of the tapes of two conversations was not laid, even though the state did not call as witnesses the two officers who manned the recording device, for it was not shown what helpful testimony the officers could have supplied, because there was no indication that they could have known at the time whether or not the recording device was working. *Williamson v. State*, 267 Ark. 46, 590 S.W.2d 847 (1979).

Where the participants in conversations with the defendant testified as to the accuracy of the tapes and transcripts of the conversations, and a police officer who heard the conversations take place testified that the tape recording was an accurate transcription of the conversations, a proper foundation was laid under subsection (a) of this rule, for the admission of the tapes and transcripts. *Smithey v. State*, 269 Ark. 538, 602 S.W.2d 676 (1980).

Where a detective viewed obscene films, then went before a circuit judge to obtain a search warrant, testifying at length about the films he had seen, and after obtaining the warrant returned to the theater and seized the films, and on the following day reviewed the films and placed them in storage, the three films viewed by the detective, who later died, were admissible, even though he could not testify at trial, since the facts, taken as a whole, satisfied the conditions precedent to admissibility prescribed in this rule. *Century Theaters, Inc. v. State*, 274 Ark. 484, 625 S.W.2d 511 (1981).

In a negligence suit arising from a car accident, the testimony of the injured driver's expert, a chiropractor, was sufficient to lay the foundation for admitting a videotape used to help explain the body's reaction to a rear-end-collision, not to reenact the original happenings of the accident. *Petterie Transp. v. Thurmond*, 79 Ark. App. 375, 90 S.W.3d 1 (2002).

**Voice Identification.**

Where, in second-degree murder prosecution, witness testified that he received telephone calls from a man identifying himself as the employer of defendant, inquiring about the insurance coverage on defendant's husband, who was the murder victim, the court erred in allowing the testimony, even though caller had same first name as codefendant who was defendant's employer, since under this rule the identity of the caller must be established before the evidence is admissible, and in this case, there was no basis for the witness to identify the codefendant as the caller, nor was there any reliable circumstantial evidence as to his identity. Thus, no foundation was laid for admission of this evidence, even though it was possible that the witness would be able to identify the caller based on hearing his voice at trial. *Roleson v. State*, 272 Ark. 346, 614 S.W.2d 656 (1981), questioned *Wingfield v. State*, 303 Ark. 291, 796 S.W.2d 574 (1990).

It was within the trial court's discretion to allow into evidence taped telephone conversations between the defendant and a police informant, where the trial judge was satisfied that the informant could identify the other speaker as the defendant. *Marshall v. State*, 289 Ark. 462, 712 S.W.2d 894 (1986).

In a prosecution for murder, a deputy was properly permitted to testify to statements made by the defendant while he was in custody which the deputy heard over a monitor used for security purposes where the deputy testified that she became familiar with and was also able to recognize the defendant's voice because he talked a lot while incarcerated. *Hinkston v. State*, 340 Ark. 530, 10 S.W.3d 906 (2000).

**Waiver of Error.**

Defendant waived any error in admitting without a proper foundation photos of defendant using a victim's bank card because he failed to get a specific ruling that the photos were considered authenticated under this rule or under the hearsay exception in Ark. R. Evid. 803(6) for business records described by a custodian. *Settles v. State*, 2011 Ark. App. 241, — S.W.3d —, 2011 Ark. App. LEXIS 262 (Mar. 30, 2011).

**Witness Having Knowledge.**

Identification was not by testimony of a witness "having knowledge." *City of Ft. Smith v. Driggers*, 294 Ark. 311, 742 S.W.2d 921 (1988).

A 25-page writing held not properly authen-

ticated where witness' testimony was replete with reference to his lack of knowledge regarding the 25-page writing. *Columbia Mut. Ins. Co. v. Patterson*, 320 Ark. 584, 899 S.W.2d 61 (1995).

Trial court did not err in admitting photographs of the mother's child who had died through the testimony of the doctor, even though he was not present when they were taken; the doctor testified that, other than having gauze on his head, the child looked the same in the photographs as when he last saw the child, and one method of authentication was the presentation of a witness with knowledge that a matter was what it was claimed to be. *Vasquez v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 575, 337 S.W.3d 552 (2009).

In a case in which defendant appealed his conviction for violating § 5-27-306(a)(2)(C), he unsuccessfully argued the trial court abused its discretion in admitting into evidence a cut-and-paste word document from the police computer system because it was not properly authenticated or the best evidence. The trial court did not abuse its discretion by deeming the printout sufficiently authenticated by the officer who conducted the chat and who converted it to a printable Wordpad document, and the trial court did not abuse its discretion in admitting the printout into evidence because it was properly authenticated and was admissible as a duplicate or an original. *Buffalo v. State*, 2010 Ark. App. 127, — S.W.3d —, 2010 Ark. App. LEXIS 118 (Feb. 11, 2010).

**Cited:** *Rood v. State*, 4 Ark. App. 289, 630 S.W.2d 543 (1982); *Walker v. Lockhart*, 598 F. Supp. 1410 (E.D. Ark. 1984), rev'd en banc 763 F.2d 942 (8th Cir. 1985); *Richardson v. State*, 292 Ark. 140, 728 S.W.2d 189 (1987); *First Nat'l Bank v. Hess*, 23 Ark. App. 129, 743 S.W.2d 825 (1988); *Thomas v. State*, 303 Ark. 210, 795 S.W.2d 917 (1990); *Butler v. State*, 303 Ark. 380, 797 S.W.2d 435 (1990); *Estate of Hastings v. Planters & Stockmen Bank*, 307 Ark. 34, 818 S.W.2d 239 (1991); *Mobbs v. State*, 307 Ark. 505, 821 S.W.2d 769 (1991), questioned *Thomas v. State*, 330 Ark. 442, 954 S.W.2d 255 (1997), overruled *Thomas v. State*, 322 Ark. 670, 911 S.W.2d 259 (1995); *Monk v. State*, 320 Ark. 189, 895 S.W.2d 904 (1995); *Jenkins v. State*, 321 Ark. 551, 905 S.W.2d 845 (1995); *Childress v. State*, 322 Ark. 127, 907 S.W.2d 718 (1995); *Stivers v. State*, 64 Ark. App. 113, 978 S.W.2d 749 (1998); *Box v. State*, 348 Ark. 116, 71 S.W.3d 552 (2002).

**Rule 902. Self-authentication.**

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:



(1) *Domestic Public Documents Under Seal.* A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Paname [Panama] Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) *Domestic Public Documents Not Under Seal.* A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1), having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal or that the signer has the official capacity and that the signature is genuine.

(3) *Foreign Public Documents.* A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the executing or attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificate of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may for good cause shown order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) *Certified Copies of Public Records.* A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3), or complying with any law of the United States or of this State.

(5) *Official Publications.* Books, pamphlets, or other publications issued by public authority.

(6) *Newspapers and Periodicals.* Printed material purporting to be newspapers or periodicals.

(7) *Trade Inscriptions and the Like.* Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) *Acknowledged Documents.* Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgements.

(9) *Commercial Paper and Related Documents.* Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) *Presumptions Created by Law.* Any signature, document, or other matter declared by any law of the United States or of this State, to be presumptively or prima facie genuine or authentic.

**Publisher's Notes.** The bracketed word "Panama" in subdivision (1) was inserted by the publisher.

### CASE NOTES

#### ANALYSIS

In general.

Document not self-authenticating.

Documents under seal.

Public records.

Signatures.

#### In General.

This rule does not render admissible documents which are otherwise hearsay unless the documents also fall within a hearsay exception. *Easterling v. Weedman*, 54 Ark. App. 22, 922 S.W.2d 735 (1996).

#### Document Not Self-Authenticating.

Document concerning city personnel rules was not self-authenticating. *City of Ft. Smith v. Driggers*, 294 Ark. 311, 742 S.W.2d 921 (1988).

A photocopy of a certified copy of an insurance policy was not a self-authenticating document. *Columbia Mut. Ins. Co. v. Patterson*, 320 Ark. 584, 899 S.W.2d 61 (1995).

#### Documents Under Seal.

Where the proof of prior convictions submitted to support a "habitual offender" count in a burglary and theft trial consisted of copies of orders of commitment from a court of competent jurisdiction, duly certified under seal, which were clearly admissible under subdivision (1) of this rule and competent to prove the prior convictions, and the foundation for that admission was the docket entries of the court in those two cases, properly identified by the clerk of the court whose duty it was to keep and record such records, such records not being hearsay by virtue of subdivision (8)

of Rule 803, there was substantial evidence by which the jury could find the prior convictions proved as required by § 5-4-504. *Thomas v. State*, 2 Ark. App. 238, 620 S.W.2d 300 (1981).

Document held to be self-authenticating as domestic document under seal. *Monark Boat Co. v. Fischer*, 292 Ark. 544, 732 S.W.2d 123 (1987).

#### Public Records.

Where the first two documents of an exhibit were certified by the Deputy Clerk of the Municipal Court and filed with the Department of Finance and Administration as required by § 5-65-110(b), and the documents were duly certified as true and correct copies of the records of the Office of Driver Control by the Manager of the Driver Control Section, the exhibit was admissible as a self-authenticating document pursuant to subdivision (4) of this rule. *Price v. State*, 48 Ark. App. 37, 889 S.W.2d 40 (1994).

#### Signatures.

There is nothing in this rule which mandates that the certification contain a handwritten signature; printing, typing, or stamping a name in the place where a signature should appear is sufficient if it is intended as a signature. *Dupree v. State*, 50 Ark. App. 271, 906 S.W.2d 315 (1995).

**Cited:** *Thomas v. State*, 303 Ark. 210, 795 S.W.2d 917 (1990); *Miranda v. State*, 304 Ark. 567, 803 S.W.2d 910 (1991); *McClure v. State*, 328 Ark. 35, 942 S.W.2d 243 (1997); *Stivers v. State*, 64 Ark. App. 113, 978 S.W.2d 749 (1988).

### Rule 903. Subscribing witness' testimony unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

### CASE NOTES

#### Burden of Proof.

This rule provides a subscribing witness's testimony to authenticate a writing will be unnecessary unless required by the laws of the originating jurisdiction and the burden of showing that the laws of the originating state

require testimony from a subscribing witness for proper authentication lies with the party challenging the document. *Barnes v. Barnes*, 311 Ark. 287, 843 S.W.2d 835 (1992).

**Cited:** *Bobo v. State*, 102 Ark. App. 329, 285 S.W.3d 270 (2008).



## ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

### Rule 1001. Definitions.

For purposes of this Article the following definitions are applicable:

(1) *Writings and Recordings*. “Writings” and “recordings” consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) *Photographs*. “Photographs” include still photographs, x-ray films, video tapes, and motion pictures.

(3) *Original*. An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original.”

(4) *Duplicate*. A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

### CASE NOTES

#### ANALYSIS

Computer printout.  
“Original.”

#### Computer Printout.

In a case in which defendant appealed his conviction for violating § 5-27-306(a)(2)(C), he unsuccessfully argued the trial court abused its discretion in admitting into evidence a cut-and-paste word document from the police computer system because it was not properly authenticated or the best evidence. The trial court did not abuse its discretion by deeming the printout sufficiently authenticated by the officer who conducted the chat and who converted it to a printable Wordpad document, and the trial court did not abuse its discretion in admitting the printout into

evidence because it was properly authenticated and was admissible as a duplicate or an original. *Buffalo v. State*, 2010 Ark. App. 127, — S.W.3d —, 2010 Ark. App. LEXIS 118 (Feb. 11, 2010).

#### “Original.”

Trial court did not abuse its discretion in admitting computer printouts of defendant’s internet conversations with an alleged 14 year old, who was really an undercover officer, into evidence during defendant’s trial for internet stalking of a child because the printouts fell within the definition of an “original” under subdivision (3) of this rule and were the best evidence. *Dirickson v. State*, 104 Ark. App. 273, 291 S.W.3d 198 (2009).

### Rule 1002. Requirement of original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by [rules adopted by the Supreme Court of this state or by] statute.

**Publisher’s Notes.** The bracketed material so appeared in the rule as enacted.

## RESEARCH REFERENCES

**Ark. L. Notes.** Gitelman and Watkins, No Requiem for Ricarte: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

**U. Ark. Little Rock L.J.** Arkansas Law Survey, Schneider, Evidence, 7 U. Ark. Little Rock L.J. 219.

## CASE NOTES

## ANALYSIS

Applicability.  
Computer printout.  
Mail return receipt.  
Notes.  
Tangible objects.  
Tape recording.

**Applicability.**

The best evidence rule applies only to writings, photographs and recordings. *Redman v. State*, 265 Ark. 774, 580 S.W.2d 945 (1979).

When a transaction occurs where a written record is made, it is not necessary to produce the record where there is testimony to prove the transaction; it is only where the writing itself must be proved that the writing must be produced. *Canady v. Canady*, 285 Ark. 378, 687 S.W.2d 833 (1985).

In a theft case, where the state was not attempting to introduce a transcript of defendant's recorded confession, a police officer was permitted to testify regarding the contents of the statement because the best evidence rule was not applicable; the officer was merely testifying to what defendant told him during the confession. *Gamble v. State*, 351 Ark. 541, 95 S.W.3d 755 (2003).

In an aggravated robbery case, as currency seized from defendants' vehicle was a physical exhibit, it was not within the purview of the best evidence rule. *Wingfield v. State*, 363 Ark. 380, 214 S.W.3d 843 (2005).

Under this rule and Ark. R. Evid. 1003, the heirs only complained that the son's exhibits were not certified copies and never raised questions as to their authenticity or continuing effectiveness of certified copies. *Heirs at Law of Butler v. Butler*, 2009 Ark. App. 660, 345 S.W.3d 225 (2009).

**Computer Printout.**

Trial court did not abuse its discretion in admitting computer printouts of defendant's internet conversations with an alleged 14 year old, who was really an undercover officer, into evidence during defendant's trial for internet stalking of a child because the printouts fell within the definition of an "original" under Ark. R. Evid. 1001(3) and were the best evidence. *Dirickson v. State*, 104 Ark. App. 273, 291 S.W.3d 198 (2009).

In a case in which defendant appealed his conviction for violating § 5-27-306(a)(2)(C), he unsuccessfully argued the trial court

abused its discretion in admitting into evidence a cut-and-paste word document from the police computer system because it was not properly authenticated or the best evidence. The trial court did not abuse its discretion by deeming the printout sufficiently authenticated by the officer who conducted the chat and who converted it to a printable Wordpad document, and the trial court did not abuse its discretion in admitting the printout into evidence because it was properly authenticated and was admissible as a duplicate or an original. *Buffalo v. State*, 2010 Ark. App. 127, — S.W.3d —, 2010 Ark. App. LEXIS 118 (Feb. 11, 2010).

**Mail Return Receipt.**

In an action to quiet title to property sold at a tax sale, the return receipt for the notice sent by the state land commissioner to the former owner's prior address was properly admitted into evidence under this rule and Ark. R. Evid. 1003 because it proved delivery of the notice, regardless of who signed for it, which was all that was required. *Mays v. St. Pat Props., LLC*, 357 Ark. 482, 182 S.W.3d 84 (2004), cert. denied 543 U.S. 943, 125 S. Ct. 353, 160 L. Ed. 2d 255 (2004).

**Notes.**

Typewritten notes by a jail matron of statements she heard between the defendants when they visited one another were properly admitted into evidence, notwithstanding the absence of the original handwritten notes made by the jail matron, where there was no assertion that the jail matron exercised bad faith in losing or destroying the handwritten notes and the jail matron testified that she simply could not find the handwritten notes. *Efurd v. State*, 334 Ark. 596, 976 S.W.2d 928 (1998).

**Tangible Objects.**

In a criminal case, a witness may testify concerning tangible objects which are involved without producing the articles, and this is not a violation of the best evidence rule, which applies only to writings, photographs and recordings, nor does it violate the hearsay rule. *Johnson v. State*, 289 Ark. 589, 715 S.W.2d 441 (1986).

**Tape Recording.**

The trial court did not err in admitting a tape recording of the confession although only



a transcript was available at the *Denno* hearing, inasmuch as the tape was the best evidence of the confession. *Sumlin v. State*, 266 Ark. 709, 587 S.W.2d 571 (1979).

In prosecution for delivery of a controlled substance, the trial court did not abuse its discretion in refusing to allow the jury to hear the recording of the defendant's meeting with an undercover narcotics investigator, but allowing the jury to hear a transcript of the recording with references to prior marijuana sales deleted. *Briggs v. State*, 18 Ark. App. 292, 715 S.W.2d 223 (1986).

A recording is admissible unless the inaudible portions are so substantial as to render the recording as a whole untrustworthy; further, the introduction of recordings is a matter within the trial court's discretion. *Hamm v. State*, 301 Ark. 154, 782 S.W.2d 577 (1990); *Loy v. State*, 310 Ark. 33, 832 S.W.2d 499 (1992).

Fact that a tape is inaudible in many places does not render the intelligible portions of the tape inherently prejudicial and unreliable, as the tape may still be probative on certain points. *Loy v. State*, 310 Ark. 33, 832 S.W.2d 499 (1992).

In defendant's rape case, the court did not violate the best evidence rule by admitting a transcript of defendant's statement to the police to be used as a guide while the tape of the statement played because an officer testified that he had compared the transcript with the tape and concluded that the transcript was accurate. Furthermore, if the audio tape had been played without the transcript, it would have been necessary to replay the recording several times in order to ensure the jurors' understanding of the statement. *Bell v. State*, 371 Ark. 375, 266 S.W.3d 696 (2007).

**Cited:** *Brenneman v. State*, 264 Ark. 460, 573 S.W.2d 47 (1978), cert. denied 442 U.S. 931, 99 S. Ct. 2863, 61 L. Ed. 2d 299 (1979); *Conti v. State*, 10 Ark. App. 352, 664 S.W.2d 502 (1984); *Shamlin v. Shuffield*, 302 Ark. 164, 787 S.W.2d 687 (1990); *Sossamon v. State*, 31 Ark. App. 131, 789 S.W.2d 738 (1990); *Myers v. State*, 317 Ark. 70, 876 S.W.2d 246 (1994); *JAG Consulting v. Eubanks*, 77 Ark. App. 232, 72 S.W.3d 549 (2002); *Eastin v. State*, 370 Ark. 10, 257 S.W.3d 58 (2007); *Bobo v. State*, 102 Ark. App. 329, 285 S.W.3d 270 (2008).

### Rule 1003. Admissibility of duplicates.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity or continuing effectiveness of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

**Cross References.** Photographically reproduced records admissible in court, § 16-46-108.

### CASE NOTES

#### ANALYSIS

Applicability.  
Computer printout.  
Dental records.  
Lab reports.  
Letters.  
Mail return receipt.

#### Applicability.

Under Ark. R. Evid. 1002 and this rule, the heirs only complained that the son's exhibits were not certified copies and never raised questions as to their authenticity or continuing effectiveness of certified copies. *Heirs at Law of Butler v. Butler*, 2009 Ark. App. 660, 345 S.W.3d 225 (2009).

#### Computer Printout.

Trial court did not abuse its discretion in admitting computer printouts of defendant's internet conversations with an alleged 14 year old, who was really an undercover officer,

into evidence during defendant's trial for internet stalking of a child because the evidence reflected that the hard drive was destroyed by a computer virus; the testimony of the undercover officer and a computer expert sufficiently authenticated the printouts such that they were admissible as duplicates. *Dirickson v. State*, 104 Ark. App. 273, 291 S.W.3d 198 (2009).

In a case in which defendant appealed his conviction for violating § 5-27-306(a)(2)(C), he unsuccessfully argued the trial court abused its discretion in admitting into evidence a cut-and-paste word document from the police computer system because it was not properly authenticated or the best evidence. The trial court did not abuse its discretion by deeming the printout sufficiently authenticated by the officer who conducted the chat and who converted it to a printable Wordpad document, and the trial court did not abuse

its discretion in admitting the printout into evidence because it was properly authenticated and was admissible as a duplicate or an original. *Buffalo v. State*, 2010 Ark. App. 127, — S.W.3d —, 2010 Ark. App. LEXIS 118 (Feb. 11, 2010).

#### **Dental Records.**

In a prosecution for murder by drowning, the trial court did not abuse its discretion in admitting copies of two of the victim's dental charts, where the two dentists who compiled the original dental charts testified that the admitted charts were copies of the original dental charts, where the original charts were unavailable because they were being held by the clerk of the Arkansas Supreme Court as evidence in an earlier criminal case, and where the defendant never challenged the identification of the victim during the trial. *Wallace v. Lockhart*, 701 F.2d 719 (8th Cir.), cert. denied 464 U.S. 934, 104 S. Ct. 340, 78 L. Ed. 2d 308 (1983).

#### **Lab Reports.**

A facsimile copy of the crime lab report that contained the analyst's attestation, rather than the original itself, held admissible. *Ingram v. State*, 48 Ark. App. 105, 891 S.W.2d 805 (1995).

#### **Letters.**

Defendant alleged the letter he wrote to his wife while they were both in jail was altered, whereas the wife testified that the photocopy introduced was accurate; defendant did not bear his burden of proof in showing that there was a genuine question of authenticity, and there was no abuse of discretion in the admission of the copy. *Whitham v. State*, 2009 Ark. 477, — S.W.3d —, 2009 Ark. LEXIS 653 (2009).

#### **Mail Return Receipt.**

In an action to quiet title to property sold at a tax sale, the return receipt for the notice sent by the state land commissioner to the former owner's prior address was properly admitted into evidence, under Ark. R. Evid. 1002 and this rule, because it proved delivery of the notice, regardless of who signed for it, which was all that was required. *Mays v. St. Pat Props., LLC*, 357 Ark. 482, 182 S.W.3d 84 (2004), cert. denied 543 U.S. 943, 125 S. Ct. 353, 160 L. Ed. 2d 255 (2004).

**Cited:** *Sossamon v. State*, 31 Ark. App. 131, 789 S.W.2d 738 (1990); *Myers v. State*, 317 Ark. 70, 876 S.W.2d 246 (1994); *Robinson v. State*, 317 Ark. 512, 879 S.W.2d 419 (1994).

### **Rule 1004. Admissibility of other evidence of contents.**

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

- (1) *Originals Lost or Destroyed.* All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;
- (2) *Original Not Obtainable.* No original can be obtained by any available judicial process or procedure;
- (3) *Original in Possession of Opponent.* At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing; and he does not produce the original at the hearing; or
- (4) *Collateral Matters.* The writing, recording or photograph is not closely related to a controlling issue.

#### **CASE NOTES**

##### **ANALYSIS**

Originals destroyed.

Other evidence held inadmissible.

#### **Originals Destroyed.**

An exhibit consisting of a handwritten copy of entries made on a police radio log early in the morning on which a police officer was murdered was properly introduced under this rule as the best evidence since the original log was later destroyed and since the exhibit simply duplicates identical evidence from nu-

merous other sources or undisputed points. *Renton v. State*, 274 Ark. 87, 622 S.W.2d 171 (1981).

A statement made by the defendant to the police was reliably proven, even though the original signed copy of the confession had been destroyed and was therefore not available at the trial, where a copy of the statement was used to refresh the memory of the three officials who were present during the interrogation and all three witnesses testified that they remembered the statement being



made by the defendant and recalled in general terms what was said. *Smith v. State*, 286 Ark. 247, 691 S.W.2d 154 (1985).

Printouts of e-mails from computers to which they were forwarded were properly used at trial as the printouts were the best evidence of the original emails exchanged by defendant and her victim; the originals could not be printed from defendant's computer as a result of it having crashed and they could not be printed from the victim's computer as a result of his having deleted them. *Bobo v. State*, 102 Ark. App. 329, 285 S.W.3d 270 (2008).

Trial court did not abuse its discretion in admitting computer printouts of defendant's internet conversations with an alleged 14 year old, who was really an undercover officer,

into evidence during defendant's trial for internet stalking of a child because the evidence reflected that the hard drive was destroyed by a computer virus; as such, the hard drive was not required. *Dirickson v. State*, 104 Ark. App. 273, 291 S.W.3d 198 (2009).

#### **Other Evidence Held Inadmissible.**

A party's recollection of the contents of a letter written in 1975 was not admissible under this rule since (1) the party's testimony did not establish that the original was lost or otherwise unobtainable, just that he gave it to his father's lawyer and never saw it again, and (2) the purported contents of the letter related to a controlling issue. *Hopper v. Daniel*, 72 Ark. App. 344, 38 S.W.3d 370 (2001).

**Cited:** *Jacobs v. Yates*, 342 Ark. 243, 27 S.W.3d 734 (2000).

### **Rule 1005. Public records.**

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy complying with the foregoing cannot be obtained by the exercise of reasonable diligence, other evidence of the contents may be admitted.

#### **RESEARCH REFERENCES**

**U. Ark. Little Rock L.J.** *Heller and Sallings, Survey of Public Law*, 3 U. Ark. Little Rock L.J. 296.

#### **CASE NOTES**

##### **Compilation of Ordinances.**

Under this rule, a printed compilation of ordinances when duly authenticated as correct is admissible as proof of an ordinance contained in the compilation, where it is established that the original ordinance has been misplaced or destroyed. *City of Benton v.*

*Nethercutt*, 264 Ark. 769, 574 S.W.2d 269 (1978).

**Cited:** *Hughes v. State*, 17 Ark. App. 34, 702 S.W.2d 817 (1986); *First Nat'l Bank v. Hess*, 23 Ark. App. 129, 743 S.W.2d 825 (1988); *Stivers v. State*, 64 Ark. App. 113, 978 S.W.2d 749 (1998).

### **Rule 1006. Summaries.**

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

## CASE NOTES

## ANALYSIS

Admissibility.  
Notice.

**Admissibility.**

Summary evidence properly admitted. *Ward v. Gerald E. Prince Constr., Inc.*, 293 Ark. 59, 732 S.W.2d 163 (1987).

In a challenge to assessment against employers of unpaid withholding taxes, the trial court did not err in allowing the Arkansas Department of Finance and Administration to introduce audit summaries that were based on the employers' tax records; this rule did not require prior notice of use of summaries, and the employers possessed the source docu-

ments. *Morris v. Ark. Dep't of Fin. & Admin.*, 82 Ark. App. 124, 112 S.W.3d 378 (2003).

**Notice.**

This rule does not require that a party notify an opposing party that he intends to introduce a summary; it merely mandates the originals, or duplicates, which are underlying documents of a summary, be made available for examination or copying or both, by other parties at a reasonable time and place and allows the trial court discretion to order those documents to be produced in court. *Ward v. Gerald E. Prince Constr., Inc.*, 293 Ark. 59, 732 S.W.2d 163 (1987).

**Cited:** *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001).

**Rule 1007. Testimony or written admission of party.**

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

**Rule 1008. Functions of court and jury.**

Whenever the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised whether (1) the asserted writing ever existed, or (2) another writing, recording, or photograph produced at the trial is the original, or (3) other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

## CASE NOTES

**Cited:** *Lake v. Lake*, 262 Ark. 852, 562 S.W.2d 68 (1978).

**Rule 1009. Translation of foreign-language documents and recordings.**

(a) *Translations.* A translation of foreign-language documents and recordings, including transcriptions, that is otherwise admissible under the Arkansas Rules of Evidence shall be admissible upon the affidavit of a "qualified translator," as defined in paragraph (h) of this rule, setting forth the qualifications of the translator, and certifying that the translation is fair, accurate, and complete. This affidavit, along with the translation and the underlying foreign-language documents or recordings, shall be served upon all parties at least forty-five (45) days before the date of trial.

(b) *Objections.* Any party may object to the accuracy of another party's translation by pointing out the specific inaccuracies of the translation and by stating with specificity what the objecting party contends is a fair and



accurate translation. This objection shall be served upon all parties at least fifteen (15) days before the date of trial.

(c) *Effect of Failure to Object or Offer Conflicting Translation.* If no conflicting translation or objection is timely served, the court shall admit a translation submitted under paragraph (a) without need of proof, provided however that the underlying foreign-language documents or recordings are otherwise admissible under the Arkansas Rules of Evidence. Failure to serve a conflicting translation under paragraph (a), or failure to timely and properly object to the accuracy of a translation under paragraph (b), shall preclude a party from attacking or offering evidence contradicting the accuracy of the translation at trial.

(d) *Effect of Objections or Conflicting Translations.* In the event of conflicting translations under paragraph (a), or if objections to another party's translation are served under paragraph (b), the court shall determine whether there is a genuine issue as to the accuracy of a material part of the translation to be resolved by the trier of fact.

(e) *Expert Testimony of Translator.* Except as provided in paragraph (c), this rule does not preclude the admission of a translation of foreign-language documents and recordings at trial either by live testimony or by deposition testimony of a qualified translator.

(f) *Varying of Time Limits.* The court, upon motion of any party and for good cause shown, may enlarge or shorten the time limits set forth in this rule.

(g) *Court Appointment.* The court, if necessary, may appoint a qualified translator, the reasonable value of whose services shall be taxed as court costs.

(h) *Qualified Translator.* A "qualified translator" is an interpreter satisfying the requirements established by the Arkansas Supreme Court in *In Re: Certification for Foreign Language Interpreters in Arkansas Courts*, 338 Ark. App'x. 827 (1999) and Administrative Order Number 11. A Registry of Interpreters is maintained by the Administrative Office of the Courts. (Added October 9, 2008, effective January 1, 2009.)

## CASE NOTES

### ANALYSIS

Admissibility.  
Failure to object.

#### Admissibility.

Because the state's translator not only was uncertified, but had taken and failed the certification exam, pursuant to subsection (h) of this rule, the state's translation of defendant's statement to the police should not have been admitted or introduced as an admission of guilt. *Mendez v. State*, 2011 Ark. 536, — S.W.3d —, 2011 Ark. LEXIS 608 (Dec. 15, 2011).

#### Failure to Object.

In a case in which defendant appealed his conviction for sexual assault in the second degree, in violation of § 5-14-125(a)(4)(A)(iii),

he complained that a transcript of his interview at the police department was obtained with the assistance of a translator who was not certified by the Administrative Office of the Courts and was admitted into evidence in violation of this rule. While it was true that the translation was not made by a qualified translator as set forth in this rule, and defendant objected on that basis, he did not object to the admission of the transcript at trial; in fact, his attorney stipulated at trial that the transcript reflected the interview; furthermore, the victim's testimony alone is sufficient to support defendant's conviction. *Chavez v. State*, 2010 Ark. App. 161, — S.W.3d —, 2010 Ark. App. LEXIS 151 (Feb. 17, 2010).

## ARTICLE XI. MISCELLANEOUS RULES

### Rule 1101. Rules applicable.

(a) Except as otherwise provided in subdivision (b), these rules apply to all actions and proceedings in the [courts of this State].

(b) *Rules Inapplicable.* The rules other than those with respect to privileges do not apply in the following situations:

(1) *Preliminary questions of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104 (a).

(2) *Grand jury.* Proceedings before grand juries.

(3) *Miscellaneous proceedings.* Proceedings for extradition or rendition; [preliminary examination] detention hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) Contempt proceedings in which the court may act summarily.

**Publisher's Notes.** The bracketed material so appeared in the rule as enacted.

### CASE NOTES

#### ANALYSIS

Extradition or rendition proceedings.

Privileges.

Probation revocation proceedings.

#### Extradition or Rendition Proceedings.

The Uniform Rules of Evidence do not apply to proceedings for extradition or rendition, because the purpose of the extradition hearing is simply to determine whether the evidence of the fugitive's criminal conduct is sufficient to justify his or her extradition. *Rivera v. State*, 19 Ark. App. 100, 717 S.W.2d 493 (1986).

#### Privileges.

Evidentiary rules with respect to privileges apply to prosecutor's subpoenas as the functional equivalent of grand jury proceedings. *Holt v. McCastlain*, 357 Ark. 455, 182 S.W.3d 112 (2004).

Where an accident reconstructionist was hired by an attorney representing a driver who was involved in a car accident, the accident reconstruction report and testimony of the accident reconstructionist's employee were confidential, privileged communications that could not be subpoenaed. *Holt v. McCastlain*, 357 Ark. 455, 182 S.W.3d 112 (2004).

#### Probation Revocation Proceedings.

The Uniform Rules of Evidence, except for those with respect to privileges, do not apply

in sentencing or probation revocation proceedings; still, a defendant in such proceedings is not entitled to have rules of evidence stricter than those set out in the Uniform Rules applied in such proceedings. *Redman v. State*, 265 Ark. 774, 580 S.W.2d 945 (1979).

The Rules of Evidence are not applicable in probation revocation proceedings. *Wilson v. State*, 25 Ark. App. 45, 752 S.W.2d 46 (1988); *Tipton v. State*, 47 Ark. App. 187, 887 S.W.2d 540 (1994).

Although the rules of evidence, including the hearsay rule, are not strictly applicable in revocation proceedings, the right to confront the witnesses is. *Jones v. State*, 31 Ark. App. 23, 786 S.W.2d 851 (1990).

Even if a defendant had preserved a claim regarding a court's failure to place defendant under oath in defendant's probation revocation proceeding, the claim would have failed because the rules of evidence did not apply in a proceeding to revoke probation. *Ingram v. State*, 2009 Ark. App. 729, 363 S.W.3d 6 (2009).

**Cited:** *Fitzpatrick v. State*, 7 Ark. App. 246, 647 S.W.2d 480 (1983); *K.N. v. State*, 360 Ark. 579, 203 S.W.3d 103 (2005); *Freeman v. State*, 2010 Ark. App. 8, — S.W.3d —, 2010 Ark. App. LEXIS 5 (2010).



**Rule 1102. Title.**

These rules shall be known as the Arkansas Rules of Evidence and may be cited as A.R.E. Rule —. (Acts 1975 (Extended Sess., 1976), No. 1143, § 1, p. 2799; adopted October 13, 1986.)

**Publisher's Notes.** Adoption of Uniform Rules of Evidence. The Per Curiam of October 13, 1986, that adopted the Uniform Rules of Evidence read: "As explained in today's opinion in *Ricarte v. State*, 290 Ark. 100, 717 S.W.2d 488 (Oct. 13, 1986), the court under its

statutory and rule-making authority adopts the Uniform Rules of Evidence as they are set forth in Act 1143 of 1975 (Extended Session, 1976). The Rules will be applicable as stated in Rule 1101 ... ."

**RESEARCH REFERENCES**

**Ark. L. Rev.** Evidentiary Aspects of Manufacturer Recommendations in Establishing Physicians' Standard of Care, 31 Ark. L. Rev. 477.

**CASE NOTES****Repeal of Dead Man's Statute.**

Since the dead man's statute (Ark. Const., Schedule, § 2) (1874) was expressly repealed by the Uniform Rules of Evidence, a party who filed a claim against an estate for the

value of services rendered to the testator shortly before his death could testify about the services rendered. *Davis v. Hare*, 262 Ark. 818, 561 S.W.2d 321 (1978).





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# RULES OF CIVIL PROCEDURE

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## ARTICLE I. SCOPE OF RULES — ONE FORM OF ACTION

### Rule 1. Scope of rules.

These rules shall govern the procedure in the circuit courts in all suits or actions of a civil nature with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy and inexpensive determination of every action. (Amended November 18, 1996, effective March 1, 1997; amended May 24, 2001, effective July 1, 2001.)

**Publisher's Notes.** The Per Curiam order of the Supreme Court entered on December 18, 1978, adopting the Rules of Civil Procedure, and the supplemental Per Curiam order of December 18, 1978, read: "PER CURIAM. The Court, pursuant to Act 38 of 1973 and to its constitutional and inherent power to regulate procedure in the courts, hereby adopts the Rules of Civil Procedure submitted by the Civil Procedure Revision Committee, with modifications made by the Court. These Rules will be effective July 1, 1979. The Court expresses its great appreciation for the untiring work done by the members of the Committee and for the various suggestions made by attorneys in response to the Court's invitation.

"Without limiting the effect of the supersession rule adopted by this court as part of the Arkansas Rules of Civil Procedure, Rules of Appellate Procedure and Rules for Inferior Courts, pursuant to Act 38 of the General Assembly of 1973, we deem the following statutes (designated by section numbers in Ark.Stat., 1947, Annotated) to be specifically superseded by those rules:

"§ 26-401; § 26-402 through § 26-406; § 26-501; § 26-601; through § 26-603; § 26-605; § 26-901; § 26-902; § 26-1301 through § 26-1307; § 26-1309; § 26-1310; § 26-1315 through § 26-1318; § 26-1322;

"§ 27-201; § 27-206; § 27-303; § 27-308; § 27-309; § 27-319; § 27-801; § 27-330; § 27-332; § 27-336 through § 27-338; § 27-804; § 27-806 through § 27-809; § 27-814; § 27-816; § 27-833; § 27-1012 through § 27-1014; § 27-1102; § 27-1103; § 27-1105; § 27-

1113 through § 27-1121; § 27-1123; § 27-1130 through § 27-1134; § 27-1134.1; § 27-1134.2; § 27-1135 through § 27-1140; § 27-1146; § 27-1147; § 27-1150 through § 27-1152; § 27-1158; § 27-1159; § 27-1161 through § 27-1163; § 27-1208; § 27-1301; § 27-1304; § 27-1305; § 27-1401; § 27-1405; § 27-1501 through § 27-1504; § 27-1601; § 27-1705 through § 27-1716; § 27-1719; § 27-1721; § 27-1724; § 27-1729; § 27-1741.2; § 27-1744; § 27-1746 through § 27-1753; § 27-1762; § 27-1801; § 27-1803; § 27-1804; § 27-1806 through § 27-1818; § 27-1901; § 27-1902; § 27-1904 through § 27-1908; § 27-2009; § 27-2104; § 27-2107.3; § 27-2110; § 27-2110.1; § 27-2117 through § 27-2125; § 27-2127.2 through § 27-2127.7; § 27-2127.9 through § 27-2127.11; § 27-2129; § 27-2129.1; § 27-2308; § 27-2310; § 27-2312; § 27-2401; § 27-2504; § 27-1741.1;

"§ 28-351; § 28-352; § 28-353(1); § 28-355; § 28-356; § 28-358 through § 28-360; § 28-401 through § 28-413; § 28-502; § 28-505 through § 28-508; § 28-510; § 28-511; § 28-713; § 28-357; § 29-102; § 29-111; § 29-113; § 29-119; § 29-211; § 29-401; § 29-402; § 29-409; § 29-504 through § 29-512; § 30-102.

"The following rules are deemed to be superseded:

"Rule 13, Rules Governing Procedures in Circuit and Chancery Courts.

"Rule 26A, Rules of Supreme Court.

"The question of supersession of all other rules and statutes will be determined by the supersession rule and Act 38 of 1973."



The Per Curiam of November 24, 1986, provided: "Added to the list of statutes deemed superseded by the Arkansas Rules of Civil Procedure are the following sections as codified in Arkansas Statutes Annotated: §§ 22-406.3; 27-1003; 27-1004; 27-1005; 27-1006; 27-1007; 27-1144; 27-1160; 27-1407; 27-1801; 27-2102; 27-2505; 28-318; 28-332; 28-346; 28-348; 28-349; 28-350; 28-353; 28-354; 28-512; 28-513; 28-514; 28-515; 28-517; 28-519; 28-525; to the extent it conflicts with Ark. R. Civ. P. 45(d); 28-526; 28-527; 28-537; 28-538; 28-539; 28-540; 29-120; 29-410; 30-906; 32-103; 32-201; 32-202; 32-203; 32-206; 32-401; 36-101; 36-102; 36-103; 36-104; 36-106; 36-108; 39-226 (as to civil cases only); 39-232; 39-234; and 64-223F.

"Added to the list of statutes deemed superseded by the Arkansas Rules of Appellate Procedure and the Rules for Inferior Courts are the following sections as codified in Arkansas Statutes Annotated: §§ 26-507; 27-2101; 27-2102; 27-2103; 27-2106.1; 27-2106.2; 27-2106.3 through 27-2106.6; 27-2127.1; 27-2127.8; and 31-165."

The Per Curiam order of the Supreme Court delivered on November 21, 1988, provided:

"Added to the list of statutes deemed superseded by the Arkansas Rules of Civil Procedure are the following sections as codified in the Arkansas Code Annotated (1987): §§ 16-44-101 through 16-44-106; 16-44-107(b); 16-44-109 through 16-44-113; 16-44-115; and 16-44-121.

"As a result of this order and the order of November 24, 1986, In the Matter of Statutes Deemed Superseded by the Arkansas Rules of Civil Procedure, 290 Ark. 616, 719 S.W.2d 436

(1986), SubChapter 1 of Chapter 44 of the Arkansas Code of 1987 has been deemed superseded in its entirety."

**Reporter's Notes to Rule 1:** 1. This rule is substantially the same as Federal Rules of Civil Procedure (FRCP) Rule 1. Merger of Arkansas law and equity proceedings is not contemplated by these Rules, thus reference is made to Circuit, Chancery, and Probate Courts.

2. Rule 81 makes exceptions to the applicability of these rules for special statutory proceedings. An example is Probate Court proceedings as described in *Ark. Stat. Ann.*, § 62-2105, et seq., (Repl. 1971).

3. In instances where the specific statutory action insufficiently described the procedure to be used, these rules will be applied.

#### **Addition to Reporter's Notes, 1997**

**Amendment:** This revision, which adds the words "and administered" to the second sentence, is based on the 1993 amendment to the corresponding federal rule. Its purpose is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. Attorneys, as officers of the court, share this responsibility.

#### **Addition to Reporter's Notes, 2001**

**Amendment:** The reference to chancery and probate courts in the first sentence has been deleted in light of Constitutional Amendment 80, the new judicial article approved by the voters in November 2000. That amendment established the circuit courts as the state's "trial courts of original jurisdiction" and abolished the separate chancery and probate courts.

## RESEARCH REFERENCES

**Ark. L. Rev.** Cox and Newbern, New Civil Procedure: The Court That Came in From the Code, 33 Ark. L. Rev. 1.

Brill, *Harvey v. Eastman Kodak Company*: Faculty Note, 34 Ark. L. Rev. 722.

Note, Default Judgments in Arkansas, 43 Ark. L. Rev. 921.

Biggers, Special Proceedings in Arkansas after *Weiss v. Johnson*, 52 Ark. L. Rev. 233.

## CASE NOTES

### **Purpose.**

The objective of the rules of procedure is the orderly and sufficient resolution of disputes. *Bradford v. Bradford*, 52 Ark. App. 81, 915 S.W.2d 723 (1996).

**Cited:** *Gautney v. Rapley*, 2 Ark. App. 116, 617 S.W.2d 377 (1981); *Whitlock v. G.P.W. Nursing Home, Inc.*, 283 Ark. 158, 672 S.W.2d 48 (1984); *Mixon v. Anderson* (In re Ozark Restaurant Equip. Co.), 61 Bankr. 750 (W.D.

Ark. 1986), aff'd 816 F.2d 1222 (8th Cir. 1987); *May v. Bob Hankins Distrib. Co.*, 301 Ark. 494, 785 S.W.2d 23 (1990); *Wright v. Eddinger*, 320 Ark. 151, 894 S.W.2d 937 (1995); *Weiss v. Johnson*, 331 Ark. 409, 961 S.W.2d 28 (1998), overruled in part, *Wright v. City of Little Rock*, 366 Ark. 96, 233 S.W.3d 644 (2006); In re Implementation of Amendment 80: Amendments to Rules of Civ. Procedure & Inferior Court Rules, — Ark. —,

S.W.3d —, 2001 Ark. LEXIS 707 (May 24, 2001); *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004).

## Rule 2. One form of action.

There shall be one form of action to be known as “civil action.” (Amended May 24, 2001, effective July 1, 2001.)

**Reporter’s Notes to Rule 2:** 1. The first sentence is the same as FRCP 2. As in the Federal Rules and code pleading, the intent here is to obviate the “forms of action.”

2. The second sentence makes clear the intent to preserve the distinction between law and equity cases. See Rule 1, Reporter’s Note 1.

**Addition to Reporter’s Notes, 2001 Amendment:** The second sentence, which provided that actions in equity were to be brought in chancery court and actions at law in circuit court, has been deleted in conformity with Constitutional Amendment 80, under which the circuit courts are the state’s “trial courts of original jurisdiction.” The effect of this change in the rule is to merge law and equity, as contemplated by Amendment 80. As the U.S. Supreme Court observed with respect to the corresponding federal rule, “law and equity are procedurally combined; nothing turns now upon the form of the action or the procedural devices by which the parties happen to come before the court.” *Ross v. Bernhard*, 396 U.S. 531, 540 (1970).

Section 6(B) of Amendment 80 authorizes the Supreme Court to promulgate rules governing the organization of circuit courts into subject matter divisions. Administrative Order No. 14, adopted by the Supreme Court pursuant to this authorization, requires that the circuit judges of each judicial circuit “establish the following subject-matter divisions in each county of the circuit: criminal, civil, juvenile, probate, and domestic relations.” However, the order expressly provides that this designation of divisions “is for the purpose of judicial administration and caseload

management and is not for the purpose of subject-matter jurisdiction.” At all times, a circuit judge has “the authority to hear all matters within the jurisdiction of the circuit court and has the affirmative duty to do so regardless of the designation of divisions.”

The merged system is to be contrasted with and distinguished from the prior practice in Arkansas during the period in which chancery courts had not been created in all counties. In counties without chancery courts, the circuit court “was a court of dual jurisdiction, the judge presiding in one division or ‘on the law side’ as a superior court of common law, and also sitting in chancery as judge of a court of equity . . .” *Morgan Utilities, Inc. v. Perry County*, 183 Ark. 542, 547, 37 S.W.2d 74, 77 (1931). With the merger of law and equity, there are not separate law and equity “sides” of the circuit court.

Although law and equity have been merged, equitable principles may be applied where appropriate. This has been so in the federal courts. *E.g., Stainback v. Ho Hock Ke Lok Po*, 336 U.S. 368, 382 n.26 (1949) (“Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected”); *In re United States Brass Corp.*, 110 F.3d 1261, 1267 (7th Cir. 1997) (“Ever since law and equity were merged in the federal courts . . . more than a half century ago, the courts have had a free hand in importing equitable defenses into suits at law”). Moreover, the merger does not alter substantive rights. *Grupo Mexicano de Desarrollo, S.A.*, 527 U.S. 308, 322 (1999).

## RESEARCH REFERENCES

**Ark. L. Rev.** First National Bank of Dewitt v. Cruthis: An Analysis of the Right to a Jury

Trial in Arkansas After the Merger of Law and Equity, 60 Ark. L. Rev. 563.

## CASE NOTES

### ANALYSIS

Actions.  
Delinquency case.  
Election contest.  
Motions.  
Policy.

Probate proceeding.

### Actions.

An “action” is an ordinary proceeding in a court of justice by one party against another for the enforcement or protection of a private right or the redress or prevention of a private



wrong; all proceedings which are not ordinary proceedings are “special proceedings” created exclusively by statute. In re Martindale, 327 Ark. 685, 940 S.W.2d 491 (1997).

#### **Delinquency Case.**

State was not entitled to appeal dismissal for violation of speedy trial in the delinquency proceeding, because under Ark. R. App. P. Crim. 3, the correct and uniform administration of justice was not at issue, when after acknowledging its error in sua sponte nolle prosequing the delinquency petition, the circuit court determined which periods of time were excludable for the purposes of speedy trial. State v. S.L., 2012 Ark. 73, — S.W.3d —, 2012 Ark. LEXIS 90 (Feb. 23, 2012).

#### **Election Contest.**

Local option election contest was a special proceeding; it was not necessary that all of the rules of civil procedure be applied. Garrett v. Andrews, 294 Ark. 160, 741 S.W.2d 257 (1987), cert. denied 487 U.S. 1219, 108 S. Ct. 2873, 101 L. Ed. 2d 908 (1988).

#### **Motions.**

Although the subject of responses to motions is contemplated by the ARCP, the subject is not clearly addressed therein. Smith v. Walt Bennett Ford, Inc., 314 Ark. 591, 864 S.W.2d 817 (1993).

#### **Policy.**

An order granting partial summary judgment on the issue of punitive damages is not a final order from which an appeal can be taken and is contrary to the policy of prohibiting piecemeal appeals. Austin v. First Nat'l Bank, 305 Ark. 456, 808 S.W.2d 773 (1991).

#### **Probate Proceeding.**

Dismissal of a suit contesting a will cannot be done without prejudice, since a probate proceeding is a special proceeding rather than

an “action” because it is not a civil action under this rule or ARCP 3, and since a will contestant cannot take a nonsuit under ARCP 41, because such a contest is not an independent proceeding in itself; thus, dismissal with prejudice is necessary, since it would seriously disrupt the administration and distribution of estates if a will contest would be dismissed voluntarily or without prejudice and refiled at some indefinite later date. Screeton v. Crumpler, 273 Ark. 167, 617 S.W.2d 847 (1981).

Where the guardian of the wife's estate failed to timely obtain letters of administration within forty days of the wife's death, the guardian lost its authority to prosecute an action to contest her husband's will on her behalf. Ark. R. Civ. P. 25 was inapplicable, because this was a special proceeding and no substitution of parties was at issue. First Sec. Bank v. Estate of Leonard, 369 Ark. 213, 253 S.W.3d 434 (2007).

**Cited:** *Mixon v. Anderson* (In re Ozark Restaurant Equip. Co.), 61 Bankr. 750 (W.D. Ark. 1986), aff'd 816 F.2d 1222 (8th Cir. 1987); *Wiederkehr Wine Cellars, Inc. v. City Nat'l Bank*, 300 Ark. 537, 780 S.W.2d 551 (1989); *Brantley v. Davis*, 305 Ark. 68, 805 S.W.2d 75 (1991); *University Hosp. v. Undernehr*, 307 Ark. 445, 821 S.W.2d 26 (1991); *Arkansas Intercollegiate Conference v. Parnham*, 309 Ark. 170, 828 S.W.2d 828 (1992); *Crockett & Brown v. Wilson*, 314 Ark. 578, 864 S.W.2d 244 (1993); *Tracor/MBA v. Flowers*, 41 Ark. App. 186, 850 S.W.2d 30 (1993); *Williamson v. Misemer*, 316 Ark. 192, 871 S.W.2d 396 (1994); *Sosebee v. County Line Sch. Dist.*, 320 Ark. 412, 897 S.W.2d 556 (1995); In re Implementation of Amendment 80: Amendments to Rules of Civ. Procedure & Inferior Court Rules, — Ark. —, — S.W.3d —, 2001 Ark. LEXIS 707 (May 24, 2001); *Deaver v. Faucon Props.*, 367 Ark. 288, 239 S.W.3d 525 (2006).

## **ARTICLE II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS**

### **Rule 3. Commencement of action — “Clerk” defined.**

(a) A civil action is commenced by filing a complaint with the clerk of the court who shall note thereon the date and precise time of filing.

(b) The term “clerk of the court” as used in these Rules means the circuit clerk and, with respect to probate matters, any county clerk who serves as ex officio clerk of the probate division of the circuit court pursuant to Ark. Code Ann. § 14-14-502(b)(2)(B). In counties where the county clerk serves as the ex officio clerk of any division of the circuit court, the filing requirement shall be satisfied when the complaint is filed with either the circuit clerk or the county clerk.

(c) The clerk shall assign a new case number and charge a new filing fee for the filing of any case that is refiled after having been dismissed.

(d) No other claim or counterclaim for relief, including without limitation, divorce, annulment, separate maintenance, or paternity, shall be asserted in an action filed under the Domestic Abuse Act, Ark. Code Ann. § 9-15-101 *et seq.*, but a separate action seeking other relief shall be filed, and the clerk shall assign a new case number and charge a filing fee unless the filing fee is waived pursuant to Rule 72 of these rules.

(e) A petition for adoption cannot be asserted in a guardianship proceeding, but a separate action shall be filed, and the clerk shall assign a new case number and charge a filing fee unless the filing fee is waived pursuant to Rule 72 of these rules. (Amended May 16, 1983; amended May 24, 2001, effective July 1, 2001; amended March 13, 2003; amended February 10, 2005; amended June 2, 2011, effective July 1, 2011; amended February 23, 2012.)

**Publisher's Notes.** The Per Curiam of May 24, 2001, provided that this Rule contain a transitional provision: "Transitional Provision. For the period July 1, 2001 through December 31, 2001, probate matters shall continue to be filed with the same clerk where such matters were filed immediately prior to July 1, 2001."

**Reporter's Notes to Rule 3:** 1. This Rule changes Arkansas law. The statute, *Ark. Stat. Ann.* § 27-301 (Repl. 1962), which is superseded by this rule provided, in part, that an action was commenced by filing a complaint and placing it and a summons in the hands of the sheriff of the proper County. Under this Rule, an action will commence without regard to receipt by the process server, subject only to the requirement that service be completed within 60 days from the filing of the complaint, unless the time for service has been extended by the Court.

2. This rule will do away with uncertainty in "race to venue" and statute of limitation cases as to where or when the action was first commenced. It will also do away with the need to decide whether the Complaint and Summons have been placed in the hands of the sheriff with reasonable expectations of service or whether the Complainant has acted in good faith in trying to effect service. See *Williams v. Edmondson and Ward*, 257 Ark. 837, 250 S.W.2d 260 (1975). Instead, where service is in issue under the 60 days or extension proviso, actual service will be the standard. If actual service is not made within 60 days, the Court may extend the time for service, thus protecting the plaintiff against the running of the statute where there is good cause to do so.

3. FRCP 3 contains no proviso regarding the obtaining of service of process within a specified period after the complaint is filed. Federal courts are thus plagued with the question whether filing a complaint tolls the

statute of limitations where there is an allegation of lack of diligence in obtaining service. See Wright and Miller, *Federal Practice and Procedure*, § 1056 (1969). This rule will effectively cause the decision whether delay in service is justified to be made within 60 days of filing rather than at some indefinite later time.

4. The term "proper court" means one which has jurisdiction of the subject matter and parties described in the complaint and in which venue is properly laid.

**Addition to Reporter's Notes, 1983 Amendment:** The words of the first sentence of the rule were changed from "precise date and time of filing" to "date and precise time of filing."

A second sentence of the rule had provided that an action would not be deemed commenced unless service were obtained within 60 days of filing, with provisions for extension of the time limit. That sentence was deleted, and the matter of the time within which service must be obtained is addressed in Rule 4(i).

**Addition to Reporter's Notes, 2001 Amendment:** The word "proper," which modified "court" in the original version of the rule, has been deleted. Also, the one sentence that comprised the rule has been designated as subdivision (a) and a new subdivision (b) added to define the term "clerk of the court."

As the original Reporter's Notes accompanying this rule make plain, the "proper court" was one with jurisdiction over the subject matter. When the rule was adopted in 1978, that jurisdiction was divided among three courts — circuit, chancery, and probate. Under Constitutional Amendment 80, however, the circuit court is the single trial court of general jurisdiction.

The original Reporter's Notes to this rule also state that the term "proper court" referred to the court "in which venue is properly



laid.” This issue has since been addressed in Rule 12(h)(3), which provides that in cases where venue is improper, the court may either “dismiss the action or direct that it be transferred to a county where venue would be proper.” In the event of a transfer pursuant to this provision, the action remains “commenced” as of the date of the original filing. If the action is dismissed, it was nonetheless commenced for statute of limitations purposes and may be refiled within one year under the savings statute, Ark. Code Ann. § 16-56-126. *See Forrest City Machine Works v. Lyons*, 315 Ark. 173, 866 S.W.2d 372 (1993) (savings statute is applicable when action is dismissed for insufficient service of process).

Subdivision (b) has been added in light of Administrative Order No. 14 of the Supreme Court and Act 997 of 2001. The order, adopted pursuant to Section 6(B) of Amendment 80, requires the judges of each judicial circuit to establish the following divisions: criminal, civil, juvenile, probate, and domestic relations divisions. Act 997, which amended Ark. Code Ann. § 14-14-502(a)(2)(B), provides that in those counties in which county clerks have been elected, the county clerk “may be ex officio clerk of the probate division of circuit court, if such division exists, of the county until otherwise provided by the General Assembly.” Consequently, in some counties probate proceedings will be initiated by a filing in the county clerk’s office, and in such cases the county clerk will be the “clerk of the court” for other purposes under these Rules.

Most probate matters are “special proceedings” within the meaning of Rule 81(a) and thus governed by statutory procedures, if any, rather than by these Rules. *See, e.g., In re Adoption of Martindale*, 327 Ark. 685, 940 S.W.2d 491 (1997) (adoption); *Screeton v. Crumpler*, 273 Ark. 167, 617 S.W.2d 847 (1981) (probate of will). However, some probate matters are civil actions. *See, e.g., Coleman v. Coleman*, 257 Ark. 404, 520 S.W.2d 239 (1974) (proceeding by which a claim against the estate of a deceased person is reduced to judgment is a civil action). The status of a particular probate matter as a special proceeding or a civil action has no bearing on where the papers are to be filed.

Filing in the wrong clerk’s office is not fatal, and the action is commenced as of the filing date. *Cf. Linder v. Howard*, 296 Ark. 414, 757

S.W.2d 562 (1995) (the timely filing of the complaint in chancery court tolled the statute of limitations even though the case should have been brought in circuit court and was transferred there after statute had run).

**Addition to Reporter’s Notes, 2003 Amendment:** The statutory reference in subdivision (b) has been corrected.

**Addition to Reporter’s Notes, 2005 Amendment:** Rule 3(b) has been amended. As the Rule states, in some counties the county clerk serves as the ex officio clerk of the probate division of the circuit court. Uncertainties have arisen in these circumstances about the effect of filing a pleading or paper with the wrong clerk. A sentence has been added to subsection (b) to make plain that, in these counties, a party complies with Rule 3(a) when the complaint is filed marked by either the circuit clerk or the county clerk. This new provision accords with pre-Amendment 80 cases. *Cf., Linder v. Howard*, 296 Ark. 414, 415-18, 757 S.W.2d 549, 550-51 (1995) (the timely filing of a complaint in chancery court tolled the statute of limitations even though the case should have been brought in circuit court and was transferred there after the statute had run.). Similar clarifying language has been added to Rule of Civil Procedure 5(c)(1) (filing papers in general), Administrative Order Number 2 (clerk’s docket and filing), and Rule of Appellate Procedure — Civil 3(b) (filing a notice of appeal).

**Addition to Reporter’s Notes, 2011 Amendment:** The amendment adds a new subdivision (c) to clarify that a new case number is to be assigned and a new filing fee charged for a case re-filed after having been dismissed. The new case number and filing fee requirements apply to cases voluntarily or involuntarily dismissed under Rule 41. The new case number and filing fee requirements do not apply to cases that have not been dismissed but have been closed subject to reopening depending on further developments in the case. Consequently, the requirements do not apply to requests for modification of visitation, custody, or child support provisions in domestic relation cases; the filing of motions for contempt citations; and other requests for court orders in cases that have been closed, but not dismissed. However, other fees or charges authorized by law, such as case reopening fees, may be imposed.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Heller, Survey of Civil Procedure, 3 U. Ark. Little Rock L.J. 172.

Survey — Civil Procedure, 12 U. Ark. Little Rock L.J. 135.

Seventeenth Annual Survey of Arkansas Law — Civil Procedure, 17 U. Ark. Little Rock L.J. 447.

## CASE NOTES

## ANALYSIS

Commencement date.  
Extension of time.  
Limitation of actions.  
Malpractice proceedings.  
Probate proceeding.  
Relief from bond.  
Supersession of statute.  
Untimely service of process.

**Commencement Date.**

Under this rule, an action is commenced by the filing of a complaint with the clerk of the proper court, and the establishment of venue and the tolling of a statute of limitations is based on the date the complaint is filed; however, the commencement date is subject to the plaintiff completing service within 120 days from the date of filing of the complaint, unless the time for service has been extended by the court under ARCP 4(i). *Forrest City Mach. Works, Inc. v. Lyons*, 315 Ark. 173, 866 S.W.2d 372 (1993).

The effectiveness of the commencement date is dependent upon meeting the requirements of ARCP 4(i), which provides in part that service of process on a defendant must be accomplished within 120 days after the filing of the complaint. *Sublett v. Hipps*, 330 Ark. 58, 952 S.W.2d 140 (1997).

Although the amended complaint in parents' medical malpractice action was filed before the expiration of the two-year statute of limitations in § 16-114-203, the limitations period was not tolled because a summons was never issued, and parents admitted they failed to complete service of process of the amended complaint, as required by this rule; while this rule provides that an action is commenced by filing a complaint with the clerk of the proper court, the effectiveness of the commencement date is dependent upon a party satisfying the requirements of Ark. R. Civ. P. 4(i), which provides that service of process on a defendant must be accomplished within 120 days after the filing of the complaint. *Posey v. St. Bernard's Healthcare, Inc.*, 365 Ark. 154, 226 S.W.3d 757 (2006).

Circuit court properly dismissed a patient's negligent treatment case against a chiropractor without prejudice to being refiled where the patient had commenced his case under this rule by completing timely, but defective, service, and thus, he was entitled to the shelter of § 16-56-126(a)(1). *Clouse v. Ngau Van Tu*, 101 Ark. App. 260, 274 S.W.3d 344 (2008).

**Extension of Time.**

The court's discretion as to whether to extend the time for service of process must be exercised within the time period allowed under this rule. *Simpson v. Bailey*, 279 Ark. 27,

648 S.W.2d 464 (1983).

**Limitation of Actions.**

When the court lacking subject matter jurisdiction has, by statute, authority to transfer the action to a court of competent jurisdiction, timely filing of the suit in the first court tolls the statute of limitations. *Linder v. Howard*, 296 Ark. 414, 757 S.W.2d 549 (1988).

**Malpractice Proceedings.**

Where appellant failed to comply with the 60-day statutory notice requirement prior to filing a medical malpractice complaint, this rule regarding commencement of actions superseded that statutory provision. *Weidrick v. Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992), limited, *Thomas v. Cornell*, 316 Ark. 366, 872 S.W.2d 370 (1994).

This rule directly conflicts with and supersedes § 16-114-204 [repealed], with respect to the commencement of civil actions. *Weidrick v. Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992), limited, *Thomas v. Cornell*, 316 Ark. 366, 872 S.W.2d 370 (1994).

The constitutional infirmity in § 16-114-209(b) is the provision for dismissal if an affidavit does not accompany a complaint within thirty days; therefore, a decision to dismiss a medical malpractice action for failing to file such an affidavit was reversed on appeal since this conflicted with this rule and Ark. Const., Amend. 80, § 3. *Summerville v. Thrower*, 369 Ark. 231, 253 S.W.3d 415 (2007).

Savings statute was applicable entitling the patient to refile his medical malpractice suit because his initial attempted service on the surgeon was proper; the return receipt was signed by the surgeon's secretary and the patient not only served the surgeon by certified mail, return receipt requested, restricted delivery, he further sent interrogatories certified mail, return receipt requested, restricted delivery and the secretary signed for those documents as the surgeon's agent. *McCoy v. Montgomery*, 370 Ark. 333, 259 S.W.3d 430 (2007).

**Probate Proceeding.**

Dismissal of a suit contesting a will cannot be done without prejudice, since a probate proceeding is a special proceeding rather than an "action" because it is not a civil action under ARCP 2, or this rule, and since a will contestant cannot take a nonsuit under ARCP 41, because such a contest is not an independent proceeding in itself; thus, dismissal with prejudice is necessary, since it would seriously disrupt the administration and distribution of estates if a will contest would be dismissed voluntarily or without prejudice and refiled at some indefinite later date. *Screeton v. Crumpler*, 273 Ark. 167, 617 S.W.2d 847 (1981).



**Relief from Bond.**

If a defendant seeks relief from a bond established by an inferior court [now district court], he must first commence his or her action by filing a pleading with the clerk of the superintending court. *State v. Pulaski County Circuit Court*, 327 Ark. 287, 938 S.W.2d 815 (1997).

**Supersession of Statute.**

The two subsections of § 16-114-204 [repealed] are dependent upon one another, and, since subsection (a) of this rule is superseded in its application by this rule, the entire section is superseded. *Parnley v. Moose*, 317 Ark. 52, 876 S.W.2d 243 (1994).

The grace period pursuant to § 16-114-204 [repealed] has been invalidated by this rule. *Thompson v. Dunn*, 319 Ark. 6, 889 S.W.2d 31 (1994).

**Untimely Service of Process.**

Where a building materials supplier brought an action to foreclose its materialmen's lien against the contractor and the landowners, but service of process on the contractor was not had until more than 47 months after the filing of the complaint and no order was ever obtained extending the time for service, the action was void because it was not commenced within the 15-months limitation period of § 18-44-119, the applicable materialmen's lien statute. *Calton Properties, Inc. v. Ken's Disc. Bldg. Materials, Inc.*, 282 Ark. 521, 669 S.W.2d 469 (1984).

The "dismissal without prejudice" language

in subsection (i) of this rule does not apply if the plaintiff's action is barred by a statute of limitations running as a result of the failure to obtain service within 120 days. *Bodiford v. Bess*, 330 Ark. 713, 956 S.W.2d 861 (1997).

**Cited:** *Cotton v. Cotton*, 3 Ark. App. 158, 623 S.W.2d 540 (1981); *In re Amendments to Rules of Civil Procedure*, 279 Ark. 470, 651 S.W.2d 63 (1983); *Gay v. Rabon*, 280 Ark. 5, 652 S.W.2d 836 (1983); *Morgan v. Morgan*, 8 Ark. App. 346, 652 S.W.2d 57 (1983); *Nelson v. Wakefield*, 282 Ark. 285, 668 S.W.2d 29 (1984); *Mark Twain Life Ins. Corp. v. Cory*, 283 Ark. 55, 670 S.W.2d 809 (1984); *Lubin v. Crittenden Mem. Hosp.*, 288 Ark. 370, 705 S.W.2d 872 (1986); *Dawson v. Gerritsen*, 290 Ark. 499, 720 S.W.2d 714 (1986); *Henry, Walden & Davis v. Goodman*, 294 Ark. 25, 741 S.W.2d 233 (1987); *questioned Lockley v. Easley*, 302 Ark. 13, 786 S.W.2d 573 (1990); *Hailey v. Kemp*, 300 Ark. 120, 776 S.W.2d 828 (1989); *Cole v. First Nat'l Bank*, 304 Ark. 26, 800 S.W.2d 412 (1990); *Green v. Wiggins*, 304 Ark. 484, 803 S.W.2d 536 (1991); *Egg City of Ark., Inc. v. Rushing*, 304 Ark. 562, 803 S.W.2d 920 (1991); *Brantley v. Davis*, 305 Ark. 68, 805 S.W.2d 75 (1991); *Sosebee v. County Line Sch. Dist.*, 320 Ark. 412, 897 S.W.2d 556 (1995); *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997); *In re Implementation of Amendment 80: Amendments to Rules of Civ. Procedure & Inferior Court Rules*, — Ark. —, — S.W.3d —, 2001 Ark. LEXIS 707 (May 24, 2001); *Deaver v. Faucon Props.*, 367 Ark. 288, 239 S.W.3d 525 (2006).

**Rule 4. Summons.**

(a) *Issuance.* Upon the filing of the complaint, the clerk shall forthwith issue a summons and cause it to be delivered for service to a person authorized by this rule to serve process.

(b) *Form.* The summons shall be styled in the name of the court and shall be dated and signed by the clerk; be under the seal of the court; contain the names of the parties; be directed to the defendant; state the name and address of the plaintiff's attorney, if any, otherwise the address of the plaintiff; and the time within which these rules require the defendant to appear, file a pleading, and defend and shall notify him that in case of his failure to do so, judgment by default may be entered against him for the relief demanded in the complaint.

(c) *By Whom Served.* Service of summons shall be made by (1) a sheriff of the county where the service is to be made, or his or her deputy, unless the sheriff is a party to the action; (2) any person appointed pursuant to Administrative Order No. 20 for the purpose of serving summons by either the court in which the action is filed or a court in the county in which service is to be made; (3) any person authorized to serve process under the law of the place outside this state where service is made; or (4) in the event of service by mail or commercial delivery company pursuant to subdivision (d)(8) of this rule, by the plaintiff or an attorney of record for the plaintiff.

(d) *Personal Service Inside the State.* A copy of the summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made upon any person designated by statute to receive service or as follows:

(1) Upon an individual, other than an infant by delivering a copy of the summons and complaint to him personally, or if he refuses to receive it, by offering a copy thereof to him, or by leaving a copy thereof at his dwelling house or usual place of abode with some person residing therein who is at least 14 years of age, or by delivering a copy thereof to an agent authorized by appointment or by law to receive service of summons.

(2) When the defendant is under the age of 14 years, service must be upon a parent or guardian having the care and control of the infant, or upon any other person having the care and control of the infant and with whom the infant lives. When the infant is at least 14 years of age, service shall be upon him.

(3) Where the defendant is a person for whom a plenary, limited or temporary guardian has been appointed, the service must be upon the individual and the guardian. If the person for whom the guardian has been appointed is confined in a public or private institution for the treatment of the mentally ill, service shall be upon the superintendent or administrator of such institution and upon the guardian.

(4) Where the defendant is incarcerated in any jail, penitentiary, or other correctional facility in this state, service must be upon the administrator of the institution, who shall deliver a copy of the summons and complaint to the defendant. A copy of the summons and complaint shall also be sent to the defendant by first class mail and marked as "legal mail" and, unless the court otherwise directs, to the defendant's spouse, if any.

(5) Upon a domestic or foreign corporation or upon a partnership, limited liability company, or any unincorporated association subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, partner other than a limited partner, managing or general agent, or any agent authorized by appointment or by law to receive service of summons.

(6) Upon the United States or any officer or agency thereof, by service upon any person and in such manner as is authorized by the Federal Rules of Civil Procedure or by other federal law.

(7) Upon a state or municipal corporation or other governmental organization or agency thereof, subject to suit, by delivering a copy of the summons and complaint to the chief executive officer thereof, or other person designated by appointment or by statute to receive such service, or upon the Attorney General of the state if such service is accompanied by an affidavit of a party or his attorney that such officer or designated person is unknown or cannot be located.

(8)(A)(i) Service of a summons and complaint upon a defendant of any class referred to in paragraphs (1) through (5), and (7) of this subdivision (d) may be made by the plaintiff or an attorney of record for the plaintiff by any form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or the agent of the addressee. The addressee must be a natural person specified by name, and the agent of the addressee must be authorized in accordance with U.S.



Postal Service regulations. However, service on the registered agent of a corporation or other organization may be made by certified mail with a return receipt requested.

(ii) Service pursuant to this paragraph (A) shall not be the basis for the entry of a default or judgment by default unless the record contains a return receipt signed by the addressee or the agent of the addressee or a returned envelope, postal document or affidavit by a postal employee reciting or showing refusal of the process by the addressee. If delivery of mailed process is refused, the plaintiff or attorney making such service, promptly upon receipt of notice of such refusal, shall mail to the defendant by first class mail a copy of the summons and complaint and a notice that despite such refusal the case will proceed and that judgment by default may be rendered against him unless he appears to defend the suit. Any such default or judgment by default may be set aside pursuant to Rule 55(c) if the addressee demonstrates to the court that the return receipt was signed or delivery was refused by someone other than the addressee or the agent of the addressee.

(B) Alternatively, service of a summons and complaint upon a defendant of any class referred to in paragraphs (1)-(5) and (7) of this subdivision of this rule may be made by the plaintiff by mailing a copy of the summons and the complaint by first-class mail, postage prepaid, to the person to be served, together with two copies of a notice and acknowledgement conforming substantially to a form adopted by the Supreme Court and a return envelope, postage prepaid, addressed to the sender. If no acknowledgement of service is received by the sender within twenty days after the date of mailing, service of such summons and complaint shall be made pursuant to subdivision (c)(1)-(3) of this rule in the manner prescribed by subdivisions (d)(1)-(5) and (d)(7). Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within twenty days after mailing, the notice and acknowledgement of receipt of summons. The notice and acknowledgement of receipt of summons and complaint shall be executed under oath or affirmation.

(C) Service of a summons and complaint upon a defendant of any class referred to in paragraphs (1) through (5) and (7) of this subdivision may also be made by the plaintiff or an attorney of record for the plaintiff using a commercial delivery company that (i) maintains permanent records of actual delivery, and (ii) has been approved by the circuit court in which the action is filed or in the county where service is to be made. The summons and complaint must be delivered to the defendant or an agent authorized to receive service of process on behalf of the defendant. The signature of the defendant or agent must be obtained. Service pursuant to this paragraph shall not be the basis for a judgment by default unless the record reflects actual delivery on and the signature of the defendant or agent, or an affidavit by an employee of an approved commercial delivery company reciting or showing refusal of the process by the defendant or agent. If delivery of process is refused, the plaintiff or attorney making such service, promptly upon receipt of notice of such refusal, shall mail to the defendant by first class mail a copy of the summons and complaint and a notice that despite such refusal the case will proceed and that judgment by default may be rendered against the defendant unless he or she appears to defend the suit. A judgment by default may be set aside pursuant to Rule 55(c) if the court finds that someone other than the defendant or agent signed the

receipt or refused the delivery or that the commercial delivery company had not been approved as required by this subdivision.

(e) *Other Service.* Whenever the law of this state authorizes service outside this state, the service, when reasonably calculated to give actual notice, may be made:

(1) By personal delivery in the same manner prescribed for service within this state;

(2) In any manner prescribed by the law of the place in which service is made in that place in an action in any of its courts of general jurisdiction;

(3) By mail as provided in subdivision (d)(8) of this rule;

(4) As directed by a foreign authority in response to a letter rogatory or pursuant to the provisions of any treaty or convention pertaining to the service of a document in a foreign country;

(5) As directed by the court.

(f) *Service By Warning Order.*

(1) If it appears by the affidavit of a party seeking judgment or his or her attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, or if a party seeks a judgment that affects or may affect the rights of persons who are not and who need not be subject personally to the jurisdiction of the court, service shall be by warning order issued by the clerk. This subdivision shall not apply to actions against unknown tortfeasors.

(2) The warning order shall state the caption of the pleadings; include, if applicable, a description of the property or other res to be affected by the judgment; and warn the defendant or interested person to appear within 30 days from the date of first publication of the warning order or face entry of judgment by default or be otherwise barred from asserting his or her interest. The party seeking judgment shall cause the warning order to be published weekly for two consecutive weeks in a newspaper having general circulation in the county where the action is filed and to be mailed, with a copy of the complaint, to the defendant or interested person at his or her last known address by any form of mail with delivery restricted to the addressee or the agent of the addressee.

(3) If the party seeking judgment has been granted leave to proceed as an indigent without prepayment of costs, the clerk shall conspicuously post the warning order for a continuous period of 30 days at the courthouse or courthouses of the county wherein the action is filed. The party seeking judgment shall cause the warning order to be mailed, with a copy of the complaint, to the defendant or interested person as provided in paragraph (2). Newspaper publication of the warning order is not required.

(4) No judgment by default shall be taken pursuant to this subdivision unless the party seeking the judgment or his or her attorney has filed with the court an affidavit stating that 30 days have elapsed since the warning order was first published as provided in paragraph (2) or posted at the courthouse pursuant to paragraph (3). If a defendant or other interested person is known to the party seeking judgment or to his or her attorney, the affidavit shall also state that 30 days have elapsed since a letter enclosing a copy of the warning order and the complaint was mailed to the defendant or other interested person as provided in this subdivision.

(g) *Proof of Service.* The person effecting service shall make proof thereof to the clerk within the time during which the person served must respond to the summons. Failure to make proof of service, however, shall not affect the



validity of service. If service is made by a sheriff or his deputy, proof may be made by executing a certificate of service or return contained in the same document as the summons. If service is made by a person other than a sheriff or his deputy, the person shall make affidavit thereof, and if service has been by mail or commercial delivery company, shall attach to the affidavit a return receipt, envelope, affidavit or other writing required by Rule 4(d)(8). Proof of service in a foreign country, if effected pursuant to the provisions of a treaty or convention as provided in Rule 4(e)(4), shall be made in accordance with the applicable treaty or convention.

(h) *Amendment.* At any time in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the summons is issued.

(i) *Time Limit for Service.* If service of the summons is not made upon a defendant within 120 days after the filing of the complaint, the action shall be dismissed as to that defendant without prejudice upon motion or upon the court's initiative. If a motion to extend is made within 120 days of the filing of the suit, the time for service may be extended by the court upon a showing of good cause. The order granting any such extension, however, must be entered within 30 days after the motion to extend is filed, or by the end of the 120-day period, whichever date is later. If service is made by mail pursuant to this rule, service shall be deemed to have been made for the purpose of this provision as of the date on which the process was accepted or refused. This paragraph shall not apply to service in a foreign country pursuant to Rule 4(e) or to complaints filed against unknown tortfeasors.

(j) *Service of Other Writs and Papers.* Whenever any rule or statute requires service upon any person, firm, corporation or other entity of notices, writs, or papers other than a summons and complaint, including without limitation writs of garnishment, such notices, writs or papers may be served in the manner prescribed in this rule for service of a summons and complaint. Provided, however, any writ, notice or paper requiring direct seizure of property, such as a writ of assistance, writ of execution, or order of delivery shall be made as otherwise provided by law.

FORM OF SUMMONS

The Supreme Court of Arkansas has adopted the following form of summons for use in all cases in which personal service is to be had pursuant to Rule 4(c), (d) and (e) of the Arkansas Rules of Civil Procedure. The form incorporates a proof of service to be made by a sheriff, deputy sheriff, or other person, as appropriate, in accordance with Rule 4(g). The form may be modified as needed in special circumstances. Additional notices, if required, should be inserted in the appropriate space. This form is not for use in cases of constructive service pursuant to Rule 4(f). The adoption of this form is in compliance with Rule 4(b) and does not modify or amend any part of that rule.

THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, ARKANSAS  
\_\_\_\_\_ DIVISION [Civil, Probate, etc.]

Plaintiff:

v. No. \_\_\_\_\_

\_\_\_\_\_  
Defendant

## SUMMONS

### THE STATE OF ARKANSAS TO DEFENDANT:

\_\_\_\_\_  
[Defendant's name and address.]  
\_\_\_\_\_

A lawsuit has been filed against you. The relief demanded is stated in the attached complaint. Within 30 days after service of this summons on you (not counting the day you received it) — or 60 days if you incarcerated in any jail, penitentiary, or other correctional facility in Arkansas — you must file with the clerk of this court a written answer to the complaint or a motion under Rule 12 of the Arkansas Rules of Civil Procedure.

The answer or motion must also be served on the plaintiff or plaintiff's attorney, whose name and address are: \_\_\_\_\_

If you fail to respond within the applicable time period, judgment by default will be entered against you for the relief demanded in the complaint.

\_\_\_\_\_  
CLERK OF COURT  
Address of Clerk's Office.  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
[Signature of Clerk or  
Deputy Clerk]

Date: \_\_\_\_\_

[SEAL]

No. \_\_\_\_\_ This summons is for \_\_\_\_\_  
(name of Defendant).

### PROOF OF SERVICE

☐ I personally delivered the summons and complaint to the individual at \_\_\_\_\_ [place] on \_\_\_\_\_ [date]; or

☐ I left the summons and complaint in the proximity of the individual by \_\_\_\_\_ after he/she refused to receive it when I offered it to him/her; or

☐ I left the summons and complaint at the individual's dwelling house or usual place of abode at \_\_\_\_\_ [address] with \_\_\_\_\_ [name], a person at least 14 years of age who resides there, on \_\_\_\_\_ [date]; or

☐ I delivered the summons and complaint to \_\_\_\_\_ [name of individual], an agent authorized by appointment or by law to receive service of summons on behalf of \_\_\_\_\_ [name of defendant] on \_\_\_\_\_ [date]; or



☐ I am the plaintiff or an attorney of record for the plaintiff in this lawsuit, and I served the summons and complaint on the defendant by certified mail, return receipt requested, restricted delivery, as shown by the attached signed return receipt.

☐ I am the plaintiff in this lawsuit, and I mailed a copy of the summons and complaint by first-class mail to the defendant together with two copies of a notice and acknowledgment and received the attached notice and acknowledgment form within twenty days after the date of mailing.

☐ Other [specify]: \_\_\_\_\_

☐ I was unable to execute service because: \_\_\_\_\_

My fee is \$ \_\_\_\_\_.

**To be completed if service is by a sheriff or deputy sheriff:**

Date: \_\_\_\_\_

SHERIFF OF \_\_\_\_\_  
COUNTY, ARKANSAS

By: \_\_\_\_\_  
[Signature of server]

\_\_\_\_\_  
[Printed name]

Address: \_\_\_\_\_  
\_\_\_\_\_

Phone: \_\_\_\_\_

Subscribed and sworn to before me this date: \_\_\_\_\_

\_\_\_\_\_  
Notary Public

**My commission expires:** \_\_\_\_\_

Additional information regarding service or attempted service:

\_\_\_\_\_  
\_\_\_\_\_

(Amended February 1, 1982; amended May 16, 1983; amended June 9, 1984, effective September 1, 1984; amended July 1, 1986, effective September 15, 1986; amended November 21, 1988, effective January 1, 1989; amended November 20, 1989, effective January 1, 1990; amended November 11, 1991, effective January 1, 1992; amended November 8, 1993, effective January 1, 1994; amended November 18, 1996, effective March 1, 1997; amended January 22, 1998; amended January 28, 1999; amended February 1, 2001; amended January 24, 2002; amended March 13, 2003; amended January 22, 2004; amended May 25, 2006; amended January 10, 2008; amended June 3, 2010, effective July 1, 2010; amended June 2, 2011, effective July 1, 2011; amended May 24, 2012, effective July 1, 2012.)

**Publisher's Notes.** The 2002 amendments to Ark. R. Civ. P. 4(d)(8)(C) and Ark. R. Civ. P. 5 are deemed to supersede Ark. Code Ann. § 1-2-122(b) with respect to the service of process and other papers.

**Reporter's Notes to Rule 4:** 1. Recognizing necessary distinctions between state and federal practice, this Rule is designed to be generally consistent with FRCP 4.

2. Whereas FRCP 4 places the onus of delivering process to the server upon the Clerk, this Rule permits the Clerk to "cause it to be delivered," thus contemplating placing the summons with the plaintiff's attorney who then will see to it that it is served by an appropriate official. The second sentence of Rule 4(a) will permit issuance of summons against a defendant named after the original complaint is filed or alias process. See Wright and Miller, *Federal Practice and Procedure*, § 1085 (1969).

3. Rule 4(b) is generally the same as FRCP 4(b). It adds to the requirements contained in FRCP 4(b) the requirement that the summons be dated. The latter is a carryover from superseded Ark. Stat. Ann. § 27-306 (Repl. 1962).

4. Rule 4(c) is essentially the same as FRCP 4(c). It recognizes and incorporates the practice of permitting plaintiff's attorney to effect service pursuant to Ark. Stat. Ann. § 27-2503 (B) (Supp. 1975) which is superseded hereby. It is further provided that plaintiff's attorney is permitted to effect service by mail under Rule 4(f) as opposed to having it served by an attorney *ad litem*. The provision in FRCP 4(c) for liberal special appointments of persons to serve process is eliminated here as the special travel distance considerations are not as compelling in state practice.

5. Section 4(d)(1) is essentially the same as FRCP 4(d)(1) and superseded Ark. Stat. Ann. § 27-330 (Repl. 1962). While the Federal Rule permits service upon "some person of suitable age and discretion" in defendant's usual place of abode, this Rule requires service upon a person who has attained the age of 14 years, thus achieving greater certainty as to validity of service. This Rule permits effective service in the event it is refused by the defendant, thus continuing the Arkansas practice in that regard and making explicit the effect of FRCP 4(d)(1) in that regard. See *Smith v. Kincaid*, 249 F. 2d 243 (6th Cir. 1957) and *Errion v. Connell*, 236 F. 2d 447 (9th Cir. 1956).

6. FRCP 4(d)(2) defers to state law for service upon an infant or incompetent. Sections 4(d)(2) and 4(d)(3) thus have no precedent in the Federal Rules. They represent a simplification of superseded Ark. Stat. Ann. §§ 27-336 and 27-337 (Repl. 1962) with careful regard to protecting the rights of minors and incompetents. Section (d)(2) permits ser-

vice upon an infant who is at least fourteen (14) years of age, but unlike superseded Arkansas law, it provides for service on either parent or guardian who has care and control of such an infant. Where such an infant resides with someone other than a parent or guardian, service shall be upon that person, provided that he has the care and control of the infant.

7. Section 4(d)(3) supersedes Ark. Stat. Ann. 27-337 (Repl. 1962) and its requirement that service be had upon the incompetent personally. This section provides that service shall be upon the guardian, if one has been appointed. Since a guardian is a fiduciary and usually bonded, it should be assumed that he will protect the interest of the ward and seek legal counsel on behalf of the ward. Where no guardian has been appointed, service is permitted upon the spouse or other person having the care of the incompetent and with whom the incompetent lives. When the incompetent is confined to an institution, service shall be upon the superintendent or administrator of the institution and upon the guardian, if any. As suggested in the compiler's note to Ark. Stat. Ann. 27-337.1 (Supp. 1975), that section may have been sufficiently broad to affect proceedings other than in probate. This rule is intended to supersede that statute.

8. Section (d)(4) has no specific counterpart in the Federal Rules. This section is essentially the same as superseded Ark. Stat. Ann. 27-338 (Repl. 1962) except that it was there provided that the summons and complaint could be left at the inmate's last address with someone sixteen (16) years of age or older. Limitation of the requirement to service upon the superintendent or keeper of the institution and upon the spouse, if any, of the inmate, is sufficiently protective of the inmate's rights, particularly in view of Ark. Stat. Ann. 27-833 (Repl. 1962) which remains unaffected by these Rules.

9. Section (d)(5) is almost identical to FRCP 4(d)(3). It does not purport to change the law to make an unincorporated association any more subject to service than it has been heretofore, rather, the intent is merely to specify a procedure for service in those cases in which an unincorporated association may be served.

10. Section (d)(7) is identical to FRCP 4(d)(7) except for a minor phraseology change to adapt it to state practice.

11. Sections (e)(1) through (5) cover the matters found in FRCP 4(e) and 4(i), and deal with service upon a person outside the State of Arkansas or the United States. The provisions in these Sections are identical to those of the Uniform Interstate and International Procedure Act, Ark. Stat. Ann. § 27-2503 (1) (Supp. 1975).



12. Section (f) is intended to cover those situations where the court has jurisdiction of the subject matter and person or persons named as defendant(s), but where the whereabouts of a defendant is unknown. This provision significantly alters Arkansas law, particularly as it applies to *in rem* or *quasi in rem* actions. It abolishes the necessity of having a warning order published and an attorney *ad litem* appointed in *in rem* actions where the identity and whereabouts of a defendant are known. In such situations, actual service under Section (e) will suffice. This Rule does not define the distinction between personal and *in rem* actions. Presumably the distinction will remain, and the courts will use it to ascertain the propriety of proceeding in some cases where "personal service" has not been effected. The mechanics of service herein prescribed will not be affected by characterization of the action as being personal or *in rem*, however. Regarding procedural due process, the Supreme Court of the United States has held that the adequacy of constructive service is dependent upon whether it is reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard. *Millikin v. Meyer*, 311 U. S. 456, 61 S. Ct. 339 (1940). Obviously, actual notice is better than constructive service which may confer no notice at all. This Rule requires service resulting in actual notice in all cases where the identity or whereabouts of the defendant is known. Similar procedure has been adopted in New York and California. See *New York Civil Practice Law & Rules*, §§ 314 and 315 (1972) and *California Code of Civil Procedure*, § 415.50 (1973). The burden is on the party attempting service by publication to attempt to locate the missing or unknown defendant. Such party or his attorney is required to demonstrate to the court, by affidavit or otherwise, that after diligent inquiry, the defendant's identity or whereabouts remains unknown.

13. Section (g) requires that the return be made at least within the time during which the defendant must respond to the summons. Where the summons is served by someone other than a sheriff or his deputy, an affidavit concerning service is required. The return must show facts, to the satisfaction of the court, demonstrating that the form of service complied with this Rule. Failure to make proof of service does not render invalid an otherwise valid service of summons.

14. Section (h) continues the Arkansas practice permitting the trial judge to allow amendment of a summons or return where prejudice would not result to the party against whom the summons is issued.

**Addition to Reporter's Notes, 1982 Amendment:** Rule 4(b) was amended to state

a default judgment "may," rather than "will," be taken upon failure to answer.

**Addition to Reporter's Notes, 1983 Amendment:** Rule 4(c) has been changed to be consistent with the new provisions for service by mail appearing in Rule 4(d)(8).

Rule 4(d)(2) has been amended by the substitution of the word "when" for the word "where" at the beginning of each sentence.

Rule 4(d)(5) has been amended by inserting the words "Partner other than a limited partner" thus providing a means of serving a partnership heretofore missing from the rule. Deleted from the rule is the requirement of adding to the personal delivery provision service by certified mail.

Added to Rule 4(d)(7) is the language permitting service upon a municipality by serving the Attorney General when plaintiff's counsel makes affidavit to the effect that the appropriate municipal officer is unknown or cannot be found. This will permit service on a municipality even though the office of the appropriate officer to receive service is vacant.

Rule 4(d)(8) is added to permit service upon all defendants named in paragraphs 1 or 5 of Rule 4(d), whether or not they are residents of Arkansas, to be served by mail.

In Rule 4(e)(3), the words "requiring a signed receipt" have been replaced by "requiring a receipt signed by the addressee or the agent of the addressee." Postal regulations permit mail addressed with delivery restricted to addressee to be received only by the addressee or an agent appointed according to postal regulations.

Rule 4(f) is amended by reducing the number of publications of notice to defendants whose whereabouts or identity is unknown from four to two and by adding the words "if any" to the requirement of mailing notice to a last known address.

The first sentence of Rule 4(g) is amended to remove the words "and in any event." The second sentence is amended to suggest putting the "return" on "the same page" as contains the summons which the Supreme Court suggested parenthetically at the end of the summons form adopted by per curiam order of February 1, 1982. In the third sentence, all words after the word "thereof" have been added to take account of the new mailing provisions of Rule 4(d)(8). A sentence in the Rule before amendment stating that "failure to make proof of service shall not affect the validity of the service" is omitted.

The entire subdivision, Rule 4(i) has been excised. It required that default judgment not be taken in cases of service by mail unless an attorney *ad litem* had been appointed at least 30 days before judgment to inform the defendant of the suit. In its place, the amended Rule 4(i) deals, in a substantially different

way with the requirement, heretofore in Rule 3, that service be obtained within a specified time after the filing of a claim for relief. Ark.R.Civ.P. 4(i) is substantially similar to F.R.C.P. 4(j).

**Addition to Reporter's Notes, 1984**

**Amendment:** Rule 4(d)(1) is amended to remove the words "or an incompetent person," and Rule 4(d)(3) is amended to provide for service upon any person for whom a guardian has been appointed. The terminology is from the Limited Guardianship Act, Ark. Stat. Ann. §§ 57-801 through 57-820 (Supp. 1983). To the extent this Act has not supplanted other forms of guardianships, i.e., those provided in Chapters 5 and 6 of the Arkansas Probate Code, there may be appointments of "guardians of the person" and "guardians of the estate." The term "plenary guardian" is intended to apply to those cases, and service should be upon the guardian and the individual or the superintendent of an institution in which the individual may be confined.

Rule 4(d)(8) is amended to permit service by mail upon all classes of defendants except the United States and its agencies. If service is by mail, it should be directed to the person or officer to whom the service would otherwise be "delivered" pursuant to this Rule. Subsection (8) is also amended by insertion of the words "or the agent of the addressee" in the second sentence.

Rule 4(e) is amended to permit service in foreign countries by means provided in any applicable treaty, convention or executive agreement.

That which had been Rule 4(f) has become 4(f)(1) with the addition of the last sentence which makes it clear there is no need to publish or mail notice to "John Doe" in an action brought against an unknown tortfeasor. Subsection 4 (f)(2) has been added to assist trial courts in their efforts to comply with the requirements of *Boddie v. Connecticut*, 401 U.S. 371 (1971).

Rule 4(i) is amended by removal of the requirement of notice to a plaintiff of dismissal of a complaint not served within 120 days and by addition of an exception making it inapplicable to actions against unknown tortfeasors.

Rule 4(j) has been added to bring into the Rule a notice procedure to be followed when the court is exercising its power in rem, e.g., an action for divorce seeking no personal judgment. The mailing procedure replaces any requirement that an attorney ad litem be appointed for the defendant in these cases.

**Addition to Reporter's Note, 1986**

**Amendment:** Rule 4(e)(3) is amended to make explicit that service by mail outside the state must be sent with restricted delivery, thus harmonizing the provision with Rule 4(d)(8), which governs service by mail within

the state. New subsection (k) is primarily aimed at making clear that the service-by-mail provisions of Rule 4(d)(8) may be utilized to serve writs of garnishment.

**Addition to Reporter's Notes, 1988**

**Amendment:** Rule 4 is amended in an effort to expand the options for service of process. Under amended Rule 4(c)(3), a new class of persons — anyone not less than eighteen years of age who is not a party — may serve the summons and complaint. The federal rules contain a similar provision. *See* Rule 4(c)(2)(A), Fed. R. Civ. P. As under prior Arkansas practice, the rule also permits the sheriff, a deputy sheriff, or any other person specially appointed by the court to serve the summons and complaint, though the amendment makes clear that a person so appointed must not be less than eighteen years of age. The prior provision permitting service by "any other person authorized by law to serve summons" has been deleted as unnecessary, particularly in light of new subdivision (c)(3). New subdivision (c)(4), which applies in the event of service by mail, tracks the language of subdivision (d)(8) and was added here for the sake of clarity.

Amended Rule 4(d)(8) establishes an alternative method for service of process by mail. New paragraph (B) of this subdivision is virtually identical to the corresponding federal rule. *See* Rule 4(c)(2)(C)(ii), (D) & (E), Fed. R. Civ. P. Because new paragraph (B) supplements rather than supplants the prior service-by-mail provision now found in paragraph (A) of subdivision (d)(8), practitioners may choose the method they consider the most workable. The federal courts also allow this choice, since Rule 4(c)(2)(C)(i), Fed. R. Civ. P., allows service in accordance with the law of the state in which the federal court sits.

The following form is adopted to accompany the service-by-mail provision of Rule 4(d)(8)(B):

**NOTICE AND ACKNOWLEDGEMENT  
FOR SERVICE BY MAIL**

**NOTICE**

To: (insert the name and address of the person to be served.)

The enclosed summons and complaint are served pursuant to Rule 4(d)(8)(B) of the Arkansas Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 20 days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.



If you do not complete and return the form to the sender within 20 days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within the time specified in the summons. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Summons and Complaint will have been mailed on (insert date).

---

Signature

---

Date of Signature

#### ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the above-captioned matter at (insert address).

---

Signature

---

Relationship to Entity/  
Authority to Receive Service  
of Process

---

Date of Signature

#### Addition to Reporter's Notes, 1989

**Amendment:** Rule 4(c) is amended by deleting a provision that permitted service of process by any person not less than eighteen years of age who is not a party. The change was made to assure adequate judicial control over persons who serve process.

#### Addition to Reporter's Notes, 1993

**Amendment:** Subdivision (d)(5) is amended by inserting the term "limited liability company." As a result of the amendment, these entities are to be served in the same manner as other business organizations, such as corporations and partnerships. Act 1003 of 1993, the Small Business Entity Tax Pass Through Act [§ 4-32-101 et seq.], provides for service on the registered agent of a limited liability company and, in some cases, on the Secretary of State. However, the Act expressly provides that it does not limit or restrict "the rights to serve process in any other manner now or hereafter provided by law." Act 1003, § 107(c) [§ 4-32-107]. This provision plainly contemplates that alternative methods of service, such as those set out in Rule 4, may be employed. See *CMS Jonesboro Rehabilitation, Inc. v. Lamb*, 306 Ark. 216, 812 S.W.2d 472 (1991) (discussing analogous statute).

Subdivision (d)(8)(A) is amended to provide that when service is made by mail pursuant to this provision, the addressee must be "a natural person specified by name." The amendment is necessary to comply with Postal Service rules. Under Section 933.1 of the Domestic Mail Manual, "[r]estricted delivery service permits a mailer to direct delivery only to the addressee or the addressee's authorized agent," and "[t]he addressee must be an individual (or natural person) specified by name."

#### Addition to Reporter's Notes, 1997

**Amendment:** Subdivision (a) has been reworded for purposes of clarity; no substantive change is intended. Subdivision (c)(2) has been amended to make plain that "the court" for purposes of appointing a person to serve the summons and complaint is either the court in which the action is filed or the court in the county where service is to be made. This question arose, but was not resolved, in *Hubbard v. The Shores Group, Inc.*, 313 Ark. 498, 855 S.W.2d 924 (1993). The amendment also changes the caption of subdivision (g) from "return" to "proof of service," makes minor grammatical revisions, and adds a sentence dealing with proof of service in a foreign country, a matter not previously addressed by the rule. The new provision is based on language in Rule 4(l) of the Federal Rules of Civil Procedure, as amended in 1993.

#### Addition to Reporter's Notes, 1999

**Amendment:** Subdivision (c)(2) has been amended by deleting the word "a" before the word "summons." This amendment is intended to make plain that private process servers may be appointed by standing order as well as on a case-by-case basis. In addition, subdivision (e)(3) has been amended to provide that service by mail outside the state in accordance with the requirements of subdivision (d)(8), which governs service by mail inside the state. This change makes the two provisions consistent.

#### Addition to Reporter's Notes, 2001

**Amendment:** Subdivision (a) has been revised to provide that service may be made only by a person "authorized by this rule to serve process." Previously, the rule allowed anyone "authorized by law" to serve process and thus incorporated statutes permitting or requiring certain persons to make service. See, e.g., *Nelson v. Wakefield*, 282 Ark. 285, 668 S.W.2d 29 (1984) (service on sheriff by deputy held improper in light of Ark. Code Ann. § 16-58-112, which provides that "in an action wherein the sheriff is a party or is interested, [process] shall be directed to the coroner or, if he is interested to some constable"). Applying *Nelson* to other statutes could defeat the purpose of subdivision (c) of the rule, which limits service to a particular person, including a sheriff, a deputy, or a person

at least 18 years of age appointed by the court. For example, Ark. Code Ann. § 16-58-107(2) authorizes service “[b]y any person appointed by the officer to whom the summons is directed.” This provision would allow a sheriff, deputy sheriff, or a person appointed by the court to designate someone else to serve process, a result contrary to the purpose of the subdivision (c), i.e., to give the court control over private process servers. Also, paragraph (3) of the statute allows service “[b]y any person not a party to the action, in all actions arising on contract for the recovery of money only.” In such cases, no court appointment would be necessary, and even someone under 18 could make service so long as he or she were not a party. Other statutes are not as troublesome as Section 16-58-107 but are not necessary in light of Rule 4. See Ark. Code Ann. §§ 16-58-108, 16-58-109, 16-58-113, 16-58-118, 16-58-119. These statutes are deemed superseded, as are Sections 16-58-107 and 16-58-112. New language in subdivision (c)(1) treats the problem that Section 16-58-112 was meant to address, i.e., service by a sheriff or deputy when the sheriff is a party. In that situation, neither the sheriff nor a deputy may serve process. Thus, service must be accomplished pursuant to one of the other provisions of subdivision (c), e.g., by someone appointed by the court or by mail.

**Addition to Reporter's Notes, 2002 Amendment:** Subdivision (c)(4) has been amended to refer to service by a commercial company, an option authorized by new paragraph (C) of subdivision (d)(8) and discussed below. Over the years, lawyers have questioned the efficacy of service by mail under paragraph (A) of subdivision (d)(8), in part because the postal service does not always follow its own rules regarding restricted delivery mail.

Subdivision (d) has been revised to provide that service shall be made as provided in that subdivision or “upon any person designated by statute to receive service.” This provision incorporates statutes which, for example, provide for service on the registered agent of a corporation. E.g., Ark. Code Ann. §§ 4-26-503, 4-27-1510. It was deemed advisable in light of case law suggesting that Rule 4 is exclusive as to the recipients of process, despite language in subdivisions (d)(1) & (5) permitting service on an “agent authorized ... by law to receive service of summons.” See, e.g., *May v. Bob Hankins Distributing Co.*, 301 Ark. 494, 785 S.W.2d 23 (1990).

Subdivision (d)(4) has been amended to require the plaintiff not only to serve the superintendent of the correctional facility housing the defendant (as well as the defendant's spouse, if any, unless the court orders otherwise), but also to send a copy of the summons and complaint, marked as “legal

mail,” to the defendant by first class mail. This additional safeguard is similar to that found in substituted service statutes. E.g., Ark. Code Ann. § 16-58-120(b)(2)(B) (in addition to serving Secretary of State, plaintiff must mail copy of summons and complaint to defendant at last known address).

New paragraph (C) of subdivision (d)(8) permits service by “a commercial delivery company that (i) maintains permanent records of actual delivery and (ii) has been approved by the circuit court in which the action is filed or in the county where service is to be made.” Service of papers by commercial delivery companies under Rule 5 has been allowed for more than a decade with no apparent problem. See Rule 5(b)(2) & Addition to Reporter's Notes, 1989 Amendment. Rule 5(b)(2) has been amended to require court approval of the commercial delivery company, a requirement imposed by new paragraph (C) of this rule.

Paragraph (C) is more restrictive than Ark. Code Ann. § 1-2-122(b), which allows service by “an alternative mail carrier.” The statute has thus been superseded with respect to service of process. Paragraph (C) contains additional safeguards similar to those found in paragraph (A) for service by mail and requires, as does subdivision (c)(2) with respect to service by a private person, that the commercial delivery company be approved by the circuit court of the county where the action is filed or where service is to be made. This approval may be in the form of a standing order or may be made on a case-by-case basis, as under subdivision (c)(2). See Addition to Reporter's Notes to Rule 4, 1999 Amendment.

The rule has also been amended to provide uniform requirements for warning orders. Those requirements are contained in revised subdivision (f), which deals with both situations in which service by warning order is permissible, i.e., “when the identity or whereabouts of a defendant remains unknown, or if a party seeks a judgment that affects or may affect the rights of persons who are not and who need not be subject personally to the jurisdiction of the court.” Former subdivision (j) has been deleted and former subdivision (k) redesignated as subdivision (j).

#### Official Form of Summons

##### (Effective July 1, 2001.)

The Supreme Court of Arkansas has adopted the following form of summons for use in all cases in which personal service is to be had pursuant to Rule 4(c), (d) and (e) of the Arkansas Rules of Civil Procedure. The form, adopted May 24, 2001, and effective July 1, 2001, may be modified as needed in special circumstances. Additional notices, if required, should be inserted in the appropriate space.



This form is not for use in cases of constructive service pursuant to Rule 4(f). The adoption of this form is in compliance with Rule 4(b) and does not modify or amend any part of that rule.

“IN THE CIRCUIT COURT OF \_\_\_\_\_  
COUNTY, ARKANSAS

SUMMONS

Plaintiff: \_\_\_\_\_  
  
Court Division  
[or other  
appropriate  
court data]

[If not represented by an  
attorney, give address]  
vs.

Defendant: \_\_\_\_\_ Case Number: \_\_\_\_\_

Plaintiff’s attorney: \_\_\_\_\_  
[name and address]

THE STATE OF ARKANSAS TO DEFEN-  
DANT: \_\_\_\_\_

NOTICE

“1. You are hereby notified that a lawsuit has been filed against you; the relief asked is stated in the attached complaint.

“2. The attached complaint will be considered admitted by you and a judgment by default may be entered against you for the relief asked in the complaint unless you file a pleading and thereafter appear and present your defense. Your pleading or answer must meet the following requirements:

“A. It must be in writing, and otherwise comply with the Arkansas Rules of Civil Procedure.

“B. It must be filed in the court clerk’s office within \_\_\_\_\_ days from the day you were served with this summons.

“3. If you desire to be represented by an attorney you should immediately contact your attorney so that an answer can be filed for you within the time allowed.

“4. Additional notices:

“Witness my hand and the seal of the court this

\_\_\_\_\_  
(date)

Address of Clerk’s Office: \_\_\_\_\_

[SEAL] \_\_\_\_\_ Clerk  
(The appropriate return of service may be on the same page.)”

**Addition to Reporter’s Notes, 2003 Amendment:** Subdivision (d)(4) has been revised by replacing the phrase “confined in a state or federal penitentiary or correctional facility” with “incarcerated in any jail, penitentiary, or other correctional facility in this state.” This change makes the terminology consistent with that used in Rule 12(a), as amended in 2003.

**Addition to Reporter’s Notes, 2004 Amendment:** Subdivision (d)(8)(A) of the

rule has been divided into two paragraphs. In a change that reflects settled case law, paragraph (A)(i) has been rewritten to state expressly that the agent of the addressee “must be authorized in accordance with U.S. Postal Service regulations.” See *Green v. Yarbrough*, 299 Ark. 175, 771 S.W.2d 760 (1989). For the applicable postal service regulations, see Domestic Mail Manual S916.

More importantly, paragraph (A)(i) has been amended to establish less onerous requirements when service is made on the registered agent of a corporation or other organization. In that situation, the new last sentence provides that service may be made by certified mail, return receipt requested. Because delivery need not be restricted, there is no requirement that the addressee be a natural person or that the agent of the addressee be authorized in accordance with postal service regulations. See generally Domestic Mail Manual S912 (certified mail), S915 (return receipt).

**Addition to Reporter’s Notes, 2006**

**Amendment:** Rule 4(d)(4) has been amended to delete the untoward reference to the “keeper” of a jail, penitentiary, or other correctional facility. The term “administrator” has been substituted for “superintendent.”

Rule 4(i), which governs the time limit for service, has been amended to set a reasonable deadline for getting an order entered on a motion to extend time for service. In *Edwards v. Sazabo Foods*, 317 Ark. 369, 877 S.W.2d 932 (1994), the supreme court rejected an effort to require that both the motion for extension of time to serve and the order granting that motion must be filed within the 120-day period. This amendment leaves *Edwards* intact. To encourage prompt service, and discourage filing a motion to extend but not securing an order promptly, the amendment sets a deadline for the entry of that order: thirty days after the motion is filed, or the end of the 120-day period, whichever date is later. The alternative deadlines eliminate the possibility that an early motion for extension will inadvertently reduce the time allowed for extending the time for service.

**Addition to Reporter’s Notes, 2008**

**Amendment:** New Administrative Order Number 20 prescribes minimum qualifications for private process servers appointed by the circuit courts, as well as the procedure for their appointment. The change in Rule 4(c) eliminates the one former qualification (being at least eighteen years old) and incorporates by reference the expanded qualifications contained in the new Administrative Order.

**Addition to Reporter’s Notes, 2010**

**Amendment:** Rule 4(g) has been amended by restoring a sentence from the original rule reciting the familiar legal principle that a failure to make proof of service does not affect

the validity of the service. The sentence was removed more than twenty-five years ago without explanation. Addition to Reporter's Notes, 1983 Amendment. Since then, the supreme court and court of appeals have repeatedly reaffirmed and applied this principle. *E.g.*, *Lyons v. Forrest City Machine Works, Inc.*, 301 Ark. 559, 562, 785 S.W.2d 220, 222 (1990); *Renfro v. Air Flo Co.*, 91 Ark. App. 99, 101, 208 S.W.3d 807, 809 (2005). This amendment makes the rule reflect settled law.

**Addition to Reporter's Notes, 2012 Amendment:** The summons form has been revised to include an "all purpose proof of service" form for service made by a sheriff, deputy sheriff, or other person (generally an appointed private process server) or, if service

is by mail or commercial delivery company, the plaintiff, or an attorney for the plaintiff. *See* Rule 4(c). In accordance with Rule 4(g) governing proof of service, the proof of service section of the summons includes an "affidavit of service" for service made by a person other than a sheriff or deputy sheriff and a "certificate of service or return" for service made by a sheriff or deputy sheriff. The language of the summons form is also updated consistent with changes in December 2009 to the comparable federal summons form. The changes to the federal form were part of a nearly three-year-long process to clarify and simplify the language of the Federal Rules of Civil Procedure.

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#### In General.

The Uniform Interstate and International Procedure Act, § 16-4-101 et seq., is, at least in part, identical to subsection (e) of this rule. *A.O. Smith Harvestore Prods., Inc. v. Burnside*, 282 Ark. 27, 665 S.W.2d 288 (1984).

Trial court properly allowed mother to amend her petition to modify the agreement for increased child support where father failed to provide any meaningful information about his current income level and withdrew his request to reduce his child support obligation at the beginning of the hearing; it was difficult to believe that father would claim a lack of notice that child support was at issue when he initiated the current action to reduce his child support obligation, and he failed to present any proof of prejudice. *Martin v. Scharbor*, 95 Ark. App. 52, 233 S.W.3d 689 (2006).

Because the service requirements imposed by this rule and Ark. R. Civ. P. 12 had to be strictly construed and compliance had to be exact, and appellant's summons incorrectly stated that a foreign corporation only had 20 days to file an answer, the circuit court properly dismissed the complaint for failure of service of valid process under Ark. R. Civ. P. 12(b). *Trusclair v. McGowan Working Ptnrs*, 2009 Ark. 203, 306 S.W.3d 428 (2009).

#### Construction.

The phrase "is summoned" in § 16-60-116(a) should be read to mean "is served." *Brown v. Texarkana Nat'l Bank*, 889 F. Supp. 351 (E.D. Ark. 1992).

Although subsection (i) of this rule provides that an action shall be dismissed without prejudice, the dismissal without prejudice language does not apply if the plaintiff's action is otherwise barred by the running of a statute of limitations. *Edwards v. Szabo Food Serv., Inc.*, 317 Ark. 369, 877 S.W.2d 932 (1994).

Subsection (i) of this rule is not so rigid and inflexible that no relief can be granted even when plaintiff has failed to comply because of deception practiced upon plaintiff and upon state court by defendant. *Eddinger v. Wright*, 904 F. Supp. 932 (E.D. Ark. 1995).

This rule expressly governs the service of the complaint and summons, while ARCP 5 governs the service of every pleading and every other paper filed after the complaint. *Office of Child Support Enforcement v. Ragland*, 330 Ark. 280, 954 S.W.2d 218 (1997).

The Arkansas Supreme Court, by incorporating the service requirements of this rule into Ark. R. Civ. P. 5(b)(3), intended to adopt the spirit of this rule in that actual knowledge does not validate defective service of process; thus, just as actual notice does not satisfy due process under this rule, it does not satisfy due process under Ark. R. Civ. P. 5(b)(3). *Connally v. Connally*, 95 Ark. App. 42, 233 S.W.3d 168 (2006).

#### Applicability.

The notice provisions of this rule do not apply in an action by the board of commissioners to sell a landowner's property to satisfy a lien created by his failure to pay a water improvement district assessment; this is a special statutory action which contains its own provisions for notice. *Fulmer v. Board of Comm'rs*, 286 Ark. 419, 692 S.W.2d 246 (1985).

Subsection (i) of this rule does not apply to a writ of scire facias. *Bohnsack v. Beck*, 294 Ark. 19, 740 S.W.2d 611 (1987).

Notice of a complaint to prevent annexation pursuant to § 14-40-604 means service of process pursuant to this rule. *Britton v. City of Conway*, 36 Ark. App. 232, 821 S.W.2d 65 (1991).

This rule governs personal service of the summons and complaint; it does not govern the service of a counterclaim. *Arnold & Arnold v. Williams*, 315 Ark. 632, 870 S.W.2d 365, cert. denied 513 U.S. 990, 115 S. Ct. 489, 130 L. Ed. 2d 400 (1994).

The "deemed denied" provision of subsection (c) of this rule did not apply to an appeal from the denial of a post-trial motion for new trial claiming ineffective assistance of counsel. *Chavis v. State*, 328 Ark. 251, 942 S.W.2d 853 (1997).

Purpose of Ark. R. Civ. P. 5(b)(3) is not to require a party to serve a summons with a motion to modify a final decree when the court has reserved continuing jurisdiction, rather, it simply directs that such motions are required to be served in the same manner or method required for a summons and complaint, that is, served by mail with a return receipt requested and delivery restricted to the addressee or his or her agent, under subdivision (d)(8)(A)(i) of this rule; thus, because the trial court retained jurisdiction over the divorce decree, a new complaint and summons were not required to be served on the ex-husband. *Dickson v. Fletcher*, 361 Ark. 244, 206 S.W.3d 229 (2005).

Notice of appeal may be filed within thirty days of one of two dates: (1) the date on which the Arkansas Public Service Commission (PSC) enters an order upon the application for rehearing, or (2) the date on which the application is deemed denied, and Ark. R. App. P. Civ. 4 does not apply; therefore, a motion to dismiss an appeal as untimely was denied

because it was filed within 30 days of the PSC denying rehearing, even though the deemed denied date had already passed when the PSC decided to reconsider the case. *Commercial Energy Users Group v. Ark. PSC*, 369 Ark. 13, 250 S.W.3d 225 (2007).

Section 16-55-202 is not an unconstitutional intrusion on the rule-making authority of the Supreme Court of Arkansas, it must be interpreted based on its plain terms, and it clearly allows juries to consider the fault of employers and other non-parties in tort suits, including products liability suit, without restriction and regardless of whether the employer or non-party could be directly joined in the suit. Section 16-55-202 does not present any constitutional concerns because under the Arkansas Civil Justice Reform Act, of which § 16-55-202 is a part, a designated non-party is not subject to any liability for its fault, therefore that party does not need to be served under this rule, and the non-party will receive sufficient notice and protection pursuant to the discovery process that results when a § 16-55-202 notice is filed. *Bohannon v. Johnson Food Equip., Inc.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 45273 (E.D. Ark. June 9, 2008).

Motion to strike the notice of intent to assert non-party fault, which was filed by defendants who were sued by an injured worker in a products liability suit, was denied. By its plain terms, § 16-55-202 allowed defendants to request that the jury to consider the fault of the worker's employer and a non-party manufacturer of a component used in the chicken processing machine that was the focus of the suit, and it did not matter that the employer could not be directly sued in the suit, based on the exclusivity provision of Arkansas' Workers' Compensation Act, or that the manufacturer had not been made a party in the suit or served under this rule, as no liability would be imposed, even if the jury found the employer or the manufacturer to be at fault pursuant to § 16-55-202. *Bohannon v. Johnson Food Equip., Inc.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 45273 (E.D. Ark. June 9, 2008).

#### **Acceptance of Process.**

The authority of an attorney to bind his client by acceptance of process pursuant to subdivision (d)(1) of this rule may be implied in law from the ostensible circumstances, although an attorney does not, by mere virtue of employment, have authority to accept service of process. *May v. Barg*, 276 Ark. 199, 633 S.W.2d 376 (1982).

#### **Agent.**

The "agent" to whom subdivision (d)(8) of this rule refers must be an agent appointed pursuant to the applicable postal regulations.

*Green v. Yarbrough*, 299 Ark. 175, 771 S.W.2d 760 (1989).

Service failed to meet the requirements of subdivision (e)(3) of this rule prior to the 1986 amendment where defendant's stepdaughter who was not appointed his agent pursuant to postal regulations signed the return receipt and there were no markings on the receipt in the boxes provided for "addressee" or "agent" located above her signature. *Cole v. First Nat'l Bank*, 304 Ark. 26, 800 S.W.2d 412 (1990).

Service of summons upon a domestic corporation was ineffective where mortgagee corporation's employee, who picked up and signed for the certified mail, was not listed in any file at either the post office or the Secretary of State's office as an agent for service of registered mail, nor had express authority to receive restricted mail. *Henry v. Gaines-Derden Enters., Inc.*, 314 Ark. 542, 863 S.W.2d 828 (1993).

Debtor who had initiated an adversary proceeding to determine dischargeability of a student loan obligation was entitled to default and a default judgment because the debtor had complied with the service of process requirements of Fed. R. Bankr. P. 7004 and subdivision (d)(5) of this rule when the debtor served an amended summons and complaint on the creditor's designated agent. The debtor was not also required to service process on the creditor itself as well as the agent. *Weston v. Ed Fin. Servs., LLC (In re Weston)*, 398 B.R. 325 (Bankr. E.D. Ark. 2008).

#### **Appointment of Attorney Ad Litem.**

A default judgment cannot be taken against a nonresident defendant who has been served by mail until 30 days have elapsed after the appointment of an attorney ad litem and the attorney ad litem's report has been made. *Aldridge v. Watling Ladder Co.*, 275 Ark. 225, 628 S.W.2d 322 (1982).

Where in a products liability action against a nonresident manufacturer of ladders, the plaintiffs did not cause the court clerk to appoint an attorney ad litem on the date the action was filed, and an attorney ad litem was not appointed until a later date, the defendant's answer which was filed within 30 days of the appointment of the attorney ad litem was timely and a default judgment should not have been entered against the defendant. *Aldridge v. Watling Ladder Co.*, 275 Ark. 225, 628 S.W.2d 322 (1982).

#### **Commencement of Action.**

Under ARCP 3, an action is commenced by the filing of a complaint with the clerk of the proper court, and the establishment of venue and the tolling of a statute of limitations is based on the date the complaint is filed; however, the commencement date is subject to the plaintiff completing service within 120



days from the date of filing of the complaint, unless the time for service has been extended by the court under subsection (i) of this rule. *Forrest City Mach. Works, Inc. v. Lyons*, 315 Ark. 173, 866 S.W.2d 372 (1993).

The effectiveness of the commencement date under ARCP 3 is dependent upon meeting the requirements of subsection (i) of this rule, which provides in part that service of process on a defendant must be accomplished within 120 days after the filing of the complaint. *Sublett v. Hipps*, 330 Ark. 58, 952 S.W.2d 140 (1997).

### Corporations.

Corporate employee held to be a proper person to serve under subdivision (d)(5) of this rule. *Lyons v. Forrest City Machine Works, Inc.*, 301 Ark. 559, 785 S.W.2d 220 (1990).

Subdivision (d)(5) of this rule provides that the summons and complaint shall be served together. *Thompson v. Potlach Corp.*, 326 Ark. 244, 930 S.W.2d 355 (1996).

Trial court abused its discretion in not granting retailer's motion to set aside a default judgment in builder's third-party breach of contract action because the builder failed to comply with the service of process requirements of subdivision (d)(8) of this rule where it addressed a certified letter to the retailer; a limited liability company was clearly not a "natural person" within the meaning of subdivision (d)(8), and the letter failed to name a human being as an addressee. *Grand Slam Stores, LLC v. L&P Builders, Inc.*, 92 Ark. App. 210, 212 S.W.3d 6 (2005).

Limited liability company (LLC) was not entitled to the issuance of a writ of certiorari because the circuit court, in correctly interpreting subsection (d) of this rule and denying the LLC's motion to dismiss a complaint on the ground of insufficiency of service of process, did not act in excess of its jurisdiction; restricted delivery is not required when serving the registered agent of a corporation or other organization because subdivision (d)(8)(A)(i) permits service to be made on the registered agent of a corporation or other organization by certified mail with return receipt requested. *Advance Fiberglass, LLC v. Rovnaghi*, 2011 Ark. 516, — S.W.3d —, 2011 Ark. LEXIS 595 (Dec. 8, 2011).

Fact that the owners elected to restrict delivery to the registered agent of a limited liability company (LLC) did not render the service on the LLC insufficient because the owners chose a more restrictive form of service than they had to, and based on an error on the part of the U. S. Postal Service, that more restrictive form of service was not properly completed. *Advance Fiberglass, LLC v. Rovnaghi*, 2011 Ark. 516, — S.W.3d —, 2011 Ark. LEXIS 595 (Dec. 8, 2011).

### Default Judgments.

Plaintiff's attempt at service of process and notice of impending default must be measured against the extremely heavy burden imposed upon him. *MEEKS v. STEVENS*, 301 Ark. 464, 785 S.W.2d 18 (1990).

Where mail sat on registered agent's desk for two months and no reason for the lapse was offered, and the failure to answer the complaint contained in the mail appeared due more to carelessness or as a result of not attending to business, the circuit court did not abuse its discretion in entering a default judgment against defendant. *Maple Leaf Canvas, Inc. v. Rogers*, 311 Ark. 171, 842 S.W.2d 22 (1992).

After a default judgment had been entered in a discrimination case, employer's motion to dismiss an amended complaint should have been granted because the amended complaint was improperly mailed to the employer's attorney; service of the amended complaint on a corporation was required to comply with this rule. *Tobacco Superstore, Inc. v. Darrough*, 362 Ark. 103, 207 S.W.3d 511 (2005).

Where homeowner testified that he was a business man who was familiar with court processes, but failed to respond to the summons and did nothing until after being informed by letter that a trial on damages was pending, the trial court's conclusion that this did not rise to excusable neglect was not clearly erroneous; thus, the trial court did not abuse its discretion in entering a default judgment against homeowner. *Israel v. Oskey*, 92 Ark. App. 192, 212 S.W.3d 45 (2005).

Arkansas courts recognize that judgments by default that are rendered without valid service are judgments rendered without jurisdiction and are therefore void. *Grand Slam Stores, LLC v. L&P Builders, Inc.*, 92 Ark. App. 210, 212 S.W.3d 6 (2005).

Although a debtor alleged an incorrect zip code for a circuit court's address rendered the summons served on her fatally defective, the circuit court properly determined the debtor was not entitled to set aside a default judgment, pursuant to Ark. R. Civ. P. 55(c)(2), as void because nothing in subsection (b) of this rule required the court address to appear in the summons and, as such, there was exact compliance with this rule. *Talley v. Asset Acceptance, LLC*, 2011 Ark. App. 757, — S.W.3d —, 2011 Ark. App. LEXIS 809 (Dec. 7, 2011).

### Defective Summons.

Where the actions and method of serving process are valid, but the notice itself is defective, a default judgment based upon the valid service of the defective summons is voidable, and being voidable, a person needs to show a meritorious defense in order to have it set aside. *Tucker v. Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982), overruled *Southern*

*Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998). But see *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998).

Where a defect in the summons is so substantial as to render the process void, there can be no waiver of the defect; nor does actual knowledge of a proceeding validate defective process. *Tucker v. Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982), overruled *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998). But see *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998).

A summons which was not directed to the defendant, which did not direct the defendant to file a pleading and defend, and which did not fully apprise the defendant of the consequences of his failure to answer, did not substantially comply with the requirements of subsection (b) of this rule and was fatally defective. *Tucker v. Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982), overruled *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998). But see *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998).

The first reading of the summons by a defendant is the only step in the legal process which is not expected to be performed with the advice and assistance of licensed attorneys; therefore, the Supreme Court in adopting subsection (b) of this rule sought to achieve a summons format which would advise defendants that their person or property was in jeopardy by virtue of the complaint. *Tucker v. Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982), overruled *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998). But see *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998).

For a summons to be valid process, it must at the very least be such that will give the person notice that an action is pending against him, advise him of the action which he must take to defend himself, and apprise him of the consequences of his failure to take that action. *Tucker v. Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982), overruled *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998). But see *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998).

Summonses which advised defendants that they had 20 days to answer, instead of 30 days allowed to out-of-state defendants, and advised them to serve their answers on plaintiff's attorney instead of filing them with the court clerk were clearly defective and voidable. However, the trial court properly refused to quash the summonses where the defendants' counsel appeared specially and properly filed motions in an effort to have the defective summonses quashed and alternatively filed timely answers so that the defendants were not denied either notice or an

opportunity to be heard and were not misled by the defective summonses. *Ford Life Ins. Co. v. Parker*, 277 Ark. 516, 644 S.W.2d 239 (1982), overruled *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998), questioned *Vinson v. Ritter*, 86 Ark. App. 207, 167 S.W.3d 162 (2004). But see *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998).

Any defects in the process, the return thereon or the service thereof are cured or waived by the appearance of the defendant without raising an objection, and he is precluded from thereafter taking advantage of the defect. *Burrell v. Arkansas Dep't of Human Servs.*, 41 Ark. App. 140, 850 S.W.2d 8 (1993).

Circuit court did not abuse its discretion in setting aside the default judgment against the car dealership as void where the buyer's summons incorrectly identified the defendants and misstated the deadline for responding to the complaint; this did not strictly comply with the service requirements imposed by the Arkansas Rules of Civil Procedure. *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 120 S.W.3d 525 (2003).

Defects in the summons, which included the doctor's wrong address, the incorrect amount of time for an out-of-state defendant to file a pleading, and the incorrect date, rendered the process void and, even though the doctor was aware of the action and filed an answer before the defective service, estoppel did not apply; in addition, pursuant to Ark. R. Civ. P. 12(h), the doctor reserved the right to assert insufficiency of process as well as insufficiency of service of process in the doctor's answer. *Vinson v. Ritter*, 86 Ark. App. 207, 167 S.W.3d 162 (2004).

Where the summonses in a medical malpractice case failed to state the correct name of a hospital, the error was fatal because the misnomer actually indicated an entirely different entity; therefore, a motion to dismiss based on noncompliance with this rule was proper as strict compliance was required. *Shotzman v. Berumen*, 363 Ark. 215, 213 S.W.3d 13 (2005).

Because a plaintiff's summons ran in his name, rather than the State of Arkansas, it failed to meet the requirements of subsection (b) of this rule, which necessarily incorporated Ark. Const. Art. 7, § 49, and it was, therefore, not a valid summons. Plaintiff had no authority to direct the summons to defendant, and thus, the circuit court properly dismissed the complaint for failure to serve a valid summons on appellee. *Gatson v. Billings*, 2011 Ark. 125, — S.W.3d —, 2011 Ark. LEXIS 109 (Mar. 31, 2011).

#### Defenses.

Where defendant elected the option of asserting the defense, pursuant to subsection (i)



of this rule, of lack of jurisdiction of the person and insufficiency of service of process in its original responsive pleading, then under ARCP 12(b) and (h), defendant has preserved these defenses by including them in the original responsive pleading. *Farm Bureau Mut. Ins. Co. v. Campbell*, 315 Ark. 136, 865 S.W.2d 643 (1993).

### Dismissal.

Dismissals based on failure to serve defendant should have been with prejudice where plaintiffs had previously taken voluntary nonsuits. *Bakker v. Ralston*, 326 Ark. 575, 932 S.W.2d 325 (1996).

Subsection (i) of this rule applies when there is a failure to obtain service and nothing more; ARCP 41(b), however, is expressly addressed to a situation where there has been more than one dismissal, whether voluntary or involuntary. *Bakker v. Ralston*, 326 Ark. 575, 932 S.W.2d 325 (1996).

The "dismissal without prejudice" language in subsection (i) of this rule does not apply if the plaintiff's action is barred by a statute of limitations running as a result of the failure to obtain service within 120 days. *Bodiford v. Bess*, 330 Ark. 713, 956 S.W.2d 861 (1997).

Circuit court properly dismissed the buyer's complaint for failure of valid process under ARCP 12(b); the dismissal was mandatory under the plain language of subsection (i) of this rule and case law interpreting that rule because service of the summonses on the car dealership and its successor was improper. *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 120 S.W.3d 525 (2003).

Where appellants had previously taken a voluntary nonsuit of their medical malpractice case, the dismissal of their case for failing to strictly comply with the service requirements of subsection (i) of this rule was with prejudice. *Henyan v. Peek*, 359 Ark. 486, 199 S.W.3d 51 (2004).

Dismissal of employee's claim against employer, a state university, was warranted because employee had been warned by the court that she needed to effect service of process, as required by subsection (d) of this rule, but employee failed to do so; employee attempted to serve university officials but failed to restrict delivery of the documents and the service was accepted by a student. *Dunlap v. Ark. State Univ.*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 29010 (E.D. Ark. Nov. 14, 2005).

Court granted physician's petition for a writ of certiorari in administratrix's third medical negligence and wrongful death action where the physician's motion to dismiss the second complaint for failure to comply with this rule was a good-faith contest of the second complaint; as the administratrix had failed to comply with subsection (i) of this rule, dismissal

of the second complaint was mandatory. *Jordan v. Circuit Court*, 366 Ark. 326, 235 S.W.3d 487 (2006).

Although a writ of prohibition was not granted where a dismissal should have been entered due to a lack of service under subsection (i) of this rule, a writ of certiorari was granted since a circuit court exceeded its jurisdiction by proceeding instead of dismissing the case; the remedy of appeal was inadequate since a show-cause order was involved. *Boyd v. Sharp County Circuit Court*, 368 Ark. 566, 247 S.W.3d 864 (2007).

Trial court properly dismissed appellants' false imprisonment action against appellees on the ground that appellants failed to show good cause in their motions for extension of time to serve pursuant to subsection (i) of this rule where appellants' assertions that they were unable because of various unrelated difficulties to obtain service of a summons that had never been issued was, at the very least, constructive fraud. *Wilkins v. Food Plus, Inc.*, 99 Ark. App. 64, 257 S.W.3d 107 (2007).

Default judgment in a child support case should have been set aside because service was unquestionably defective where it was effectuated upon a purported father's brother; therefore, a circuit court abused its discretion when it took any action other than a dismissal of the case under subsection (i) of this rule. The father's subsequent participation in enforcement proceedings, including his act of filing for paternity testing, did not validate the void judgment. *Ivy v. Office of Child Support Enforcement*, 99 Ark. App. 341, 260 S.W.3d 328 (2007).

Circuit court did not err in dismissing a corporation's action against a limited liability company without prejudice under Ark. R. Civ. P. 41(b) due to the corporation's complaint for failure to obtain service because the corporation's failure to comply with subsection (b) of this rule operated as an involuntary dismissal for purposes of Rule 41(b) and did not trigger the two-dismissal rule of Rule 41(b); the prior dismissal of the suit in district court was due to a lack of subject-matter jurisdiction and was not a voluntary nonsuit or a voluntary dismissal under Rule 41(a) because the corporation had no choice and no unilateral right to allow the case to proceed in district court, and the literal application of Rule 41(b) to the case would bring about a harsh and absurd result that did not serve the purpose behind the two-dismissal rule. *Jonesboro Healthcare Ctr., LLC v. Eaton-Moery Envtl. Servs.*, 2011 Ark. 501, — S.W.3d —, 2011 Ark. LEXIS 585 (Dec. 1, 2011).

### Divorce Proceedings.

The court reversed a divorce decree on the basis that the plaintiff husband neither served the defendant wife with a copy of the

complaint nor had her sign an entry of appearance whereby she waived service of summons within the required 120-day period, notwithstanding that the wife signed a conditional reconciliation agreement within the 120-day period. *Raymond v. Raymond*, 343 Ark. 480, 36 S.W.3d 733 (2001).

Trial court set aside a divorce decree obtained by default where the husband failed to strictly comply with the requirements of subsection (f) of this rule in attempting to perfect service by warning order. *Littleton v. Albert-Littleton*, 89 Ark. App. 325, 202 S.W.3d 563 (2005).

Where ex-husband argued that, although the signature on the entry of appearance and waiver, the waiver of corroboration of grounds, and the separation agreement appear to be his, he did not "sign" the waiver and entry of appearance because he signed the verification portion of the document and, therefore, the trial court never acquired jurisdiction over him, the husband still signed a valid entry of appearance when he signed the portion labeled "verification"; there was no requirement under subdivision (d)(8) of this rule or Ark. R. Civ. P. 11 that such entry of appearance be verified and, thus, the language of the verification portion of the document was mere surplusage. *Morehouse v. Lawson*, 90 Ark. App. 379, 206 S.W.3d 295 (2005).

#### **Due Process.**

Evidence insufficient to find that attempted service would satisfy defendant's due process rights. *Meeks v. Stevens*, 301 Ark. 464, 785 S.W.2d 18 (1990).

A certificate of service is no substitute for a summons; a summons is necessary to satisfy due process requirements. *Thompson v. Potlach Corp.*, 326 Ark. 244, 930 S.W.2d 355 (1996).

#### **Extensions.**

Employee's FELA suit was properly dismissed for failure to serve the employer within 120 days as required by subsection (i) of this rule. An alleged oral extension granted by the trial judge was ineffective because it was not entered as required by subsection (i), and Ark. R. Civ. P. 60(b) did not operate to create an order that was never entered. *Verbitski v. Union Pac. R.R. Co.*, 2011 Ark. App. 6, — S.W.3d —, 2011 Ark. App. LEXIS 1 (Jan. 5, 2011).

Because appellant failed to perfect service of process on appellees within the 120-day period under subsection (i) of this rule, the trial court was required to dismiss her complaint; appellant's motion to extend the time for service was never filed, and even if the motion was considered to be timely, the order granting the extension was not actually entered until more than thirty days after appel-

lant made the motion. *Maguire v. Jines*, 2011 Ark. App. 359, — S.W.3d —, 2011 Ark. App. LEXIS 378 (May 11, 2011).

#### **Garnishment.**

A writ of garnishment must meet the requirements applicable to summonses in civil cases. *Terminal Truck Brokers v. Memphis Truck & Trailer, Inc.*, 279 Ark. 427, 652 S.W.2d 34 (1983).

Where a writ of garnishment fell short of the requirements of subsection (b) of this rule in that it was directed not to the garnishee but to the sheriff, it did not direct the garnishee to file a pleading and defend, it did not state that any default judgment would be for the relief demanded, and it was not under the seal of the court, the writ of garnishment was voidable. *Terminal Truck Brokers v. Memphis Truck & Trailer, Inc.*, 279 Ark. 427, 652 S.W.2d 34 (1983).

Former garnishment statute and this rule, read together, still did not satisfy the constitutional mandate of requiring that adequate notice be given to the garnishee that his property may be subject to satisfaction of the debt. *Bob Hankins Distrib. Co. v. May*, 305 Ark. 56, 805 S.W.2d 625 (1991).

#### **Identity or Whereabouts Unknown.**

This rule requires service resulting in actual notice in all cases where the identity or whereabouts of the defendant is known; however, in instances where his identity or whereabouts is demonstrated to be unknown, this rule, particularly subsection (f) of this rule, provides a method of construction notice that is reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard. *Horne v. Savers Fed. Sav. & Loan Ass'n*, 295 Ark. 182, 747 S.W.2d 580 (1988).

Where, under the circumstances, plaintiff was denied in its efforts to give defendants actual or personal service provided for out-of-state persons under the methods set forth under § 16-4-102 and subsection (e) of this rule, plaintiff was relegated to obtain service of process on defendants under subsection (f) of this rule, which is another effective procedure for service under § 16-4-102, the long-arm law. *Horne v. Savers Fed. Sav. & Loan Ass'n*, 295 Ark. 182, 747 S.W.2d 580 (1988).

An action to reduce past due arrearages to an executible judgment is not a "new cause of action"; it flows from the original divorce decree and personal jurisdiction over the parties continues without the need for additional service of process. *Office of Child Support Enforcement v. Ragland*, 330 Ark. 280, 954 S.W.2d 218 (1997).

#### **Insufficiency of Process.**

None of the circumstances which would have warranted granting the company and its officers' motion for reconsideration under Fed.



R. Civ. P. 60 were present because although the company and its officers argued that despite the misstatement of law in their summonses, they complied with the form set forth in subsection (b) of this rule, the court did not believe that requiring the company and its officers to correctly state the response times clearly set forth in Ark. R. Civ. P. 12(a) led to an absurd result or defied common sense; rather, the company and its officers were simply expected to accurately state the procedural rules as set forth in subdivision (4) of this rule and Ark. R. Civ. P. 12(a). Moreover, the fact that the LLC and its owner suffered no prejudice as a result of the error did not save the defective summonses at issue. *Charkoma Res., LLC v. JB Energy Explorations, LLC*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 114336 (W.D. Ark. Dec. 8, 2009).

### **Jurisdiction.**

Where the trial court did not have jurisdiction over a hospital in a medical malpractice case due to a lack of proper service of process, the court had no jurisdiction to consider a motion to amend the summonses to name the correct party. *Shotzman v. Berumen*, 363 Ark. 215, 213 S.W.3d 13 (2005).

Circuit court did not have personal jurisdiction over a lessor in a negligence claim as the summons failed to comply with subsection (b) of this rule. However, a writ of prohibition could not lie as the circuit court had already acted, finding it had jurisdiction; thus, the court treated the lessor's petition as one for a writ of certiorari and determined that the issuance of a writ of certiorari was appropriate. *Patsy Simmons Ltd. P'ship v. Finch*, 2010 Ark. 451, — S.W.3d —, 2010 Ark. LEXIS 557 (Nov. 18, 2010).

### **Limitation of Actions.**

While it was true that the effectiveness of the commencement of an action was dependant on the plaintiff completing service of process as provided for in subsection (i) of this rule, for purposes of tolling the statute of limitations, the Supreme Court looked to the time that the complaint was filed; therefore, the filing of the complaint commenced the action, and the fact that appellants were represented by counsel at the time service was completed did not toll the statute of limitations when appellants were not represented by counsel at the time the complaint was filed. *Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002).

Negligence action for a slip and fall was improperly dismissed as being barred by the three-year limitations period of § 16-56-105 because under Ark. R. Civ. P. 15(c), an amendment correcting the name of a wrong owner as defendant related back to the original complaint in that the same allegations were made and the new owner was served within 120

days. *Bell v. Jefferson Hosp. Ass'n*, 96 Ark. App. 283, 241 S.W.3d 276 (2006).

### **Minors.**

Minors between the ages of 14 and 18 may be served by substituted service on persons in the household. *Green v. Mills*, 339 Ark. 200, 4 S.W.3d 493 (1999).

### **Notice.**

The service provisions of this rule apply to § 5-65-104 circuit court de novo review because the statutory procedure is silent on notice or service of process at the circuit court level. *Weiss v. Johnson*, 331 Ark. 409, 961 S.W.2d 28 (1998), overruled in part, *Wright v. City of Little Rock*, 366 Ark. 96, 233 S.W.3d 644 (2006).

Rules of civil procedure under the Arkansas Supreme Court's exclusive procedural rule-making authority governed the notice to be given even for a special county court proceeding under § 14-18-106 to close a road, and a court order closing a road with less than 30 days' notice required by subdivision (f)(4) of this rule was void. *Myers v. Bogner*, 2011 Ark. App. 98, — S.W.3d —, 2011 Ark. App. LEXIS 108 (Feb. 9, 2011).

### **Presumption of Validity.**

Appellant did not offer sufficient evidence to rebut the presumption of validity of a signature created by the circuit court's seal on a summons. The circuit court's seal gave the presumption of validity to the signature that was not rebutted and, therefore, strict compliance with the signature requirement of subsection (b) of this rule and Ark. Const. Art. 7, § 49, was satisfied. *Unimeks, LLC v. Puro-lite*, 2012 Ark. 20, — S.W.3d —, 2012 Ark. LEXIS 39 (Jan. 26, 2012).

### **Process Server.**

Where process server was not issued a process server's card until two weeks after he served the process on defendant, the attempted service was invalid, and, as a consequence, the default judgment was void. *Hubbard v. Shores Group, Inc.*, 313 Ark. 498, 855 S.W.2d 924 (1993).

### **Proof of Service.**

Failure to make proof of service does not affect the validity of service, because proof of service may be made by means other than demonstration on the return of the service official. *Lyons v. Forrest City Machine Works, Inc.*, 301 Ark. 559, 785 S.W.2d 220 (1990).

Where a process server testified that he served appellant with the original complaint to collect on a debt, the lack of an affidavit under subsection (g) of this rule providing proof of service did not affect the validity of service; the defect in the proof of service was cured by the process server's testimony. *Renfro v. Air Flo Co.*, 91 Ark. App. 99, 208 S.W.3d 807 (2005).

Although the process server failed to comply with subsection (g) of this rule by failing to provide an affidavit to prove her service of summons, this omission did not affect the validity of her service; proof of service may be made by means other than demonstration on the return of the serving official. *Israel v. Oskey*, 92 Ark. App. 192, 212 S.W.3d 45 (2005).

#### **Refusal of Service.**

With respect to subdivision (d)(8)(A) of this rule, the active nature of refusal is spelled out with care. The record must contain a return receipt signed by the addressee or the agent of the addressee or a returned envelope, postal document or affidavit by a postal employee reciting or showing refusal of the process by the addressee; silence or inaction, which elsewhere in the law may be presumed to be token consent, is not, in this instance, equivalent to refusal. *Meeks v. Stevens*, 301 Ark. 464, 785 S.W.2d 18 (1990).

The court erred in dismissing the plaintiff's motion for a default judgment since the plaintiff's exhibits properly showed that service of process was refused specifically by the defendant where (1) the plaintiff attempted service via certified mail, restricted delivery requested, and he filed the return of summons with the refused returned envelope attached, and (2) the plaintiff also mailed a cover letter with a copy of the complaint, summons, and interrogatories to the defendant by first class mail, and he filed the cover letter with the envelope marked "refused, return to sender." *McAdams v. Ellington*, 333 Ark. 362, 970 S.W.2d 203 (1998).

Service was proper where an authorized process server testified that he went to the defendant's house to serve him with process, saw the defendant's truck in his driveway, knocked on his door, received no answer, went to a side window, saw the defendant inside, made eye contact with him, announced that he had papers for the defendant, saw the defendant fall to his knees and crawl to the back of the house, and stuck the process papers through the front door. *Valley v. Bogard*, 342 Ark. 336, 28 S.W.3d 269 (2000).

#### **Restricted Delivery.**

Where there is no evidence that plaintiff directed the summons and complaint to be mailed with restricted delivery, service does not meet the requirements of subdivision (e)(3) of this rule. *Wilburn v. Keenan Cos.*, 298 Ark. 461, 768 S.W.2d 531 (1989).

Even though the restricted delivery box was not checked on the postal service form, there was restricted delivery where the procedure followed by the postal service and addressee in mailing and delivering the summons and complaint was the designated procedure under subdivision (d)(8)(A) of this rule,

the person who accepted delivery and signed the required receipt was authorized to do so and the required receipt was returned to the plaintiffs. *CMS Jonesboro Rehabilitation, Inc. v. Lamb*, 306 Ark. 216, 812 S.W.2d 472 (1991).

#### **Rule Mandatory.**

Under subsection (i) of this rule, dismissal of a case for failure to make service of summons is mandatory. *Lyons v. Forrest City Machine Works, Inc.*, 301 Ark. 559, 785 S.W.2d 220 (1990).

Service of process requirements, being in derogation of common law rights, must be strictly construed and compliance with them must be exact. *Carruth v. Design Interiors, Inc.*, 324 Ark. 373, 921 S.W.2d 944 (1996).

Subsection (b) of this rule sets out the technical requirements of a summons, and compliance with those requirements must be exact. *Thompson v. Potlach Corp.*, 326 Ark. 244, 930 S.W.2d 355 (1996).

Although the amended complaint in parents' medical malpractice action was filed before the expiration of the two-year statute of limitations in § 16-114-203, the limitations period was not tolled because a summons was never issued, and parents admitted they failed to complete service of process of the amended complaint, as required by this rule; while Ark. R. Civ. P. 3 provides that an action is commenced by filing a complaint with the clerk of the proper court, the effectiveness of the commencement date is dependent upon a party satisfying the requirements of subsection (i) of this rule, which provides that service of process on a defendant must be accomplished within 120 days after the filing of the complaint. *Posey v. St. Bernard's Healthcare, Inc.*, 365 Ark. 154, 226 S.W.3d 757 (2006).

#### **Saving Statute.**

To toll the limitations period and to invoke the saving statute, § 16-56-126, a plaintiff need only file his or her complaint within the statute of limitations and complete timely service on a defendant under this rule; a court's later ruling finding such completed service invalid does not disinherit the plaintiff from the benefit of the saving statute. *Forrest City Mach. Works, Inc. v. Lyons*, 315 Ark. 173, 866 S.W.2d 372 (1993).

To toll the limitations period and to invoke the one year savings statute, § 16-56-126, a plaintiff need only file his or her complaint within the statute of limitations and complete timely service on a defendant pursuant to ARCP 3 and this rule; even where a court later finds the plaintiff's timely completed service to be invalid, the plaintiff is not disinherited from benefiting from the one year saving statute. *Hicks v. Clark*, 316 Ark. 148, 870 S.W.2d 750 (1994).

Where plaintiff filed a medical malpractice action on March 4, 1994, two days short of the



two-year statute of limitations under § 16-114-203(a), and had until July 2, 1994, to complete service of process pursuant to subsection (i) of this rule, requested another 120 days on June 23, 1994, and was granted a 30-day extension on July 28, 1994, and where plaintiff, after failing to obtain service, requested a nonsuit on August 18, 1994, which was granted on September 14, 1994, the claim refiled on August 11, 1995, had not invoked the one-year savings statute, § 16-56-126, and was barred by the statute of limitations. *Thomson v. Zufari*, 325 Ark. 208, 924 S.W.2d 796 (1996).

#### **Service by Mail.**

To accomplish service by mail under subdivision (d)(8) of this rule, the return receipt must be signed by the addressee or the agent of the addressee, and requirements under this rule, being in derogation of common law, must be strictly followed. *Maple Leaf Canvas, Inc. v. Rogers*, 311 Ark. 171, 842 S.W.2d 22 (1992).

#### **Service by Warning Order.**

Subsection (f) of this rule permits constructive service by warning order only if the whereabouts of the defendant is unknown after diligent inquiry; thus, where the evidence clearly supported the trial court's finding that the cross-complainant did not make a diligent search for the cross-defendant in order to serve process on him, the cross-complainant was not entitled to rely on constructive service by warning order despite the affidavit signed by his attorney which recited the standard phrase that the location of the cross-defendant was unknown "after a diligent and reasonable inquiry." *Smith v. Edwards*, 279 Ark. 79, 648 S.W.2d 482 (1983).

An affidavit of a petitioner does not conform to the procedures for constructive service required by subdivision (f)(1) of this rule if it does not state that, after making diligent inquiry, the whereabouts of a defendant in an action to quiet title are unknown, a condition in this rule for a warning order's issuance. *Gilbreath v. Union Bank*, 309 Ark. 360, 830 S.W.2d 854 (1992).

It is a well-settled rule that constructive service is a departure from the common law, and statutes providing for such service are mandatory and must be complied with exactly. *Black v. Merritt*, 37 Ark. App. 5, 822 S.W.2d 853 (1992).

Issuing and publishing of warning order by appellee's attorney did not satisfy provisions of this rule that warning orders be issued by clerk, and their attempt to obtain service by publication failed. *Black v. Merritt*, 37 Ark. App. 5, 822 S.W.2d 853 (1992).

In a divorce action, where service on the husband was attempted by sending the complaint and summons by certified mail to the husband's last known address, but the sum-

mons was returned unclaimed, the trial court erred in allowing service by warning order without the filing of an affidavit that a diligent inquiry had been made into the husband's whereabouts, as required by subsection (f) of this rule, and the divorce decree that had been entered was void. *Jackson v. Jackson*, 81 Ark. App. 249, 100 S.W.3d 92 (2003).

Mother did not preserve for review the argument that service of a petition to terminate parental rights by warning order pursuant to subsection (f) of this rule was not sufficient because her attorney was provided with notice under Ark. R. Civ. P. 5, the Arkansas Department of Human Services satisfied the requirement of diligent inquiry provided in this rule, and at no time during the initial hearing on the petition for termination of the mother's parental rights was an objection made or a ruling requested on the issue of whether service was proper; because the mother was represented by counsel throughout the proceedings, service was properly made upon counsel of record pursuant to Rule 5, the circuit court had jurisdiction, and it was the mother's responsibility to stay informed and keep her attorney informed of her current address. *Blackerby v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 858, — S.W.3d —, 2009 Ark. App. LEXIS 1011 (2009).

Appellant failed to obtain valid service on appellee via warning order under subsection (f) of this rule, as it did not mail a copy of the warning order to appellee's last known address and did not file an affidavit stating that 30 had elapsed since the order was published. *Pulaski Choice, L.L.C. v. 2735 Villa Creek, L.P.*, 2010 Ark. App. 451, — S.W.3d —, 2010 Ark. App. LEXIS 478 (May 26, 2010).

Default judgment against a goat seller was set aside under Ark. R. Civ. P. 55(c) as: (1) the buyer knew of the seller's whereabouts as the buyer had gone to the seller's house, yet the buyer did not make a diligent inquiry into the seller's whereabouts before applying for a warning order under subdivision (f)(1) of this rule; (2) all of the buyer's service attempts in 2000 were at different incorrect addresses; (3) the seller's knowledge of the lien against her property did not validate the void default judgment; (4) the trial court lacked jurisdiction; and (5) laches and estoppel did not apply as the default judgment was void ab initio. *Scott v. Wolfe*, 2011 Ark. App. 438, — S.W.3d —, 2011 Ark. App. LEXIS 469 (June 15, 2011).

#### **Service in Foreign Divorce Proceeding.**

Where husband in Illinois divorce and custody proceeding attempted to obtain constructive service on his wife, who resided in Arkansas with their two children, by publication in Illinois in accordance with the Illinois Civil Practice Act, such publication was not sufficient notice to vest the Illinois court with the

personal jurisdiction necessary to award custody of the children to the father; the Illinois version of the Uniform Child Custody Jurisdiction Act does not provide for notice by publication, and although § 9-13-205(a)(2) does authorize notice to be served in the manner prescribed by the law of the place in which the service is made, the procedure utilized by the father did not remotely comply with the requirements of subsections (f) and (i) of this rule, and, accordingly, the Arkansas trial court which was hearing the wife's later-filed divorce and custody suit was not required to give full faith and credit to the Illinois custody order nor to defer jurisdiction to the Illinois court under the act. *Pawlik v. Pawlik*, 2 Ark. App. 257, 620 S.W.2d 310 (1981).

### **Service Not Proper.**

Where the summons had not been signed by the court clerk as required by this rule, service had not been properly made. *Carruth v. Design Interiors, Inc.*, 324 Ark. 373, 921 S.W.2d 944 (1996).

Because the rule for substituted service of process must be complied with exactly, service of process at the home of appellee's mother was insufficient for the purpose of proper notice. *State Office of Child Support Enforcement v. Mitchell*, 330 Ark. 338, 954 S.W.2d 907 (1997).

The plaintiff in a motor vehicle accident case failed to comply with the rule where the summons properly named both the individual who drove the truck with which he collided and the company which owned the truck and by which the driver was employed, but improperly directed service on the driver, rather than the company. *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998).

Trial court's decision to dismiss the action was proper because guardian's wrongful death claim was derivative of her negligence action, and the negligence action was subject to dismissal with prejudice as it was undisputed that guardian's second complaint contained the same negligence allegations set out in her first suit, which she voluntarily nonsuited; however, the guardian never properly served the second complaint alleging negligence within the extended time for service and subsection (i) of this rule mandated dismissal of the negligence claim, thus, under Ark. R. Civ. P. 41(b), the dismissal operated as an adjudication of the merits, making the dismissal with prejudice. *Brown v. Pine Bluff Nursing Home*, 359 Ark. 471, 199 S.W.3d 45 (2004).

Husband's post-decree motion to enforce a divorce agreement was dismissed as he failed to comply with subdivision (d)(8)(A) and subsection (c) of this rule; the record did not indicate that he used return-receipt requested and restricted delivery to the wife or

her agent, and his attempt at service by commercial delivery failed as the notice was not delivered to the wife or signed for by the wife, and there was no evidence to show that the person who signed for the package was the wife's agent. *Connally v. Connally*, 95 Ark. App. 42, 233 S.W.3d 168 (2006).

Trial court did not err in dismissing with prejudice a pedestrian's personal injury suit against an automobile driver when service was improperly completed by leaving a copy of the summons and the complaint with the driver's father at the father's place of business. Moreover, the pedestrian and his wife failed to seek an extension of time with which to complete proper service, and the pedestrian and his wife failed to show proof of fraud on the driver's part, which would have tolled the statute of limitations. *Brennan v. Wadlow*, 372 Ark. 50, 270 S.W.3d 831 (2008).

Because an accident victim filed his complaint during the limitations period and served it timely, albeit imperfectly, under this rule, he was entitled to the one-year grace period provided by the saving statute, § 16-56-126(a)(1), and therefore the case was properly dismissed without prejudice, allowing him to refile. *McCoy v. Bodiford*, 2010 Ark. App. 152, — S.W.3d —, 2010 Ark. App. LEXIS 174 (Feb. 17, 2010).

### **Service of Cross-Complaint.**

Where a creditor's cross-complaint was attached to a summons requiring the debtor defendants to answer the plaintiff's complaint, but the summons made no mention of the attached cross-complaint, the chancellor properly set aside a default judgment that had been obtained on the cross-complaint since there had been no proper service of the cross-complaint. *Moore v. Owens*, 268 Ark. 324, 597 S.W.2d 65 (1980).

### **Service on Coroner.**

Subsection (a) of this rule does not purport to change § 16-58-112, which requires that summons be served on the coroner when sheriff is party to an action, for the rule provides that any summons is to be delivered for service to a sheriff or to a person authorized by law to serve it. *Nelson v. Wakefield*, 282 Ark. 285, 668 S.W.2d 29 (1984).

### **Service Proper.**

When defendant refused to accept service and process server, on his return and affidavit, noted that he left the complaint, summons and lis pendens on a stump under a rock outside the gate to defendant's property, such service comported with requirements of subdivision (d)(1) of this rule. *Riggin v. Dierdorff*, 302 Ark. 517, 790 S.W.2d 897 (1990).

Trial court did not err in holding that a default judgment was not void due to insufficiency of service of process and concluding that service was proper; the process server



was properly appointed to serve process in Pulaski County under subdivision (c)(2) of this rule where the server was appointed for the purpose of serving summons in Pulaski County and service was made in Pulaski County. *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004).

Where both homeowner's and process server's testimony indicated that homeowner received documents from the process server at his residence on April 19, but he simply neglected to read the documents, homeowner's contention that he was mistaken in his belief that he was being handed regular mail did nothing to erode the admitted fact that he received hand-delivery of his service. *Israel v. Oskey*, 92 Ark. App. 192, 212 S.W.3d 45 (2005).

Savings statute was applicable entitling the patient to refile his medical malpractice suit because his initial attempted service on the surgeon was proper; the return receipt was signed by the surgeon's secretary and the patient not only served the surgeon by certified mail, return receipt requested, restricted delivery, he further sent interrogatories certified mail, return receipt requested, restricted delivery and the secretary signed for those documents as the surgeon's agent. *McCoy v. Montgomery*, 370 Ark. 333, 259 S.W.3d 430 (2007).

County sheriff's office, although the seizing agency, was not a party to a forfeiture action brought by a prosecutor under § 5-64-505, and therefore service by the sheriff on the owners of the property to be forfeited was not deficient under subdivision (c)(1) of this rule. *State v. Hammame*, 102 Ark. App. 87, 282 S.W.3d 278 (2008).

#### **Statute Not Applicable.**

Where the plaintiff made it clear, when perfecting service upon defendants, that it was proceeding under this rule, and it was found that plaintiff's actions complied with the requirements of subsection (f) of this rule, § 16-58-119 was deemed not applicable. *Horne v. Savers Fed. Sav. & Loan Ass'n*, 295 Ark. 182, 747 S.W.2d 580 (1988).

Property owners' appeal of the denial of nonconforming use status was improperly dismissed because their appeal was perfected under Ark. Dist. Ct. R. 9 and § 14-56-425 by the timely filing of the record in circuit court; further, this rule did not apply because there was no requirement of service of summons and complaint for the appeal and, to the extent that *Weiss v. Johnson*, 331 Ark. 409, 961 S.W. 2d 28 (1998), was inconsistent, it was overruled. *Wright v. City of Little Rock*, 366 Ark. 96, 233 S.W.3d 644 (2006).

#### **Substituted Service.**

Substituted service is a departure from the common law, and rules or statutes providing

for it are mandatory and to be complied with exactly. Where the purported service was attempted at an attorney's office and not at the defendant's dwelling, the rule providing for substituted service was not complied with, and the service was void. *Sims v. Prescott Feed Mills, Inc.*, 286 Ark. 22, 688 S.W.2d 743 (1985).

#### **Summons Not Defective.**

Summons was not defective where it did not contain the signature of the county circuit clerk but was signed by the deputy clerk. *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004).

Subsection (b) of this rule lays out with great specificity the requirements for a proper summons, but nowhere does the rule require or even suggest that the summons must describe all of the requirements for a valid answer. Therefore, in a civil forfeiture action, a summons was not invalid because it failed to state the verification requirements for an answer under § 5-64-505(g)(4). *Solis v. State*, 371 Ark. 590, 269 S.W.3d 352 (2007).

Arkansas Supreme Court declines to interpret subsection (b) of this rule so as to preclude the state from using a summons in the form that is best calculated to give actual notice to a party in interest who is not the named defendant in an in rem proceeding. Therefore, there was no error in a summons naming property as a defendant, but later naming the owner as a defendant to whom the summons was directed. *Solis v. State*, 371 Ark. 590, 269 S.W.3d 352 (2007).

#### **Supersession of Statutes.**

This rule did not supersede § 16-58-125. *Sun Gas Liquids Co. v. Helena Nat'l Bank*, 276 Ark. 173, 633 S.W.2d 38 (1982), criticized *Venable v. Becker*, 287 Ark. 236, 697 S.W.2d 903 (1985).

Where service of writ of garnishment on bookkeeper and secretary of corporation would not be proper under § 16-58-124 but would be proper under subdivision (d)(5) of this rule, these provisions conflict and since § 16-58-124 does not fit into the exception described in Rule 81(a), subdivision (d)(5) of this rule supersedes § 16-58-124. *May v. Bob Hankins Distrib. Co.*, 301 Ark. 494, 785 S.W.2d 23 (1990).

To the extent § 16-58-130(c) formerly provided a different and longer publication requirement than subsections (f) and (j) of this rule, § 16-58-130(c) was preempted by this rule. *Phillips v. Commonwealth Sav. & Loan Ass'n*, 308 Ark. 654, 826 S.W.2d 278 (1992).

#### **Timeliness.**

Complaint in personal injury action against sheriff was properly dismissed where plaintiff took nonsuit in original action and, after refile, failed to have summons on sheriff served by the coroner, pursuant to § 16-58-

112, until after both the one-year statute of limitations under § 16-56-126 and the 120-day period for service of summons under subsection (i) of this rule had expired. *Nelson v. Wakefield*, 282 Ark. 285, 668 S.W.2d 29 (1984).

Under this rule, if service of summons is not made upon a defendant within 120 days after the filing of the complaint, the action shall be dismissed without prejudice, but the dismissal without prejudice language does not apply if the plaintiff's action is otherwise barred by the running of a statute of limitations. *Green v. Wiggins*, 304 Ark. 484, 803 S.W.2d 536 (1991).

Subsection (i) of this rule requires only that the plaintiff complete service upon the defendant within 120 days from filing the complaint; however, if the plaintiff fails to complete service during that period, he or she may still request that the time be extended to complete service in order to protect the plaintiff against the running of a statute of limitations if that extension is requested within the 120-day period. *Hicks v. Clark*, 316 Ark. 148, 870 S.W.2d 750 (1994).

In order to comply with subsection (i) of this rule, a party need only file the motion to extend time prior to the expiration of the deadline. *Edwards v. Szabo Food Serv., Inc.*, 317 Ark. 369, 877 S.W.2d 932 (1994).

Under subsection (i) of this rule, a circuit court does not lose jurisdiction if the order granting a motion to extend the time to obtain service of process is not signed and filed prior to the expiration of 120 days from the filing of the complaint; where the motion to extend time is filed prior to the expiration of the 120 day period, the trial court may grant the extension after the expiration of 120 days. *Edwards v. Szabo Food Serv., Inc.*, 317 Ark. 369, 877 S.W.2d 932 (1994).

Service of process must be accomplished within 120 days after the filing of the complaint absent a motion to extend. *Dougherty v. Sullivan*, 318 Ark. 608, 887 S.W.2d 305 (1994).

Court would not penalize plaintiff for her failure to file a motion requesting an extension where plaintiff was deceived into thinking that her original complaint had been properly served on defendant when in fact it had been served on defendant's father. *Eddinger v. Wright*, 904 F. Supp. 932 (E.D. Ark. 1995).

Tort claim was time-barred under § 16-56-105, even though complaint was filed in a timely manner, where plaintiff did not obtain service on defendant within 120 days pursuant to subsection (i) of this rule. *Sublett v. Hipps*, 330 Ark. 58, 952 S.W.2d 140 (1997).

Even though the appellant filed a motion for an appeal within 30 days of entry of the order, where he then filed a motion for a new

trial and failed to file a new notice of appeal within 30 days after the trial court failed to rule on the motion, the appellate court was without jurisdiction. *Alamo v. Coie*, 56 Ark. App. 97, 938 S.W.2d 873 (1997).

A default judgment was void for want of proper service upon the defendant corporation under the rule since service was not attempted until more than 120 days from the date the complaint was filed and, moreover, since service was attempted by certified mailings, the relevant date for determining whether service was timely was the date service was received. *Southeast Foods, Inc. v. Keener*, 335 Ark. 209, 979 S.W.2d 885 (1998).

An attempt at service does not toll the 120-day-period provided by subsection (i) of this rule. *Southeast Foods, Inc. v. Keener*, 335 Ark. 209, 979 S.W.2d 885 (1998).

The trial court improperly dismissed a medical malpractice action since the plaintiff complied with subsection (i) of this rule and obtained service within the extended time period granted by the trial court before the judge rescinded his orders extending the time for service. *King v. Carney*, 341 Ark. 955, 20 S.W.3d 341 (2000).

Personal injury plaintiff's failure to request motion to extend time for service of process within the 120-day period prescribed by subsection (i) of this rule rendered order granted extension after 120-day period a nullity. *Kangas v. Neely*, 346 Ark. 334, 57 S.W.3d 694 (2001).

Debtor's motion to dismiss a bank's action to collect an unpaid account based on the bank's failure to effect service of the complaint within 120 days of filing, as required by subsection (i) of this rule, or to make a timely application for an extension of time was sufficient to allow the debtor to challenge a default judgment entered against the debtor for failing to respond to the bank's complaint within 20 days of service, as required by ARCP 12(a), because the judgment was void and the debtor could challenge the trial court's jurisdiction even though her own response was also untimely. *Williams v. Citibank, N.A.*, 80 Ark. App. 42, 90 S.W.3d 451 (2002).

Although under ARCP 6(b) a trial court is permitted to enlarge the time period to act upon a motion made after the expiration of the specified period, for cause shown, Rule 6(b) does not apply where a trial court has no jurisdiction to act; thus, where the trial court must dismiss an action under subsection (i) of this rule for lack of service or failure to file a timely motion to extend time for service, then that trial court loses its jurisdiction to take any further action in that case. *Holland v. Laffer*, 80 Ark. App. 316, 95 S.W.3d 815 (2003).

Where appellants made no good cause showing for an extension of time to complete



service of process, they failed to strictly comply with the service requirements of subsection (i) of this rule; it was of no consequence whether the reason later offered by appellants, that they were unable to secure a file-marked copy of the complaint from the circuit clerk, amounted to good cause. *Henyan v. Peek*, 359 Ark. 486, 199 S.W.3d 51 (2004).

Court erred in awarding judgment to plaintiff in his breach of contract action against defendant because plaintiff's earlier failure to comply with the service requirements of subsection (i) of this rule resulted in a failure to commence the action so as to effectuate the one-year savings provision provided § 16-56-126; hence, the action was barred by the five-year statute of limitations in § 16-56-111(a). *Long v. Bonds*, 89 Ark. App. 111, 200 S.W.3d 922 (2005).

Appellate court reversed the dismissal of patient's complaint as patient's assertions in his motion for extension of time satisfied the need for a contemporaneous showing of good cause in a motion for extension of time by stating that the summons and complaint had been sent to the sheriff, but had not yet been served, and that the doctor's attorney could raise insufficiency of service of process as a ground for dismissal. *Nelson v. Weiss*, 366 Ark. 361, 235 S.W.3d 891 (2006).

Court properly denied appellees' motion to dismiss appellant's challenge to an order holding him in contempt for failing to provide financial information where appellant filed his Ark. R. Civ. P. 52 motion within 10 days of the entry of judgment on January 18, 2005; because appellant filed a motion to amend under Rule 52, the time for filing a notice of appeal was extended under subsection (b) of this rule. *Stilley v. Fort Smith Sch. Dist.*, 367 Ark. 193, 238 S.W.3d 902 (2006).

Trial court erred in granting state's motion to strike appellant's motion to dismiss a forfeiture action because, after voluntarily dismissing its first forfeiture complaint for failure to complete service of process, the state neglected to toll the limitations period to invoke the one-year savings statute because it did not file the forfeiture complaint within the 120-day period required by § 5-64-505(3). *Mitchell v. State*, 94 Ark. App. 304, 229 S.W.3d 583 (2006).

In a case where relief was sought from a foreclosure proceeding based on defective service under this rule, two debtors waived the issue since they recognized the action was in court and made an appearance at the foreclosure proceeding by agreeing to the entry of an order appointing a receiver; therefore, there was no due process violation. Moreover, subsection (i) of this rule was satisfied because the entry of the order appointing the receiver occurred well within the 120-day period pro-

vided for service. *Trelfa v. Simmons First Bank of Jonesboro*, 98 Ark. App. 287, 254 S.W.3d 775 (2007).

In an action arising from a rear-end accident, plaintiff driver could not use the relation-back doctrine in Ark. R. Civ. P. 15(c) because the 120-day requirement of subsection (i) of this rule was not met. The court could not assume defendant driver's knowledge of the action, after being named in the amended complaint, from the fact that defendant was related to and lived with the original defendant, the owner of the vehicle. *Bennett v. Spaight*, 372 Ark. 446, 277 S.W.3d 182 (2008).

In an action by a solicitor against a contractor and others, the trial court did not abuse its discretion in refusing to dismiss the action for lack of timely service under subsection (i) of this rule because the trial court had granted the solicitor's motion to extend the time for service and the contractor was, in fact, served during the period of extension. *Nobles v. Tume*, 2010 Ark. App. 731, — S.W.3d —, 2010 Ark. App. LEXIS 786 (Nov. 3, 2010).

Trial court properly dismissed a FELA action for insufficiency of service of process under subsection (i) of this rule because service was not made until 181 days after the complaint was filed. The employer's participation in discovery prior to filing its motion to dismiss did not waive the defense of insufficiency of service of process. *Wilson v. Union Pac. R.R. Co.*, 2011 Ark. App. 508, — S.W.3d —, 2011 Ark. App. LEXIS 543 (2011).

**Cited:** In re Amendments to Rules of Civil Procedure, 279 Ark. 470, 651 S.W.2d 63 (1983); Proposed Annexation to Beaver v. Ratliff, 282 Ark. 516, 669 S.W.2d 467 (1984); *Biggers v. Biggers*, 11 Ark. App. 62, 666 S.W.2d 714 (1984); *Fausett & Co. v. Bogard*, 285 Ark. 124, 685 S.W.2d 153 (1985); *Pentron Corp. v. Delta Steel & Constr. Co.*, 286 Ark. 91, 689 S.W.2d 539 (1985), criticized In re Estate of Wilkinson, 311 Ark. 311, 843 S.W.2d 316 (1992); *Reynolds v. Spotts*, 286 Ark. 335, 692 S.W.2d 748 (1985), criticized *Monk v. Farmers Ins. Co.*, 290 Ark. 38, 716 S.W.2d 201 (1986); *Metal Processing, Inc. v. Plastic & Reconstructive Assocs.*, 287 Ark. 100, 697 S.W.2d 87 (1985); *Arkansas Iron & Metal Co. v. First Nat'l Bank*, 16 Ark. App. 245, 701 S.W.2d 380 (1985); *Kupers v. Kupers*, 20 Ark. App. 198, 726 S.W.2d 686 (1987); *Knox v. Knox*, 25 Ark. App. 107, 753 S.W.2d 290 (1988); *Knight v. Allstate Ins. Co.*, 300 Ark. 203, 779 S.W.2d 138 (1989); *Atlanta Exploration, Inc. v. Ethyl Corp.*, 301 Ark. 331, 784 S.W.2d 150 (1990); *Lawson v. Edmondson*, 302 Ark. 46, 786 S.W.2d 823 (1990); *Stotts v. Johnson*, 302 Ark. 439, 791 S.W.2d 351 (1990); *McIlroy Bank & Trust v. Acro Corp.*, 30 Ark. App. 189, 785 S.W.2d 47 (1990), overruled in part *Carden v. McDonald*, 69 Ark. App. 257,

12 S.W.3d 643 (2000); *Miller v. Tony & Susan Alamo Found.*, 924 F.2d 143 (8th Cir. 1991); *Phillips Constr. Co. v. Cook*, 34 Ark. App. 224, 808 S.W.2d 792 (1991); *Goston v. Craig*, 34 Ark. App. 23, 805 S.W.2d 92 (1991); *Wright v. Eddinger*, 320 Ark. 151, 894 S.W.2d 937 (1995); *State v. Pulaski County Circuit Court*, 327 Ark. 287, 938 S.W.2d 815 (1997); *Wright v. Sharma*, 330 Ark. 704, 956 S.W.2d 191 (1997); *In re Implementation of Amendment 80: Amendments to Rules of Civ. Procedure & Inferior Court Rules*, — Ark. —, — S.W.3d —,

2001 Ark. LEXIS 707 (May 24, 2001); *Nef v. Ag Servs. of Am., Inc.*, 79 Ark. App. 100, 86 S.W.3d 4 (2002); *Llapa-Sinchi v. Mukasey*, 520 F.3d 897 (8th Cir. 2008); *Rettig v. Ballard*, 2009 Ark. 629, 362 S.W.3d 260 (2009); *South-ern Dev. Corp. v. Freightliner of New Hamp-shire, Inc.*, 2009 Ark. App. 286, 307 S.W.3d 597 (2009); *Tucker v. Sullivant*, 2010 Ark. 170, — S.W.3d —, 2010 Ark. LEXIS 200 (Apr. 15, 2010); *Reichardt v. Creasey*, 2010 Ark. App. 736, — S.W.3d —, 2010 Ark. App. LEXIS 787 (Nov. 3, 2010).

## Rule 5. Service and filing of pleadings and other papers.

(a) *Service: When Required.* Except as otherwise provided in these rules, every pleading and every other paper, including all written communications with the court, filed subsequent to the complaint, except one which may be heard ex parte, shall be served upon each of the parties, unless the court orders otherwise because of numerous parties. No service need be made upon parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served in the manner provided for service of summons in Rule 4. Any pleading asserting new or additional claims for relief against any party who has appeared shall be served in accordance with subdivision (b) of this rule.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) *Service: How Made.*

(1) Whenever under this rule or any statute service is required or permitted to be made upon a party represented by an attorney, the service shall be upon the attorney, except that service shall be upon the party if the court so orders or the action is one in which a final judgment has been entered and the court has continuing jurisdiction.

(2) Except as provided in paragraph (3) of this subdivision, service upon the attorney or upon the party shall be made by delivering a copy to him or by sending it to him by regular mail or commercial delivery company at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy for purposes of this paragraph means handing it to the attorney or to the party; by leaving it at his office with his clerk or other person in charge thereof; or, if the office is closed or the person has no office, leaving it at his dwelling house or usual place of abode with some person residing therein who is at least 14 years of age. Service by mail is presumptively complete upon mailing, and service by commercial delivery company is presumptively complete upon depositing the papers with the company. When service is permitted upon an attorney, such service may be effected by electronic transmission, including e-mail, provided that the attorney being served has facilities within his or her office to receive and reproduce verbatim electronic transmissions. Service is complete upon transmission but is not effective if it does not reach the person to be served. Service by a commercial delivery company shall not be valid unless the company: (A) maintains permanent records of actual delivery, and (B) has been approved by the circuit court in which the action is filed or in the county where service is to be made.



(3) If a final judgment or decree has been entered and the court has continuing jurisdiction, service upon a party by mail or commercial delivery company shall comply with the requirements of Rule 4(d)(8)(A) and (C), respectively.

(c) *Filing.* (1) All papers after the complaint required to be served upon a party or his attorney shall be filed with the clerk of the court either before service or within a reasonable time thereafter. The clerk shall note the date and time of filing thereon. However, proposed findings of fact, proposed conclusions of law, trial briefs, proposed jury instructions, and responses thereto may but need not be filed unless ordered by the court. Depositions, interrogatories, requests for production or inspection, and answers and responses thereto shall not be filed unless ordered by the court. When such discovery documents are relevant to a motion, they or the relevant portions thereof shall be submitted with the motion and attached as an exhibit unless such documents have already been filed. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in the proper form. In counties where the county clerk serves as the ex officio clerk of any division of the circuit court, the filing requirement for any pleading, paper, order, judgment, decree, or notice of appeal shall be satisfied when the document is filed with either the circuit clerk or the county clerk.

(2) Confidential information as defined and described in Sections III(A)(11) and VII(A) of Administrative Order 19 shall not be included as part of a case record unless the confidential information is necessary and relevant to the case. Section III(A)(2) of the Administrative Order defines a case record as any document, information, data, or other item created, collected, received, or maintained by a court, court agency or clerk of court in connection with a judicial proceeding. If including confidential information in a case record is necessary and relevant to the case:

(A) The confidential information shall be redacted from the case record to which public access is granted pursuant to Section IV(A) of Administrative Order 19. The point in the case record at which the redaction is made shall be indicated by striking through the redacted material with an opaque black mark or by inserting some explanatory notation in brackets, such as: [Information Redacted], [I.R.], [Confidential], or [Subject To Protective Order]. If an entire document is redacted, then the name of the document (with the number of pages redacted specified) should be noted in the publicly available court file and the entire document should be filed under seal. The requirement that the redaction be indicated in case records shall not apply to court records rendered confidential by expungement or other legal authority that expressly prohibits disclosure of the existence of a record; and

(B) An un-redacted copy of the case record with the confidential information included shall be filed with the court under seal. The un-redacted copy of the case record shall be retained by the court as part of the court record of the case. It is the responsibility of the attorney for a party represented by counsel and the responsibility of a party unrepresented by counsel to ensure that confidential information is omitted or redacted from all case records that they submit to a court. It is the responsibility of the court, court agency, or clerk of court to ensure that confidential information is omitted or redacted from all case records, including orders, judgments, and decrees, that they create.

(3) If the clerk's office has a facsimile machine, the clerk shall accept facsimile transmissions of any paper filed under this rule and may charge a fee of \$1.00 per page. Any signature appearing on a facsimile copy shall be presumed authentic until proven otherwise. The clerk shall stamp or otherwise mark a facsimile copy as filed on the date and time that it is received on the clerk's facsimile machine during the regular hours of the clerk's office or, if received outside those hours, at the time the office opens on the next business day.

(d) *Filing With the Judge.* The judge may permit papers or pleadings to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk. If the judge permits filing by facsimile transmission, the provisions of subdivision (c)(2) of this rule shall apply.

(e) *Proof of Service.* Every pleading, paper or other document required by this rule to be served upon a party or his attorney, shall contain a statement by the party or attorney filing same that a copy thereof has been served in accordance with this rule, stating therein the date and method of service and, if by mail, the name and address of each person served. (Amended July 9, 1984, effective September 1, 1984; amended June 24, 1985, effective September 1, 1985; amended July 7, 1986, effective September 15, 1986; amended November 20, 1989, effective January 1, 1990; amended December 10, 1990, effective February 1, 1991; amended November 8, 1993, effective January 1, 1994; amended November 18, 1996, effective March 1, 1997; amended January 28, 1999; amended June 24, 1999; amended January 27, 2000; amended January 24, 2002; amended February 10, 2005; amended October 23, 2008, effective January 1, 2009; amended June 3, 2010, effective July 1, 2010.)

**Publisher's Notes.** The 2002 amendments to Ark. R. Civ. P. 4(d)(8)(C) and Ark. R. Civ. P. 5(b) are deemed to supersede Ark. Code Ann. § 1-2-122(b) with respect to the service of process and other papers.

**Reporter's Notes (as modified by the Court) to Rule 5:** 1. This Rule is essentially the same as FRCP 5 and makes no significant change in Arkansas law. With the obvious exception of *ex parte* proceedings, and conferring some discretion on the court in cases involving multiple parties, the Rule requires service of all pleadings, papers and other documents generated in the lawsuit on each of the other parties to the action.

2. FRCP 5(b) permits service in certain instances upon "some person of suitable age and discretion" residing in the residence or usual place of abode of the person to be served. As stated in the Reporter's Notes to Rule 4, the Committee has, in order to overcome the vagueness and uncertainty of that language, provided that in such an instance service may be had upon some person who is at least fourteen years of age.

3. FRCP 5(c) is omitted from the Rule because Section (a) adequately permits the trial judge to waive service where multiple parties are involved.

4. FRCP 5(e) permits the trial judge to

accept the filing of pleadings and other papers personally. That procedure has been retained, because the clerk may not always be present.

5. Although FRCP 5 makes no provision for proof of service of pleadings, most Federal District courts require it by local rule, and it has been heretofore required in Arkansas courts. Rule 5(e) thus effects no change in that regard.

**Addition to Reporter's Notes, 1984 Amendments:** Rule 5(b) is amended to incorporate provisions from Ark. Stat. Ann. § 27-632 (Repl. 1979), which is now deemed superseded, making insufficient service of papers on an attorney in a case in which there has been a final order but reserved, continuing jurisdiction.

Rule 5(c) is amended to do away with the requirement that the papers mentioned be filed. Although discovery papers are among those which need no longer be filed, requests for admission and responses to requests for admission must be filed.

**Addition to Reporter's Notes, 1985 Amendment:** The first sentence of Rule 5(a) is amended to make plain that all correspondence between counsel and the court is to be served upon all parties. As the Reporter's Note to the original version of this rule indicates, the phrase "every other paper" is to be



given an expansive reading and includes “all pleadings, papers and other documents generated in the lawsuit . . .” Without intending to limit the breadth of the term, this amendment simply specifies by way of illustration a “paper” falling within the rule. Thus, the amended rule requires, for example, service of a precedent for judgment prepared at the court’s request. Compare *Karam v. Halk*, 260 Ark. 3, 537 S.W.2d 797 (1976).

**Addition to Reporter’s Notes, 1986 Amendment:** The 1986 amendment adds the words “or any statute” following the word “rule” in the first sentence of subsection (b). The rule thus applies not only to those papers required to be filed by the Rules of Civil Procedure, but also to documents that must be filed under the provisions of particular statutes, *e.g.*, Ark. Stat. Ann. § 34-2617 (Supp. 1985) (notice of intent to sue in medical malpractice proceedings).

**Addition to Reporter’s Notes, 1989 Amendment:** Rule 5(b) is amended to make clear that service upon an attorney under the rule is permitted by “fax” machine or by commercial delivery service, as well as by mail. This recognition of “new technology” is consistent with Act 58 of 1989 [§ 16-20-109], which permits a court clerk to accept pleadings filed via fax machine.

**Addition to Reporter’s Notes, 1990 Amendment:** Subdivision (a) of Rule 5 requires that “pleadings asserting new or additional claims for relief against [parties in default for failure to appear] shall be served in the manner provided for service of summons in Rule 4.” This provision implies that a pleading asserting a new or additional claim for relief against a party who has appeared in the action need only be served on the party’s attorney, as set forth in Rule 5(b). Some federal courts have so construed the virtually identical federal rule. *E.g.*, *Dysart v. Marriot Corp.*, 103 F.R.D. 15 (E.D. Pa. 1984). However, Arkansas cases predating adoption of the Rules of Civil Procedure indicate that service by summons on a party already before the court is required in some circumstances. *E.g.*, *Nance v. Flaugh*, 221 Ark. 352, 253 S.W.2d 207 (1953); *Arbaugh v. West*, 127 Ark. 98, 192 S.W. 171 (1917). See also *Howard v. County Court*, 278 Ark. 117, 644 S.W.2d 256 (1983) (citing *Arbaugh* with approval but not discussing Rule 5).

To clarify Arkansas procedure, subdivision (a) of Rule 5 has been amended to provide that any pleading stating a new or additional claim for relief against a party who has appeared in the action may be served in the manner prescribed by subdivision (b). Consequently, such a pleading — *e.g.*, a counterclaim, cross claim, or amended complaint stating a new claim for relief — may be served by mail on the party’s attorney, and the meth-

ods for service of process set out in Rule 4 need not be employed. Service on the attorney in this context is consistent with the basic theory of Rule 5 that service of papers on the attorney, rather than the party, will expedite adjudication of the case and constitute sufficient notice to the party to comply with the requirements of due process. See *Adam v. Saenger*, 303 U.S. 59 (1938). If a party has not appeared, however, Rule 5(a) specifically provides that service must be made under Rule 4. Similarly, if the pleading seeks to add a new party — *e.g.*, an answer asserting a counterclaim against the plaintiff and a third person over whom the court has not previously acquired jurisdiction — the pleading must be served on the new party as provided by Rule 4. Because the plaintiff in that situation is already before the court, the pleading may be served on his attorney.

**Addition to Reporter’s Notes, 1993 Amendment:** Rule 5(c) is amended by adding a new sentence providing that the clerk shall not refuse to accept any paper for filing solely because it is not presented in the proper form. Virtually identical language was added to Rule 5(e) of the Federal Rules of Civil Procedure in 1991. The amendment reflects the view that a judge, not the clerk, is the proper official to make determinations of this type. Moreover, a clerk’s refusal to accept a document for filing exposes litigants to the hazards of time bars.

**Addition to Reporter’s Notes, 1997 Amendment:** Subdivision (c) has been amended by designating the former text as paragraph (1) and by adding new paragraph (2), which addresses the filing of papers by facsimile. A statute adopted in 1989 provides that clerks may accept fax copies of pleadings but does not cover other papers that are filed. See Ark. Code Ann. § 16-20-109. Paragraph (2) tracks the language of the statute but applies to any paper filed under this rule. The new sentence added to subdivision (d) makes clear that the judge may permit papers filed with him to be transmitted by facsimile.

**Addition to Reporter’s Notes, 1999 Amendment:** Subdivision (b) has been divided into three paragraphs, but only one change has been made. Previously, service by regular mail was sufficient in all cases. See *Office of Child Support v. Ragland*, 330 Ark. 280, 954 S.W.2d 218 (1997) (motion requesting judgment for unpaid child support). Paragraph (2) provides for service by regular mail as a general rule; however, paragraph (3) creates an exception by incorporating the requirements of Rule 4(d)(8)(A) for service by mail on a party when, as in *Ragland*, a final judgment or decree has been entered and the court has continuing jurisdiction. In this situation, paragraph (1) requires, as did the prior version of the rule, that service be made

on the party, not his or her attorney. Ark. Code Ann. § 16-58-131, which addressed these issues and other matters now governed by Rules 4 and 5, has been deemed superseded.

Several changes have been made in subdivision (c)(2) concerning facsimile filings. The statute on which the rule was originally based, Ark. Code Ann. § 16-20-109, has been deemed superseded. The first sentence of subdivision (c)(2) has been amended to require any clerk with a facsimile machine to accept facsimile filings of any paper filed under this rule and to allow the clerk to charge a fee of \$1.00 per page. Previously, the rule provided that a clerk with a facsimile machine “may accept” papers filed by fax. Apparently, some clerks refused to accept papers filed in this manner even though they had the necessary equipment. Also, language in the first sentence requiring that an original document be substituted for a fax filing if the latter were not made on bond-type paper has been deleted. This provision was considered unnecessary in light of improvements in the quality of fax machines. The third sentence of subdivision (c)(2) has been amended to require that the clerk stamp or otherwise mark the facsimile copy as filed on the date and time that it is received in the clerk’s office or, if received when the office is closed, on the next business day. The last sentence of the prior version of the rule, which provided that “[t]he date and time printed by the clerk’s facsimile machine on the transmitted copy shall be prima facie evidence of the date and time of filing,” has been deleted because the date and time are printed by the sender’s facsimile machine, not the clerk’s.

#### **Addition to Reporter’s Notes, 2000**

**Amendment:** Subdivision (c)(1) of the rule has been amended to provide that discovery materials, except for requests for admission, shall not be filed with the clerk unless the court so orders. This is the practice in the federal district courts in Arkansas and in several states. *See* Rule 5.5(f), Rules of the U.S. District Courts for the Eastern and Western Districts of Arkansas; Rule 2-401(d)(2), Md. R. Civ. P.; Rule 191.4, Tex. R. Civ. P. Under the prior version of the rule, the filing of such materials was optional absent a court order.

#### **Addition to Reporter’s Notes, 2002**

**Amendment:** Since 1989, subdivision (b)(2) has allowed service of papers, other than the summons and complaint, on attorneys via commercial delivery companies. This subdivision has been amended to allow service by this method on parties as well, but with the safeguard that the commercial delivery company be court-approved. Section 1-2-122(b) of

the Arkansas Code, which allowed service by “an alternative mail carrier,” has been deemed superseded.

Subdivision (b)(2) has also been revised to provide that “service by commercial delivery company is presumptively complete upon depositing the papers with the company.” This provision parallels that for service by mail, which “is presumptively complete upon mailing.” Subdivision (b)(3), which applies when the circuit court has continuing jurisdiction, has been amended to reflect the addition of new paragraph (C) of Rule 4(d)(8).

#### **Addition to Reporter’s Notes, 2005**

**Amendment:** Rule 5(c)(1) has been amended. In some counties, the county clerk serves as the ex officio clerk of the probate division of the circuit court. Ark. Code Ann. § 14-14-502(b)(2)(B). Uncertainties have arisen in these circumstances about the effect of filing a pleading or paper with the wrong clerk. A sentence has been added to subsection (c)(1) to make plain that, in these counties, a party complies with Rule 5 when the document is file marked by either the circuit clerk or the county clerk. Similar clarifying language has been added to Rule of Civil Procedure 3(b) (filing a complaint), Administrative Order Number 2 (clerk’s docket and filing), and Rule of Appellate Procedure — Civil 3(b) (filing a notice of appeal).

#### **Addition to Reporter’s Notes, 2008**

**Amendment:** Subdivision (c) of the rule has been amended to incorporate Administrative Order 19’s requirements, which grant the public broad access to case records while safeguarding confidential information in those records. (The Administrative Order is appended to the Rules of Civil Procedure.) Amended Rule 5(c) obligates lawyers, and pro se litigants, to identify and shield confidential information that is necessary and relevant to the case by redacting that information in all publicly available documents they file with the court. The rule places primary responsibility for protecting information that the law has adjudged confidential on those individuals best situated to recognize and protect that information — lawyers and parties. They know the facts of their cases better than court staff or courts; they create almost all the documents coming into the court’s record; and they have the greatest incentive to minimize and protect confidential information in case records.

Under subdivision 2(B), courts, court agencies, and clerks are responsible for omitting or redacting confidential information from case records — including orders, judgments, and decrees — that they create. A parallel change reflecting this obligation in judgments and decrees has been made in Rule of Civil Procedure 58.

Administrative Order 19 defines categories



of confidential information and the Commentary to the Order explains the legal basis for the confidentiality. Section VII of the Order lists the following categories of confidential information in case records that are excluded from public access absent a court order allowing disclosure:

(1) information excluded from public access pursuant to federal law;

(2) information excluded from public access pursuant to the Arkansas Code Annotated;

(3) information excluded from public access by order (including protective order) or rule of court;

(4) Social Security numbers;

(5) account numbers of specific assets, liabilities, accounts, credit cards, and personal identification numbers (PINs);

(6) information about cases expunged or sealed pursuant to Ark. Code Ann. § 16-90-901, et seq.;

(7) notes, communications, and deliberative materials regarding decisions of judges, jurors, court staff, and judicial agencies; and

(8) all home and business addresses of petitioners who request anonymity when seeking a domestic order of protection.

The Commentary to Section VII of Administrative Order 19 discusses confidential information protected from public disclosure under federal and Arkansas law. The Commentary includes a non-exhaustive list of Arkansas Code Annotated sections regarding confidentiality of records whose confidentiality may extend to the records even if they become court records. See also the Arkansas Personal Information Protection Act, Ark. Code Ann. § 4-110-101, et seq.

New subsection (c)(2) embodies Order 19's important threshold requirement: only confidential information that is "necessary and relevant to the case" should be in a case record. Litigants are likewise best able to make this evaluation. And because they must redact any such information in a case record, litigants will have an incentive to reduce redactions by screening out unnecessary and irrelevant confidential information when creating documents for filing.

The amended rule provides two methods of redaction: blacking out the protected information or inserting a bracketed reference to the fact of redaction. Both achieve Administrative Order 19's balance between public access and confidentiality. If a redaction covers all of any multi-page document, then the rule requires listing the name of the document and the number of pages redacted in the publicly

available court file. No useful purpose would be served by having a stack of blacked-out pages in the public file.

Because a litigant will have deemed redacted information necessary and relevant, the court will need access to that information in handling and deciding the case. To allow this access, subdivision 2(B) obligates litigants to file unredacted copies of all their court papers under seal.

Some state agencies who deal routinely with confidential information — such as the Public Service Commission — have developed specialized rules for handling and protecting that information. Administrative Order 19 and its implementing rules in the Rules of Civil Procedure do not apply directly to those agencies' internal proceedings. But when a case from the PSC or other agency is appealed, the Rules of Appellate Procedure — Civil and the Rules of the Supreme Court and Court of Appeals do apply. Those Rules now implement Administrative Order 19 by incorporating and applying the redaction provisions of the Rules of Civil Procedure to all briefs, petitions, and other papers filed on appeal. Current agency procedures about confidential information that do not conflict with the new redaction rules are permissible. For example, confidential PSC documents are filed at the Commission on pink paper under seal. This and similar procedures supplement, but do not conflict with, the basic scheme required by Rule of Civil Procedure 5(c)(2). Certain appeal records will therefore contain materials shaped by these supplementary procedures, which is acceptable.

Former subsection (c)(2) has been renumbered, and is now (c)(3).

**Addition to Reporter's Notes, 2010 Amendment:** Subdivision (b)(2) has been amended to clarify that service upon an attorney by "electronic transmission" includes service by email. The amendment also provides that although service by electronic transmission is complete upon transmission, it is not effective if it does not reach the person to be served. As with other means of service, a claim that service by electronic transmission was not actually received may be raised by the person upon whom service was attempted. A corresponding amendment to Rule 6(d) adds the three-day additional response time allowed for service by mail or commercial delivery company to the time permitted for response to service by electronic transmission.

## RESEARCH REFERENCES

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## CASE NOTES

## ANALYSIS

Construction.

Applicability.

Continuing jurisdiction.

Extension of time.

Filing with judge.

Jurisdiction.

Service of cross-complaint.

Service on a party.

Service on attorney.

**Construction.**

Rule 4 expressly governs the service of the complaint and summons, while this rule governs the service of every pleading and every other paper filed after the complaint. Office of Child Support Enforcement v. Ragland, 330 Ark. 280, 954 S.W.2d 218 (1997).

Trial court did not err in dismissing ex-husband's post-decree motion to enforce a divorce agreement as husband failed to comply with the special requirements in subdivision (b)(3) of this rule, which applied in a post-decree, continuing-jurisdiction case and required service on the party by mail or commercial delivery. Connally v. Connally, 95 Ark. App. 42, 233 S.W.3d 168 (2006).

The Arkansas Supreme Court, by incorporating the service requirements of Ark. R. Civ. P. 4 into this rule, intended to adopt the spirit of Ark. R. Civ. P. 4 in that actual knowledge does not validate defective service of process; thus, just as actual notice does not satisfy due process under Ark. R. Civ. P. 4, it does not satisfy due process under this rule. Connally v. Connally, 95 Ark. App. 42, 233 S.W.3d 168 (2006).

**Applicability.**

This rule governs the service of all pleadings filed subsequent to the complaint. Arnold & Arnold v. Williams, 315 Ark. 632, 870 S.W.2d 365, cert. denied 513 U.S. 990, 115 S. Ct. 489, 130 L. Ed. 2d 400 (1994).

**Continuing Jurisdiction.**

The Office of Child Support Enforcement Unit (OCSE) had standing as a party and

should have received notice of the filing of a joint petition and an agreed order pursuant to which the parties agreed that the father would pay a specified amount to the mother in satisfaction of all past, present, and future child support obligations since OCSE was a party to the original action (having filed the original paternity complaint itself) and should have been considered a party to any subsequent proceedings that transpired within the course of the original action. Maxwell v. State, 343 Ark. 154, 33 S.W.3d 108 (2000).

Purpose of subdivision (b)(3) of this rule is not to require a party to serve a summons with a motion to modify a final decree when the court has reserved continuing jurisdiction, rather, it simply directs that such motions are required to be served in the same manner or method required for a summons and complaint, that is, served by mail with a return receipt requested and delivery restricted to the addressee or his or her agent, under Ark. R. Civ. P. 4(d)(8)(A)(i); thus, because the trial court retained jurisdiction over the divorce decree, a new complaint and summons were not required to be served on the ex-husband. Dickson v. Fletcher, 361 Ark. 244, 206 S.W.3d 229 (2005).

**Extension of Time.**

Because an order of extension of time to file a record on appeal made no reference to each of the findings of the circuit court required by subsection (b)(1) of this rule and because there had to be strict compliance with the rule, a remand was required for compliance with the rule. Winrock Grass Farm, Inc. v. Metro. Nat'l Bank, 373 Ark. 515, 284 S.W.3d 521 (2008).

**Filing with Judge.**

Subsection (d) of this rule, which provides that a judge may permit papers or pleadings to be filed with him, and that in such event he should note thereon the filing date and forthwith transmit them to the office of the clerk, does not mean an order can be deemed "en-



tered” simply because it is signed by a judge; thus, where the trial judge signed an order granting an extension for filing the record on appeal on the 89th day, but the extension order was not entered and filed with the clerk’s office until the 91st day, the extension order was not timely filed and the clerk properly denied the tender of the transcript. *Sullivan v. Wickliffe*, 284 Ark. 33, 678 S.W.2d 771 (1984); *Voyles v. Voyles*, 311 Ark. 186, 842 S.W.2d 21 (1992).

### **Jurisdiction.**

An action to reduce past-due arrearages to an executable judgment is not a “new cause of action”; it flows from the original divorce decree and personal jurisdiction over the parties continues without the need for additional service of process. *Office of Child Support Enforcement v. Ragland*, 330 Ark. 280, 954 S.W.2d 218 (1997).

### **Service of Cross-Complaint.**

Where a creditor’s cross-complaint was attached to a summons requiring the debtor defendants to answer the plaintiff’s complaint, but the summons made no mention of the attached cross-complaint, the chancellor properly set aside a default judgment that had been obtained on the cross-complaint since there had been no proper service of the cross-complaint. *Moore v. Owens*, 268 Ark. 324, 597 S.W.2d 65 (1980).

### **Service on a Party.**

Because appellant heir was made a party to the probate action when the circuit court granted his motion to intervene, the circuit court erred by determining that he was not entitled to notice of a hearing on a motion to remove the estate executrix pursuant to subsection (a) of this rule. *Maxwell v. Estate of Maxwell*, 2012 Ark. App. 174, — S.W.3d —, 2012 Ark. App. LEXIS 276 (Feb. 22, 2012).

### **Service on Attorney.**

Where mother assigned her child support rights to the Child Support Enforcement Unit, and the state filed a petition pursuant to § 9-14-210, then under § 9-14-210(e)(2) the attorney representing the state did not represent the mother, and under subsection (b) of this rule service on the attorney was not service on the mother. *Vanzant v. Purvis*, 54 Ark. App. 384, 927 S.W.2d 339 (1996).

After a default judgment had been entered in a discrimination case, employer’s motion to dismiss an amended complaint should have been granted because the amended complaint was improperly mailed to the employer’s attorney; service of the amended complaint on a corporation was required to comply with Ark. R. Civ. P. 4. *Tobacco Superstore, Inc. v. Darrrough*, 362 Ark. 103, 207 S.W.3d 511 (2005).

Although the mother had not been properly

served under subsection (b) of this rule, she waived any objection to lack of service of process when she appeared at each of the custody hearings; it was not until after permanent custody had been entered in favor of the father that she objected, and this motion came too late. *Littles v. Office of Child Support Enforcement*, 2009 Ark. App. 686, — S.W.3d —, 2009 Ark. App. LEXIS 846 (2009).

Mother did not preserve for review the argument that service of a petition to terminate parental rights by warning order pursuant to Ark. R. Civ. P. 4(f) was not sufficient because her attorney was provided with notice under this rule, the Arkansas Department of Human Services satisfied the requirement of diligent inquiry provided in Rule 4, and at no time during the initial hearing on the petition for termination of the mother’s parental rights was an objection made or a ruling requested on the issue of whether service was proper; because the mother was represented by counsel throughout the proceedings, service was properly made upon counsel of record pursuant to this rule, the circuit court had jurisdiction, and it was the mother’s responsibility to stay informed and keep her attorney informed of her current address. *Blackerby v. Ark. Dep’t of Human Servs.*, 2009 Ark. App. 858, — S.W.3d —, 2009 Ark. App. LEXIS 1011 (2009).

Issued subpoenas in a termination of parental rights case were not properly served pursuant to subsection (b) of this rule, as counsel for the Arkansas Department of Human Services and the attorney ad litem appeared to have had no notice; the circuit court noted that the docket sheet did not reflect that any subpoenas had been issued or that there was proof of service. *Blakes v. Ark. Dep’t of Human Servs.*, 2010 Ark. App. 379, — S.W.3d —, 2010 Ark. App. LEXIS 398 (May 5, 2010).

**Cited:** *Davis v. C & M Tractor Co.*, 2 Ark. App. 150, 617 S.W.2d 382 (1981); *Steele v. Murphy*, 279 Ark. 235, 650 S.W.2d 573 (1983); *Fausett & Co. v. Bogard*, 285 Ark. 124, 685 S.W.2d 153 (1985); *Reynolds v. Spotts*, 286 Ark. 335, 692 S.W.2d 748 (1985), criticized *Monk v. Farmers Ins. Co.*, 290 Ark. 38, 716 S.W.2d 201 (1986); *Travelodge Int’l, Inc. v. Handleman Nat’l Book Co.*, 288 Ark. 368, 705 S.W.2d 440 (1986); *Bunker v. Bunker*, 17 Ark. App. 7, 701 S.W.2d 709 (1986); *Webb v. Lambert*, 295 Ark. 438, 748 S.W.2d 658 (1988); *Lewis v. Crowe*, 296 Ark. 175, 752 S.W.2d 280 (1988); *Morris v. Valley Forge Ins. Co.*, 305 Ark. 25, 805 S.W.2d 948 (1991); *Gravett v. McGowan*, 318 Ark. 546, 886 S.W.2d 606 (1994); *Bradford v. Bradford*, 52 Ark. App. 81, 915 S.W.2d 723 (1996); *Finney v. Cook*, 351 Ark. 367, 94 S.W.3d 333 (2002); *New Holland Credit Co. v. Hill*, 362 Ark. 329, 208 S.W.3d

191 (2005); *Wandrey v. Etchison*, 363 Ark. 36, 210 S.W.3d 892 (2005).

## Rule 6. Time.

(a) *Computation.* In computing any period of time prescribed or allowed by these rules, by order of the Court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, legal holiday, or other day when the clerk's office is closed, in which event the period runs until the end of the next day that the clerk's office is open. When the period of time prescribed or allowed is less than fourteen (14) days, intermediate Saturdays, Sundays, or legal holidays shall be excluded in the computation. As used in this rule and Rule 77(c), "legal holiday" means those days designated as a holiday by the President or Congress of the United States or designated by the laws of this State.

(b) *Enlargement.* When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of mistake, inadvertence, surprise, excusable neglect, or other just cause, but it may not extend the time for taking an action under Rules 4(i), 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

(c) *For Motions, Responses, and Replies.* A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 20 days before the time specified for the hearing. Any party opposing a motion shall serve a response within 10 days after service of the motion. The movant shall then have 5 days after service of the response within which to serve a reply. The time periods set forth in this subdivision may be modified by order of the court and do not apply when a different period is fixed by these rules, including Rules 56(c) and 59(d).

(d) *Additional Time After Service by Mail or Commercial Delivery Company.* Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, commercial delivery company, or electronic transmission, including e-mail pursuant to Rule 5(b)(2), three (3) days shall be added to the prescribed period. Provided, however, that this subdivision shall not extend the time in which the defendant must file an answer or pre-answer motion when service of the summons and complaint is by mail or commercial delivery company in accordance with Rule 4. (Amended July 7, 1986, effective September 15, 1986; amended November 21, 1988, effective January 1, 1989; amended December 10, 1990, effective February 1, 1991; amended November 11, 1991, effective January 1, 1992; amended January 27, 2000; amended January 24, 2002; amended March 13, 2003; amended January 22, 2004; amended June 3, 2010, effective July 1, 2010.)



**Reporter's Notes to Rule 6: 1.** This Rule is practically identical to FRCP 6. Section (a) has been changed somewhat by omitting a recitation of specific legal holidays within the definition of legal holiday. It is redundant to list specifically the holidays and then add to the list "any other day appointed as a holiday by the President of [or] the Congress" or by the State.

2. This Rule does not substantially change previous Arkansas practice. As before, trial judges are given broad discretion in most instances to extend the various periods of time within which certain actions must be taken. The exceptions are noted in Section (b).

**Addition to Reporter's Notes, 1986 Amendment:** Rule 6(a) is amended, consistently with the federal rule, to extend the exclusion of intermediate Saturdays, Sundays, and legal holidays to the computation of time periods less than 11 days. Under the former version of the rule, parties bringing motions under rules with 10-day periods could have as few as five working days to prepare their motions.

**Addition to Reporter's Notes, 1988 Amendment:** Rule 6(d) is amended to make plain that a defendant does not have an extra three days to file an answer or preanswer motion under Rule 12 when the summons and complaint are served by mail pursuant to Rule 4. Allowing a defendant an additional three days to answer in the event of service by mail would be a "bonus" not available to a defendant served by another method. Under Rule 12(a), a defendant must answer or file a preanswer motion within a given number of days "after the service of summons and complaint upon him." The specified time period thus begins to run when the defendant receives the summons and complaint, irrespective of the manner in which it is served. Rule 6(d) continues to apply with respect to pleadings and papers other than the complaint, however, for service of these materials by mail is presumptively complete upon mailing, Rule 5(b), Ark. R. Civ. P. Thus, the three-day extension provided by Rule 6(d) is necessary to compensate for the "lag time" between the mailing of these papers and their delivery.

**Addition to Reporter's Notes, 1990 Amendment:** Rule 6(b) is amended to correspond to the changes made in Rule 55 regarding default judgments. Under revised subdivision (b)(2), the court may, upon motion, extend the time for filing an answer (or for other action) after the relevant period has expired if the failure was the result of "mistake, inadvertence, surprise, excusable neglect, or other just cause." This standard, which mirrors that employed in Rule 55(c)(1) with respect to the setting aside of a default judgment, is intended to liberalize Arkansas practice. Under former Rule 6(b), an exten-

sion of time was permissible only where the failure to act was the result of "excusable neglect, unavoidable casualty or other just cause."

**Addition to Reporter's Notes, 2000 Amendment:** The time period in the third sentence of subdivision (a) has been changed from eleven days to fourteen days, the intent being to eliminate confusion in the computation of response time when a motion has been served by mail under subdivision (d).

**Addition to Reporter's Notes, 2002 Amendment:** Rule 6(c) has been amended to clarify the timing of motions, responses, and replies. A related change with respect to motion practice has been made in Rule 7(b), which governs the form and content of motions, responses, and replies. Cross-references to Rules 6(c) and 7(b) have been added to Rule 12(i) and Rule 78(b).

Under the prior version of subdivision (c), a written motion and notice of hearing had to be served no later than ten days prior to the date set for hearing. At the same time, Rule 78(b) provided a ten-day period for a response and a five-day period for reply. As a result, there might be no time for a reply. To address this problem, the ten-day period in subdivision (c) has been expanded to twenty days. Also, the provisions governing the timing of responses and replies have been shifted from Rule 78(b) to subdivision (c). As was previously the case, the court may modify the time periods by order. These periods are inapplicable when a different time frame is established by another rule, e.g., Rule 56(c) (motions for summary judgment).

The provision in the former version of subdivision (c) as to supporting affidavits now appears in Rule 7(b)(2).

**Addition to Reporter's Notes, 2003 Amendment:** Subdivision (a) has been amended to address the situation in which the clerk's office is closed for reasons other than weekends and legal holidays. The amendment incorporates the Supreme Court's holding in *Honeycutt v. Fanning*, 349 Ark. 324, 78 S.W.3d 96 (2002), and makes Rule 6(a) consistent with, though not identical to, its federal counterpart.

Subdivision (d) of the rule has been rewritten to include commercial delivery companies. The amended subdivision applies when service of papers, other than the summons and complaint, is by mail or by commercial delivery company.

**Addition to Reporter's Notes, 2004 Amendment:** Subdivision (b) of the rule has been amended by adding Ark. R. Civ. P. 4(i) to the list of exceptions, thereby codifying the holding in *Smith v. Sidney Moncrief Pontiac*, No. 02 449 (June 19, 2003).

**Addition to Reporter's Notes, 2010 Amendment:** Subdivision (d) has been

amended to add the three-day additional response time allowed for service by mail or commercial delivery company to the time per-

mitted for response to service by electronic transmission, including by e-mail, under Rule 5(b)(2).

### RESEARCH REFERENCES

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### CASE NOTES

#### ANALYSIS

Applicability.  
Computation of time.  
Diligence.  
Discretion of court.  
Extension of time.  
Service by mail.  
Untimely responses.

#### Applicability.

This rule applies to requests for admissions. *Belcher v. Bowling*, 22 Ark. App. 248, 738 S.W.2d 804 (1987).

Rule of Civil Procedure 81(a) does not exclude the use of subsection (a) of this rule in computing the time within which a suit in a civil proceeding has to be filed in order to perfect and enforce a lien, because § 18-44-117 does not provide that a certain method or procedure be used in computing the 120 days. *Transportation Properties, Inc. v. Central Glass & Mirror of N.W. Ark., Inc.*, 38 Ark. App. 60, 827 S.W.2d 667 (1992).

Subsection (b) of this rule is not applicable to actions under ARCP 60(b). *Edwards v. Szabo Food Serv., Inc.*, 317 Ark. 369, 877 S.W.2d 932 (1994).

Although under subsection (b) of this rule a trial court is permitted to enlarge the time period to act upon a motion made after the expiration of the specified period for cause shown, subsection (b) does not apply where a trial court has no jurisdiction to act; thus, where the trial court must dismiss an action for lack of service or failure to file a timely motion to extend time for service, then that trial court loses its jurisdiction to take any further action in that case. *Holland v. Lefler*, 80 Ark. App. 316, 95 S.W.3d 815 (2003).

Circuit court erred in granting the Department of Correction's motion to dismiss an inmate's complaint under § 12-28-604 for

failure to state a claim under Ark. R. Civ. P. 12(b)(6) because the circuit court granted the motion without holding a hearing or considering the inmate's written response, which was timely filed under this rule and Ark. R. Civ. P. 78(b). *Loveless v. Agee*, 2010 Ark. 53, — S.W.3d —, 2010 Ark. LEXIS 67 (Feb. 4, 2010).

Because a protective order hearing was a special proceeding under Ark. R. Civ. P. 81, the notice procedures in § 9-15-204(b)(1)(A), and not subsection (c) of this rule, applied; therefore, because a respondent was timely served six days before the protective order hearing, the respondent's motion to set aside an order of protection was properly dismissed. *Wills v. Lacefield*, 2011 Ark. 262, — S.W.3d —, 2011 Ark. LEXIS 247 (June 16, 2011).

#### Computation of Time.

Where the opinion of the worker's compensation commission was filed on February 23, 1981, and mailed to claimant's attorney, a resident of Warren, Arkansas, it could not have been received before February 24, and under subsection (a) of this rule the court begins counting with the next day, February 25, and the thirtieth day is March 26, 1981, which is the day the notice of appeal was filed; thus, it was timely. *Ashcraft v. Quimby*, 2 Ark. App. 174, 617 S.W.2d 390 (1981).

Where the 20th day prior to scheduled trial date was a Saturday and the following Monday was Labor Day, a legal holiday, a request for a jury trial filed on Tuesday was timely. *Delight Oak Flooring Co. v. Arkansas La. Gas Co.*, 14 Ark. App. 24, 684 S.W.2d 271 (1985).

The general rule in calculating a limitations period is to exclude the first day from the computation. *Hodge v. Wal-Mart Stores, Inc.*, 297 Ark. 1, 759 S.W.2d 203 (1988).

The day on which a nonsuit is taken should



be excluded from computation. *Hodge v. Wal-Mart Stores, Inc.*, 297 Ark. 1, 759 S.W.2d 203 (1988).

Where the day by which the complaint had to be filed to perfect a lien fell on Saturday, the complaint filed on the next Monday was within the period when computed under the provisions of subsection (a) of this rule. *Transportation Properties, Inc. v. Central Glass & Mirror of N.W. Ark., Inc.*, 38 Ark. App. 60, 827 S.W.2d 667 (1992).

The Supreme Court has followed the method of calculation in § 16-55-119 and in subsection (a) of this rule in fixing a limitation period for the time for filing pleadings as well as for certain notices. *Grubbs v. Credit Gen. Ins. Co.*, 327 Ark. 479, 939 S.W.2d 290 (1997).

Defendant's notice of appeal from a conviction for second-degree battery was timely filed on July 31, 1995, where judgment was entered June 29, 1995; the day of entry of judgment was not counted, making the 30th day fall on a Saturday, thereby allowing the defendant to file the notice the following Monday, July 31. *Kersh v. State*, 56 Ark. App. 39, 938 S.W.2d 569 (1997).

The plaintiff's amended complaint was filed within the 10 days allowed by the circuit court where the order of dismissal was filed on August 6, and the amended complaint was filed on August 20, which was exactly 10 days later, excluding weekend days. *Country Corner Food & Drug, Inc. v. First State Bank & Trust Co.*, 332 Ark. 645, 966 S.W.2d 894 (1998).

Victim's motion to enlarge time for service of her personal injury complaint was timely filed where courthouse was closed by direction of the county judge on the day the motion was due and the motion was duly filed the next business day the courthouse opened. *Honeycutt v. Fanning*, 349 Ark. 324, 78 S.W.3d 96 (2002).

Prisoner's petition for writ of mandamus seeking to compel a circuit judge to issue a ruling on his motion for reconsideration of the alleged denial of his request for habeas relief was moot; assuming the prisoner's asserted date of December 19, 2007, or a later date, for the judgment on his habeas petition, Ark. R. App. P. Civ. 4(b)(1) was the applicable rule concerning the motion for reconsideration because the motion was filed within the 10-day period stated in the rule. Under the computation rules in subsection (a) of this rule, the 10-day period would have expired on January 7, 2008, and the prisoner's motion for reconsideration would have been deemed denied on the thirtieth day after it was filed; in that case, the prisoner received the relief he requested, i.e., a ruling on his motion for reconsideration, albeit through operation of law rather than a written order. *Henson v. Wyatt*, 373 Ark. 315, 283 S.W.3d 593 (2008).

Because a holiday and 2 weekend days were excluded from computation under subsection (a) of this rule, a mother's postjudgment motion was timely; because a circuit court did not rule on the motion within 30 days, it was deemed denied under Ark. R. App. P. Civ. 4(b)(1); and because the mother's notice of appeal was filed 30 days from the deemed-denied date, her appeal was timely under Rule 4(a) and properly before the court. *Whitmer v. Sullivent*, 373 Ark. 327, 284 S.W.3d 6 (2008).

#### **Diligence.**

In a construction case, a trial court did not err by not dismissing a complaint for failure to attach a contract as an exhibit under Ark. R. Civ. P. 10(d) because a construction company failed to act diligently, failed to timely file a motion, and waived its right by its own conduct to demand dismissal. No prejudice resulted from the failure to attach the contract as it was authored by the construction company. *D & D Parks Constr., Co. v. Martin*, — Ark. App. —, — S.W.3d —, 2012 Ark. App. LEXIS 465 (May 16, 2012).

#### **Discretion of Court.**

Where defendants' attorney failed to answer complaint within 20 days as required by ARCP 12, but alleged that he had mailed copies to the court clerk and both attorneys for plaintiffs, although the three denied receiving them, the court could properly excuse the failure under this rule, even though ARCP 55 mandates a default judgment and gives the court no discretion. *Hensley v. Brown*, 2 Ark. App. 175, 617 S.W.2d 867 (1981).

Subsection (b) of this rule clearly recognizes that the trial court may act after the expiration of a specified period of time under the Rules of Civil Procedure and further provides that the court may even order a period enlarged if the request therefore is made before the expiration of a period "as extended by a previous order"; thus, this rule grants the trial court discretion, for cause shown, to extend a period which has previously been extended beyond the period originally prescribed. *Edwards v. Szabo Food Serv., Inc.*, 317 Ark. 369, 877 S.W.2d 932 (1994).

The trial court did not abuse its discretion when it refused to enlarge the defendant's time to file his answer where, although the complaint was served on January 14, the defendant mistakenly informed his attorney that it was served on January 16, and, therefore, the answer was mailed to defendant's counsel and filed one day late. *Layman v. Bone*, 333 Ark. 121, 967 S.W.2d 561 (1998).

In a case charging a mother with contempt for interfering with a father's visitation with their child, the mother's due process rights were not violated because she was not given ten days to respond to the father's complaint,

pursuant to this rule, because the contempt statute, § 16-10-108, provided only that a charged party be given a reasonable time to make a defense. *Brock v. Eubanks*, 102 Ark. App. 165, 288 S.W.3d 272 (2008).

While a tenant had notice of a hearing on the landlord's unlawful detention action between three weeks and two months before the hearing, but did not request a continuance until the hearing began, and because the tenant failed to show prejudice, pursuant to subsection (c) of this rule, the tenant's motion for a continuance was properly denied as untimely. *Davis v. Pines Mall Partners*, 2011 Ark. App. 783, — S.W.3d —, 2011 Ark. App. LEXIS 816 (Dec. 14, 2011).

#### **Extension of Time.**

Subdivision (b)(2) of this rule provides broadly for extension of time to respond in instances of excusable neglect; it applies to requests for admissions. *Borg-Warner Acceptance Corp. v. Kesterson*, 288 Ark. 611, 708 S.W.2d 606 (1986).

Where service of process was to be completed by July 2, 1994, a timely request for an extension was made on June 23, 1994, and where the court granted a 30-day extension on July 28, 1994, the 30-day extension did not run from July 28, 1994, but added 30 days to the original period, thereby extending it to August 1, 1994. *Thomson v. Zufari*, 325 Ark. 208, 924 S.W.2d 796 (1996).

This rule provides that a party may not obtain an extension of time from the trial court to file a posttrial motion under ARCP 59(b); consequently, the time in which a notice of appeal must be filed is also not extended. *Moon v. Citty*, 344 Ark. 500, 42 S.W.3d 459 (2001).

Buyer could not use subsection (b) of this rule to enlarge the time to obtain service when the buyer did not comply with the requirements of ARCP 4(i); the motion to extend time for service had not been filed prior to the expiration of the period originally prescribed or as extended by a previous order. *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 120 S.W.3d 525 (2003).

Where a non-movant's reponse was filed less than 10 working days after it was due, no previous extension had been granted, and the response was filed almost 60 days before the hearing was held, the trial court did not err in granting the non-movant an extension of time to respond to the motion for summary judgment. *Ark. River Rights v. Echubby Lake Hunting Club*, 83 Ark. App. 276, 126 S.W.3d 738 (2003).

Trial court did not abuse its discretion in refusing to extend homeowner's time to answer as there was no finding of excusable neglect; although subdivision (b)(2) of this rule allows trial courts to enlarge the time to

answer even after the initial period had passed, the rule does not require trial courts to permit such answers in any circumstance. *Israel v. Oskey*, 92 Ark. App. 192, 212 S.W.3d 45 (2005).

#### **Service by Mail.**

The three extra days added to time limits following service by mail do not apply to a judgment since it is not a pleading. If an attorney receives a copy of the judgment three days after its entry, he is not prejudiced by having only 27 days more to file a simple notice of appeal. *Sagely v. State*, 285 Ark. 158, 685 S.W.2d 169 (1985).

#### **Untimely Responses.**

Where excusable neglect was neither pleaded nor proven, and the response to the requests for admission was not timely filed, the untimely response resulted in an admission of the matters contained in the requests for admissions. *Borg-Warner Acceptance Corp. v. Kesterson*, 288 Ark. 611, 708 S.W.2d 606 (1986).

Attorney responsible for late filing failed to show excusable neglect, unavoidable casualty, or other just cause. *Allen v. Kizer*, 294 Ark. 1, 740 S.W.2d 137 (1987).

Circuit court did not abuse its discretion in refusing to deem certain requests admitted based on a late response because counsel's neglect was excusable where counsel did not simply ignore the requests, but was ill and required surgery. *Chiodini v. Lock*, 2010 Ark. App. 340, — S.W.3d —, 2010 Ark. App. LEXIS 353 (Apr. 21, 2010).

**Cited:** *May v. Barg*, 276 Ark. 199, 633 S.W.2d 376 (1982); *Barnett Restaurant Supply, Inc. v. Vance*, 279 Ark. 222, 650 S.W.2d 568 (1983); *Osborn v. Wilson*, 11 Ark. App. 226, 669 S.W.2d 481 (1984); *Bunker v. Bunker*, 17 Ark. App. 7, 701 S.W.2d 709 (1986); *Webb v. Lambert*, 295 Ark. 438, 748 S.W.2d 658 (1988); *Lewis v. Crowe*, 296 Ark. 175, 752 S.W.2d 280 (1988); *Graham v. Sledge*, 28 Ark. App. 122, 771 S.W.2d 296 (1989); *Halliburton Co. v. E.H. Owen Family Trust*, 28 Ark. App. 314, 773 S.W.2d 453 (1989); *Eckels v. Arkansas Real Estate Comm'n*, 30 Ark. App. 69, 783 S.W.2d 864 (1990); *Union Nat'l Bank v. Nichols*, 305 Ark. 274, 807 S.W.2d 36 (1991); *Sphere Drake Ins. Co. v. Bank of Wilson*, 307 Ark. 122, 817 S.W.2d 870 (1991); *Smith v. State*, 307 Ark. 223, 818 S.W.2d 945 (1991); *Phillips Constr. Co. v. Cook*, 34 Ark. App. 224, 808 S.W.2d 792 (1991); *B & F Eng'g, Inc. v. Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992); *Mellon v. Director, Ark. Emp. Sec. Dep't*, 49 Ark. App. 48, 895 S.W.2d 948 (1995); *Wolford v. St. Paul Fire & Marine Ins. Co.*, 331 Ark. 426, 961 S.W.2d 743 (1998); *Arkco Corp. v. Askew*, 360 Ark. 222, 200 S.W.3d 444 (2004).



## ARTICLE III. PLEADINGS AND MOTIONS

### Rule 7. Pleadings and motions.

(a) *Pleadings Allowed.* There shall be a complaint and an answer; a counterclaim; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleadings shall be allowed.

(b) *Motions and Other Papers.*

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) All motions required to be in writing and any responses and replies shall include a brief supporting statement of the factual and legal basis for the motion, response, or reply and the citations relied upon. Any supporting affidavits shall be served with the motion, response, or reply. Failure to satisfy these requirements shall be ground for the court's striking the motion, response, or reply. The court is not required to grant a motion solely because no response or brief has been filed.

(3) The rules applicable to captions, signings, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(4) The procedure for submitting a potentially dispositive motion to the circuit court for decision, both with and without a hearing, is outlined in Administrative Order Number 3(2)(B).

(c) *Demurrers, Pleas, etc., Abolished.* Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used.

(d) *Copies of Pleadings and Motions.* One additional copy of all pleadings and motions shall be filed by a party or his attorney for the use of the court. (Amended January 24, 2002; amended September 27, 2007.)

**Reporter's Notes to Rule 7:** 1. This Rule serves the purpose of FRCP 7 by providing a simple and elastic pleading and motion procedure, placing minimum emphasis on form and reducing the number of pleadings allowed. *Roughley v. Penn. R. R. Co.*, 230 F.2d 387 (3rd Cir. 1956).

2. With minor exceptions Section (b) is the same as FRCP 7(b). Although the superseded *Ark. Stat. Ann.* § 27-1103 (Repl. 1962) did not provide for pleadings other than complaint, demurrer or answer and demurrer or reply to the answer, other now superseded statutes recognized the validity of counterclaims and replies thereto as well as cross complaints. All pleadings recognized herein have been a part of Arkansas practice.

3. As in FRCP 7, Section (b) requires a reply to a counterclaim only when it is "denominated as such." No reply is required to a set-off or to a counterclaim which is not so

denominated. Thus, by failure to reply, a plaintiff does not lose the right to defend against new matters set out in the answer unless the answer, or a part of it, is denominated "counterclaim." *Gulf Refining Co. v. Fetschan*, 130 F.2d 129 (6th Cir. 1942), cert. den., 318 U.S. 764, 63 S. Ct. 666. Indeed, a reply to an answer not containing a counterclaim denominated as such should not be considered by the court. See *Carpenter v. Rohm & Hass*, 170 F.2d 146 (3d Cir. 1948) and *Kramer v. Jarvis*, 81 F. Supp. 360 (D. C. Neb. 1948).

4. FRCP 7(a) provides that the court may order a reply to an answer or a third party answer. That provision is omitted from the Rule because its theoretical necessity is questionable and its practical value is very little. A reason given for this FRCP provision is that it may enable the defendant to determine whether the plaintiff will admit to new mat-

ters raised in the answer but not denominated as a counterclaim. The same goal can be accomplished through discovery. Other reasons for the FRCP provision are stated in Wright and Miller, *Federal Practice and Procedure*, § 1185 (1969), but none of them seems sufficient to justify its inclusion here. In the leading case on whether the court should, pursuant to FRCP 7(a), order a reply to an answer, the court held that such a reply should not be ordered unless there is a "clear and convincing factual showing of necessity or other extraordinary circumstances of a compelling nature," and that a reply should not be used as a substitute for discovery or inspection or for a pre-trial hearing. *Moire Color, Ltd. v. Eastman Kodak Co.*, 24 F.R.D. 325 (D.C. N.Y. 1959). Prior Arkansas law permitted no reply except in response to allegations containing a counterclaim or set-off. As noted above, no reply is required or permitted to a set-off under this Rule.

5. The purpose of Section 6(1), which is the same as FRCP 7(b)(1), is to give written notice to other parties of motions not made in the course of a hearing or trial. Oral motions made during a hearing or trial are still permitted as they are usually reduced to writing in the record of the proceedings, and they remain necessary, due to the unpredictable nature of litigation.

6. Section (b)(2) requires that matters as to form of pleadings are applicable to motions and other documents. The evident reason is to

avoid the unnecessary complication resulting from different formulary rules.

7. Perhaps the most notable effect of Rule 7 is its abolition of the demurrer from Arkansas procedure. It was abolished in the FRCP and the old Federal Equity Rules and elsewhere for avoiding its sheer technicality and to permit more liberal tools for attacking the sufficiency of pleadings which accomplish the legitimate purposes of the demurrer, *e.g.*, Rule 12(b)(6).

8. Section (d) continues the practice prescribed in superseded Rule 1(c) of the Uniform Rules for Circuit and Chancery Courts which required an additional copy of all pleadings and motions for use of the court.

#### **Addition to Reporter's Notes, 2002**

**Amendment:** New paragraph (2) of subdivision (b) addresses matters that previously appeared in Rule 6(c) (supporting affidavits) and Rule 78(b) (content of motions). With these changes, Rule 6(c) governs the timing of motions, responses, and replies, while Rule 7(b) governs their content. Rule 78(b) simply cross-references these provisions. Former paragraph (2) of subdivision (b) has been redesignated as paragraph (3), and minor changes have been made in the titles of subdivision (b) and the rule.

#### **Addition to Reporter's Notes, 2007**

**Amendment:** New paragraph (4) of subdivision (b) cross references the 2007 changes in Administrative Order 3, which clarify when a matter is submitted for decision for purposes of that Order.

## RESEARCH REFERENCES

**Ark. L. Notes.** Watkins, "Procedural Rules You Won't Find in the Rules of Civil Procedure," 1992 Ark. L. Notes 53.

## CASE NOTES

### ANALYSIS

Default judgment.  
Formal denial.  
Motion to dismiss.  
Pleadings.  
Response unnecessary.

#### **Default Judgment.**

Where no written motion was filed by an opposing party pursuant to ARCP 55 to set aside two default judgments, the trial court lacked the authority to set aside the default judgment and enter an order forfeiting the property to the county general fund. *State v. \$258,035.00 United States Currency*, 352 Ark. 117, 98 S.W.3d 818 (2003).

#### **Formal Denial.**

There was no merit to a plaintiff's contention that the defendants, after filing what

amounted to a counterclaim in the trial court, admitted the allegations in the plaintiff's reply by failing to file a response to that pleading, since such a formal denial is not required under subsection (a) of this rule. *Cleveland v. Gravel Ridge San. Sewer Imp. Dist. No. 213*, 274 Ark. 330, 625 S.W.2d 446 (1981).

#### **Motion to Dismiss.**

Under the Rules of Civil Procedure, the purpose formerly accomplished by a pleading called a demurrer is now accomplished by a pleading called a motion to dismiss. *Farm Bureau Mut. Ins. Co. v. Southall*, 281 Ark. 141, 661 S.W.2d 383 (1983).

Where insurer did not stand on its motion to dismiss and permit the entry of judgment for the insured, it was not entitled to a decision in Supreme Court, on petition for writ of



review, about whether the plaintiff's complaint stated a cause of action. *Farm Bureau Mut. Ins. Co. v. Southall*, 281 Ark. 141, 661 S.W.2d 383 (1983).

#### **Pleadings.**

Trial court abused its discretion in strictly construing pleadings filed in response to a defamation action and striking the pleadings because they were improperly designated as cross-claims rather than counter-claims; the court should have liberally construed the pleadings as being counter-claims as required by ARCP 8 and allowed the pleadings to stand despite the misdesignation. *Dodge v. Lee*, 352 Ark. 235, 100 S.W.3d 707 (2003).

Appellant's contention that the circuit court erred in permitting appellees to reopen a case that had been closed by mandate after appeal without a formal motion as required by this rule was rejected as it was within the circuit court's jurisdiction to enforce its prior order requiring appellant to provide certain financial information by holding appellant in contempt and incarcerating him. *Stilley v. Fort Smith Sch. Dist.*, 367 Ark. 193, 238 S.W.3d 902 (2006).

Section 16-55-202 was unconstitutional and conflicted with Ark. Const., Art. 4, § 2 and Ark. Const., Amend. 80, § 3 because rules regarding pleading, practice, and procedure were solely the responsibility of the supreme court; the nonparty-fault provision bypassed the rules of pleading, practice and procedure by setting up a procedure to determine the fault of a nonparty and mandating the consideration of that nonparty's fault in an effort to reduce a plaintiff's recovery. *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135 (2009).

#### **Response Unnecessary.**

In action to set aside tax deed, failure of plaintiff to respond to defenses, of laches,

estoppel and abandonment was of no consequence since no response to such averments is required by the Rules of Civil Procedure. *Garvan v. Potlatch Corp.*, 278 Ark. 414, 645 S.W.2d 957 (1983).

Where plaintiff filed a "Motion for Modification" requesting that the trial court modify its previously entered orders, rather than a new complaint, defendant was not required to file an answer, given subsection (b) of this rule. *James v. James*, 52 Ark. App. 29, 914 S.W.2d 773 (1996).

Ex-husband's claim that his ex-wife was barred by the compulsory-counterclaim provision of Ark. R. Civ. P. 13(a) from recovering education expenses because she did not raise the issue during a 2002 contempt action ex-husband initiated was rejected as ex-husband was not filing a pleading and asserting a claim under this rule at that time but, rather, he was filing a motion asking the trial court to enforce a previous order; Ark. R. Civ. P. 13(a) did not apply and, when his ex-wife filed a counter-petition in May 2004 to enforce the decree and recover tuition and education expenses, she was not barred by the compulsory-counterclaim rule because she did not raise the education-expense issue in response to the ex-husband's first petition filed in 2002. *Morsy v. Deloney*, 92 Ark. App. 383, 214 S.W.3d 285 (2005).

**Cited:** *Tucker v. Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982), overruled *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998); *Travelodge Int'l, Inc. v. Handleman Nat'l Book Co.*, 288 Ark. 368, 705 S.W.2d 440 (1986); *Munnerlyn v. State*, 292 Ark. 467, 730 S.W.2d 895 (1987); *Jones v. Double 'D' Props.*, 352 Ark. 39, 98 S.W.3d 405 (2003).

### **Rule 8. General rules of pleading.**

(a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether a complaint, counterclaim, crossclaim, or third party claim, shall contain (1) a statement in ordinary and concise language of facts showing that the court has jurisdiction of the claim and is the proper venue and that the pleader is entitled to relief, and (2) a demand for the relief to which the pleader considers himself entitled. In claims for unliquidated damage, a demand containing no specified amount of money shall limit recovery to an amount less than required for federal court jurisdiction in diversity of citizenship cases, unless language of the demand indicates that the recovery sought is in excess of such amount. Relief in the alternative may be demanded.

(b) *Defenses: Form of Denials.* A party shall state in ordinary and concise language his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he

shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the claim, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments, except such designated averments or paragraphs as he expressly admits, provided that he may admit any part thereof and deny the remainder. When the pleader intends in good faith to controvert all averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) *Affirmative Defenses*. In responding to a complaint, counterclaim, cross-claim or third party claim, a party shall set forth affirmatively accord and satisfaction, arbitration and award, comparative fault, discharge in bankruptcy, duress, estoppel, exclusiveness of remedy under workmen's compensation law, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, set-off, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) *Effect of Failure to Deny*. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied, either generally or specifically, in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) *Pleading to Be Concise and Direct: Consistency*.

(1) Each averment of a pleading shall be direct and stated in ordinary and concise language. No technical forms of pleadings or motions are required.

(2) When permitted by Rule 18, a party may set forth two or more separate claims, provided that each claim shall be set forth in separate, numbered counts. A party shall set forth in an answer or reply as many defenses, whether legal or equitable, as he may have. All statements shall be made subject to the obligations set forth in Rule 11.

(f) *Construction of Pleadings*. All pleadings shall be liberally construed so as to do substantial justice. (Amended May 16, 1983; amended December 14, 1992.)

**Reporter's Notes to Rule 8:** 1. Although reworded, Rule 8 is substantially the same as FRCP 8. It seeks to accomplish the same purpose as FRCP 8, i.e. to require that pleadings be drafted in such a manner as to give a party fair notice of what the claim is and the grounds upon which it is based. *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99 (1957).

2. Section (a) requires that all claims for relief contain three basic elements, one of which a statement upon which venue and jurisdiction are based which requirement was not found under superseded *Ark. Stat. Ann.* 27-1113 (Repl. 1962). Section (a)(1) and (2) substitutes the term "ordinary and concise"

language from this superseded statute for the term "short and plain" found in the Federal Rule.

3. Section (a)(3) tracks superseded *Ark. Stat. Ann.* 27-1113 (4) (Supp. 1975) relative to claims for unliquidated damages. The obvious purpose of this section is to prevent a plaintiff from using unliquidated demands to avoid removal of diversity of citizenship cases to federal court.

4. Section (b) follows FRCP 8(b). The theory behind this section is that an answer or reply should apprise a claimant which allegations in the claim are admitted and not in issue and which are contested and thus re-



quire proof. *Mitchell v. Wright*, 154 F. 2d 924 (C.C.A. 5th, 1946). In the first sentence of Section (b), the term "ordinary and concise" is substituted for the term "short and plain" used in the Federal Rule.

5. Section (b) permits a pleader to allege that he is without knowledge or information sufficient to form a belief as to the truth of an averment and thereby deny such allegation. This follows superseded *Ark. Stat. Ann.* 27-1121 (2) (Repl. 1962). In doing so, however, the pleader must act in good faith or risk having his pleading stricken under Rule 12(f). Section (b) also requires that the pleader fairly meet the substance of the averment denied. The purpose of this provision is to proscribe a pleading which neither admits nor denies, but simply demands proof of claimant's allegations. Such an allegation or averment is not sufficient to constitute a denial. *Reed v. Hickey*, 2 F.R.D. 92 (D.C., 1941). Section (b) also follows the Federal Rule by allowing a pleader to admit certain allegations while denying others, and by permitting the use of general denials, although their use is discouraged under federal practice. One asserting a general denial is required to act in good faith in doing so.

6. Section (c) follows in substance FRCP 8(c). The list of affirmative defenses contained in this section is not intended to be exclusive and other defenses may be asserted, if available, even though not specifically listed. The last sentence of this section grants the court discretion to allow a counterclaim or affirmative defense even though improperly designated.

7. Section (d) is essentially the same as FRCP 8(d) and superseded *Ark. Stat. Ann.* 27-1151 and 27-1121 (Repl. 1962) concerning general denials.

8. Section (e)(1) is designed to avoid verbosity in pleadings. It is a slightly reworded version of FRCP 8(e)(1). Technical rules or forms of pleadings or motions are abolished. Also, this section follows superseded *Ark. Stat. Ann.* 27-1121 (Repl. 1962) in requiring separate defenses to be set out in separate, numbered paragraphs.

9. Section (f) follows superseded *Ark. Stat. Ann.* 27-1150 (Repl. 1962) by requiring that all pleadings be liberally construed so as to do substantial justice.

#### **Addition to Reporter's Notes, 1983**

**Amendment:** Rule 8(a) is amended to remove the requirement of pleading grounds of jurisdiction and venue.

The original Reporter's Notes were meant to apply to the committee draft of Rule 8(a) and not to the rule as revised by the Supreme Court. In *Harvey v. Eastman Kodak Co.*, 261 Ark. 783, 610 S.W.2d 582 (1981), the Supreme Court made clear its intention that Arkansas had not become a "notice pleading" jurisdiction in the image of the federal system. See, Faculty Note, 34 Ark. L. Rev. 722 (1981).

#### **Addition to Reporter's Notes, 1992**

**Amendment:** Rule 8(a) is amended to require that the complaint and other pleadings that set forth claims for relief include facts showing that the court has jurisdiction and that venue is proper. This requirement is consistent with statements in the case law regarding personal and subject matter jurisdiction. *E.g.*, *Malone & Hyde, Inc. v. Chisley*, 308 Ark. 308, 825 S.W.2d 558 (1992) (personal jurisdiction is to be determined on the basis of facts alleged in the complaint); *Hesser v. Johns*, 288 Ark. 264, 704 S.W.2d 165 (1986) (question of whether court has jurisdiction over the subject matter is determined from allegations in the complaint). Moreover, the Supreme Court has recognized that a complaint may on its face reveal that venue is improper. *E.g.*, *Mack Trucks of Arkansas, Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969). Nonetheless, some confusion arose in light of the 1983 amendment of Rule 8(a) deleting a requirement, found in the original version of the rule, that the complaint contain a statement of "the grounds upon which venue and the court's jurisdiction depend." However, elimination of the requirement that grounds be pleaded was apparently not intended to modify the role of the factual allegations in the determination of jurisdiction and venue. The 1992 amendment, which is designed to clarify the obligations of the pleader as to jurisdiction and venue, is consistent with the requirement that a complaint allege facts constituting a cause of action. See *Harvey v. Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981).

### **RESEARCH REFERENCES**

**Ark. L. Notes.** Watkins, Procedural Rules You Won't Find in the Rules of Civil Procedure, 1992 Ark. L. Notes 53.

**Ark. L. Rev.** Brill, *Harvey v. Eastman Kodak Company*: Faculty Note, 34 Ark. L. Rev. 722.

Note, *Firestone Tire and Rubber Co. v.*

*Little*: Overextension of the Common Defense Doctrine, 35 Ark. L. Rev. 328.

Brill, *The Election of Remedies Doctrine in Arkansas*, 37 Ark. L. Rev. 385.

Note, *Rule 11 in the Federal Courts — Unanswered Questions in Arkansas*, 43 Ark. L. Rev. 847.

**U. Ark. Little Rock L.J.** Spears, Comment: The 1979 Civil Procedure Rules, 2 U. Ark. Little Rock L.J. 89.

Survey of Arkansas Law, Civil Procedure, 5 U. Ark. Little Rock L.J. 97.

Arkansas Law Survey, Price, Civil Procedure, 9 U. Ark. Little Rock L.J. 91.

Note, Torts — Product Liability — Arkansas Adopts Comment K as an Affirmative Defense in Prescription Drug Actions, 14 U. Ark. Little Rock L.J. 199.

## CASE NOTES

### ANALYSIS

Construction.

Adverse possession.

Affirmative defenses.

Amendments to pleadings.

Claims for relief.

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Construction of pleadings.

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Effect of failure to deny.

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Issue of fact.

John doe pleadings.

Jurisdiction.

Limitations plea.

Response unnecessary.

Statement of grounds for relief.

Subsequent claim by non-party.

Supersession of statute.

### Construction.

Rule 12(b)(6) provides for the dismissal of a complaint and must be read in conjunction with this rule. *Spire v. Members of Election Comm'n*, 302 Ark. 407, 790 S.W.2d 167 (1990).

Trial court abused its discretion in strictly construing pleadings filed in response to a defamation action and striking the pleadings because they were improperly designated as cross-claims rather than counter-claims; the court should have liberally construed the pleadings as being counter-claims as required by this rule and allowed the pleadings to stand despite the misdesignation. *Dodge v. Lee*, 352 Ark. 235, 100 S.W.3d 707 (2003).

Arkansas is a state that requires fact pleading, and a pleading which sets forth mere conclusions is not sufficient; however, pleadings are to be liberally construed and are sufficient if they advise a party of its obligations and allege a breach of them. *Thomas v. Pierce*, 87 Ark. App. 26, 184 S.W.3d 489 (2004).

Although plaintiff lacked standing to sue when she filed the original complaint because she had not yet been appointed the administrator of decedent's estate and she was not the sole heir, upon being appointed administrator six days later, she was deemed to be a new party when she filed the timely amended complaint; the original complaint remained a document setting out allegations satisfying the fact-pleading requirements for a com-

plaint set out in subdivision (a)(1) of this rule and the facts pled in the original complaint were adopted by reference under Ark. R. Civ. P. 10(c) into the amended complaint. *Hackelton v. Malloy*, 364 Ark. 469, 221 S.W.3d 353 (2006).

### Adverse Possession.

The defendant, in a quiet title action based on adverse possession, does not have to specifically plead permissive use under subsection (c) of this rule, because permissive use is not an affirmative defense which must be so pleaded; where the defendant development company specifically denied the plaintiff's allegations that she had been in hostile possession of the property for more than seven years, the nature of the plaintiff's use and possession was thus put in issue and the plaintiff bore the burden of proving that it was hostile and adverse and not permissive. *Mikel v. Development Co.*, 269 Ark. 365, 602 S.W.2d 630 (1980).

### Affirmative Defenses.

Although the preferred method to assert an affirmative defense such as *res judicata* is in an answer and not in a motion to dismiss, when raised in a motion to dismiss the defense of *res judicata* may be treated as if it were properly raised. *Amos v. Amos*, 282 Ark. 532, 669 S.W.2d 200 (1984).

Because the defendant booking agent failed to specifically plead as an affirmative defense the illegality of a contract, the trial court did not err in refusing to grant defendant's motion for a directed verdict in a suit by a charity concert promoter against a booking agent where the plaintiff promoter failed to register with the secretary of state as a professional fund raiser. *Jim Halsey Co. v. Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985).

An exception in a policy of insurance is an affirmative defense which must be specifically pleaded. *National Sec. Fire & Cas. Co. v. Shaver*, 14 Ark. App. 217, 686 S.W.2d 808 (1985).

The contention by insureds that the failure to file a proof of loss was an affirmative defense under subsection (c) of this rule and should have been specifically pleaded by the insurer under ARCP 9(c) was unsupported by either convincing argument or citation to le-



gal authority. *Hill v. Farmers Union Mut. Ins. Co.*, 15 Ark. App. 222, 691 S.W.2d 196 (1985).

Affirmative defense of intervening cause should have been specifically pled. *Mercer v. Nelson*, 293 Ark. 430, 738 S.W.2d 417 (1987).

Material misrepresentation is an affirmative defense. *Brooks v. Town & Country Mut. Ins. Co.*, 294 Ark. 173, 741 S.W.2d 264 (1987).

Payment is an affirmative defense, and the burden of proving payment lies on the party asserting it. *Pulpwood Suppliers, Inc. v. First Nat'l Bank*, 21 Ark. App. 147, 729 S.W.2d 425 (1987).

*Res judicata* is an affirmative defense, and the bar of *res judicata* is not "jurisdictional"; thus a writ of prohibition should not be entered because the doctrine may apply. *Arkansas State Hwy. Comm'n v. Munson*, 295 Ark. 447, 749 S.W.2d 317 (1988).

There is no logical reason why a setoff should not serve as an affirmative defense to a counterclaim as well as to an original complaint, a crossclaim, or a third-party claim. *Turner v. Eubanks*, 26 Ark. App. 22, 759 S.W.2d 37 (1988).

Payment and failure of consideration are affirmative defenses, and in situations where there are complicated business transactions between the maker and payee of a note, the burden of proving payment which was, or should have been, credited to the maker is upon the maker of the note. *Peek v. Brickey*, 300 Ark. 354, 779 S.W.2d 152 (1989).

The question of *res judicata* is an affirmative defense to be raised in the trial court and does not present a question of jurisdiction. *Pryor v. Hot Spring County Chancery Court*, 303 Ark. 630, 799 S.W.2d 524 (1990).

Party who had filed the initial complaint could not assert *res judicata* as an affirmative defense because he was not responding to a complaint, counter-claim, cross-claim, or a third party claim. *Kulbeth v. Purdom*, 305 Ark. 19, 805 S.W.2d 622 (1991).

Where counsel for both parties agreed to a hearing on the limitations issue which resulted in a trial of that issue and an order from the trial court dismissing counts I and II of the complaint, the limitations issue was tried as if it were an affirmative defense to the complaint under subsection (c) of this rule with the express consent of the parties, and should be treated as if it had been raised in the pleadings. *Godwin v. Churchman*, 305 Ark. 520, 810 S.W.2d 34 (1991).

Laches and limitations are affirmative defenses under subsection (c) of this rule, and are not listed as defenses that may be the subject of a motion to dismiss under Rule 12. *Davenport v. Pack*, 35 Ark. App. 40, 812 S.W.2d 487 (1991).

The criminal law does not require the

pleading of affirmative defenses. *Sumner v. State*, 35 Ark. App. 203, 816 S.W.2d 623 (1991).

Comparative fault is an affirmative defense. *Skinner v. R.J. Griffin & Co.*, 313 Ark. 430, 855 S.W.2d 913 (1993).

Nothing in this rule mandates that an affirmative defense be barred unless asserted in the first response to the complaint. *Tribco Mfg. Co. v. People's Bank of Imboden*, 67 Ark. App. 268, 998 S.W.2d 756 (1999).

Because a statute of repose, § 16-56-112, is not an affirmative defense, the failure to plead it as an affirmative defense is not a bar to raising the issue on appeal. *Ray & Sons Masonry Contrs., Inc. v. United States Fid. & Guar. Co.*, 353 Ark. 201, 114 S.W.3d 189 (2003).

Grant of summary judgment in favor of the city was proper where the agreement to sell real estate was unenforceable because the document did not adequately furnish a description as to the property and there was no meeting of the minds; further, estoppel was an affirmative defense required to have been specifically pled under subsection (c) of this rule and estoppel was not pled in the company's answer and counterclaim. *Dev. & Constr. Mgmt. v. City of N. Little Rock*, 83 Ark. App. 165, 119 S.W.3d 77 (2003).

Father had to affirmatively plead certain defenses, including laches, according to subsection (c) of this rule; as the father failed to raise the defense of laches at the trial court level in his paternity action, the Arkansas Supreme Court could not determine if the trial court erred in failing to consider it. *Watt v. Office of Child Support Enforcement*, 364 Ark. 236, 217 S.W.3d 785 (2005).

In a paternity suit, the alleged biological father failed to plead the defenses of statute of limitations, laches, waiver, or estoppel and, thus, the circuit court erred in considering those defenses in dismissing the suit; however, the circuit court ruling was affirmed as it was the right result, even if for the wrong reason. *State Office of Child Support Enforcement v. Morgan*, 364 Ark. 358, 219 S.W.3d 175 (2005).

Arkansas law requires that statutory exemptions be affirmatively pled as affirmative defenses and, in light of the Connecticut Statutory Trust Act's silence as to duties, the liability-limiting language of Conn. Gen. Stat. § 34-523(b) was considered sufficiently analogous to a statutory exemption in Arkansas law; accordingly, the Act represented an "avoidance or affirmative defense" within the meaning of this rule. *First Union Nat'l Bank v. Pictet Overseas Trust Corp.*, 477 F.3d 616 (8th Cir. 2007).

Doctrine of charitable immunity is an affirmative defense, falling into the catchall provision of subsection (c) of this rule, as it is any

other matter constituting an avoidance or affirmative defense. *Felton v. Rebsamen Med. Ctr., Inc.*, 373 Ark. 472, 284 S.W.3d 486 (2008).

Qualified immunity afforded by § 21-9-301 had to be asserted and proven as an affirmative defense; it was incumbent upon the school district to plead and prove that it was entitled to the immunity due to a lack of insurance, and the student's complaint did not have to allege the absence of insurance in order to state a cause of action. *Vent v. Johnson*, 2009 Ark. 92, 303 S.W.3d 46 (2009).

In a wrongful death action, a nursing center and a hospital's admission that they were non-profit organizations was insufficient to meet the pleading requirements for the defense of charitable immunity because it was their burden to specifically plead and prove the affirmative defense pursuant to subsection (c) of this section. *Downing v. Nursing Ctr.*, 2010 Ark. 175, — S.W.3d —, 2010 Ark. LEXIS 213 (Apr. 15, 2010).

Where a father moved for a change of custody, the mother's unclean-hands argument—that the father should have been barred from claiming that her cohabitation with a man amounted to a material change of circumstances because of the father's own cohabitation with a woman—was barred because she failed to raise it in the pleadings or to the trial court as an equitable defense, as required by subsection (c) of this rule. *Shields v. Kimble*, 2010 Ark. App. 479, — S.W.3d —, 2010 Ark. App. LEXIS 509 (June 2, 2010).

Although an answer generally requested dismissal of the complaint pursuant to Ark. R. Civ. P. 12(b), it did not specifically identify the Rule 12(b) defenses of insufficient process and insufficient service of process. Therefore, it did not meet the specificity requirement of subsection (b) of this rule or Ark. R. Civ. P. 12(h), and the Rule 12(b) defenses were not preserved. *Holliman v. Johnson*, 2012 Ark. App. 354, — S.W.3d —, 2012 Ark. App. LEXIS 470 (May 23, 2012).

Because charitable immunity was an affirmative defense under subsection (c) of this rule, and not jurisdictional, and a business did not show that a trial court lacked subject-matter jurisdiction in entering a default judgment against it, there was no basis to reverse the trial court's judgment. *Entertainer, Inc. v. Duffy*, 2012 Ark. 202, — S.W.3d —, 2012 Ark. LEXIS 229 (May 10, 2012).

#### **Amendments to Pleadings.**

In an action to recover an open account, the defendant was not entitled to amend his pleadings to allege a set-off on the day of trial where the plaintiff was not prepared to meet that issue, even though the defendant in his answers to interrogatories had referred to the set-off. *Odaware v. Robertson Aerial-AG, Inc.*, 13 Ark. App. 285, 683 S.W.2d 624 (1985).

Answers to interrogatories, as well as any other information disclosed during discovery are not a pleading or a defense to a pleading; however, such information may give rise to amendments to pleadings. *National Sec. Fire & Cas. Co. v. Shaver*, 14 Ark. App. 217, 686 S.W.2d 808 (1985).

Where the insured was prepared to defend against the occupancy clause in an insurance policy, the trial court abused its discretion in refusing to allow the pleadings to be amended to conform to the evidence where the insurer sought to amend the pleadings by his repeated references to lack of surprise or prejudice and by his proffer, although counsel did not specifically announce his desire to have the pleadings conform to the proof. *National Sec. Fire & Cas. Co. v. Shaver*, 14 Ark. App. 217, 686 S.W.2d 808 (1985).

Although the chancellor did not specifically rule on defendant's motion to amend his pleading to include a statute of limitations defense, given the extensive discussion of this defense at the hearing, it was clear from his actions, if not his words, that the chancellor considered the pleadings to have been amended. *King v. State, Office of Child Support Enforcement*, 58 Ark. App. 298, 952 S.W.2d 180 (1997).

Trial court properly granted summary judgment in favor of a medical center in a medical malpractice claim on the basis of charitable immunity because the medical center did not waive the defense of charitable immunity by failing to assert the defense in its original answer and the patients failed to properly challenge the assertion of the defense by the filing of a motion alleging prejudice. Under Ark. R. Civ. P. 15(a), with the exception of defenses mentioned in Ark. R. Civ. P. 12(h)(1), a party could amend its pleadings at any time without leave of the trial court unless, upon motion of the opposing party, the trial court determined that prejudice would result; while charitable immunity was an affirmative defense that had to be specifically asserted in a responsive pleading under this rule, it was not a defense listed in Ark. R. Civ. P. 12(h)(1) and thus could be raised in an amended answer under Ark. R. Civ. P. 15. *Seth v. St. Edward Mercy Med. Ctr.*, 375 Ark. 413, 291 S.W.3d 179 (2009).

Condominium seller did not waive the affirmative defense of release because he raised it in an amended answer prior to trial pursuant to subsection (c) of this rule, to which the buyer did not object, and evidence regarding the release defense was received without objection at the trial. *Siegel v. Halley*, 2010 Ark. App. 106, — S.W.3d —, 2010 Ark. App. LEXIS 110 (Feb. 3, 2010).

#### **Claims for Relief.**

Appellant's argument for reversal, based upon the false premise that the circuit-court



complaint, which failed to aver circumstances constituting the alleged fraud with particularity, raised claims in tort or fraud, held without merit. *Wordlaw v. Laster*, 323 Ark. 30, 912 S.W.2d 924 (1996).

Even when complaint was liberally construed, it alleged only conclusions and alleged no facts whatsoever, as required by subdivision (a)(1) of this rule, and therefore failed to state a claim; although the complaint should have been dismissed under ARCP 12(b)(6), the claim should not have been dismissed with prejudice. *Malone v. Trans-States Lines*, 325 Ark. 383, 926 S.W.2d 659 (1996).

Where complaint alleged that telephone company had been unjustly enriched by providing and charging customers for an optional service without authorization, but did not allege that the telephone company had violated any law, order, rule, or regulation, the complaint failed to state a cause of action, and suit was correctly dismissed. *Bryant v. Arkansas Pub. Serv. Comm'n*, 53 Ark. App. 114, 919 S.W.2d 522 (1996).

The trial court did not err in refusing to limit the plaintiff's proof of damages to \$50,000 on the basis that neither the complaint nor amended complaint contained a demand for an amount in excess than that required for federal court jurisdiction in diversity cases since the plaintiff's response to the defendant's first set of interrogatories included a chart indicating a demand for over \$180,000 in damages and the defendant could have sought removal to federal court at that time. *Interstate Oil & Supply Co. v. Troutman Oil Co.*, 334 Ark. 1, 972 S.W.2d 941 (1998).

A complaint alleging illegal and unconstitutional acts by the state as an exception to the sovereign-immunity doctrine is not exempt from complying with the rules that require fact pleading. *Arkansas Tech. Univ. v. Link*, 341 Ark. 495, 17 S.W.3d 809 (2000).

Subsection (a) of this rule does not prevent a plaintiff who seeks an unspecified amount in liquidated damages from recovering in excess of the jurisdictional minimum at trial and does not limit recovery to an amount less than that required for federal court jurisdiction; thus, diverse defendants could defeat personal injury plaintiffs' motion to remand a removed action by establishing that the amount in controversy exceeded \$75,000 by a preponderance of the evidence as of the time the action was removed. *Haynes v. Louisville Ladder Group, LLC*, 341 F. Supp. 2d 1064 (E.D. Ark. 2004).

Appellate court chose not to recognize a cause of action for educational malpractice in Arkansas and the trial court did not err in dismissing a mother's suit against a school for breach of contract, outrage, breach of fiduciary duty, negligence, and gross negligence where, even if the handbook was a part of the

"agreement" that the mother had with the school, its terms were so vague and general that they were not enforceable. *Key v. Coryell*, 86 Ark. App. 334, 185 S.W.3d 98 (2004).

Trial court erred in granting doctor's motion to dismiss a complaint that alleged sufficient facts to state a claim for medical malpractice where the complaint alleged that (1) the doctor required plaintiff mother, after achieving maximum dilation, to go through over four hours of hard labor before performing a caesarean section, (2) the doctor's failure to timely schedule and perform a caesarean section was a breach of the applicable standard of care, and (3) the child suffered neurological damage and the mother suffered injury to her bladder and associated nerves. *Thomas v. Pierce*, 87 Ark. App. 26, 184 S.W.3d 489 (2004).

Provisions of subsection (a) of this rule regarding claims for unliquidated damage and the requirement of a demand for an amount in excess of the federal jurisdictional amount do not apply to cases that, for lack of diversity of citizenship, cannot be removed to federal court; thus, the provisions of subsection (a) did not limit the driver's recovery to \$75,000 simply because she failed to include a demand for an amount in excess of the federal jurisdictional amount in her pleadings. *Cox v. Vernon*, 94 Ark. App. 112, 226 S.W.3d 24 (2006).

In an action by a county resident against officials of the Arkansas Game and Fish Commission, alleging that the Commission unconstitutionally entered into gas leases with private companies, the resident failed to state a claim upon which relief could be granted because the resident's allegations were conclusory in nature, lacking in specificity. *Dockery v. Morgan*, 2011 Ark. 94, — S.W.3d —, 2011 Ark. LEXIS 80 (Mar. 3, 2011).

In a case alleging breach of contract and bad faith, there was no error in dismissing one party from the lawsuit because there was no showing that a contract existed, and the complaint failed to allege that the party at issue was an insurance company; the tort of bad faith could have only been brought against an insurance company. Moreover, the insured conceded that his complaint against this party was sufficient to avoid dismissal only if the summary judgment in favor of an insurer was reversed. *Fulton v. Beacon Nat'l Ins. Co.*, 2012 Ark. App. 320, — S.W.3d —, 2012 Ark. App. LEXIS 423 (May 2, 2012).

#### Conclusions of Law.

Allegations by plaintiff that ballot fees collected under § 7-7-301 are unreasonably high, coupled with the fact that plaintiff did not know the total of ballot fees collected for the period in question, creates a conclusion rather than the statement of fact which is required by this rule; thus there was no basis

for finding that § 7-7-301 was contrary to any principle of constitutional law. *Moorman v. Pulaski County Democratic Party*, 271 Ark. 908, 611 S.W.2d 519 (1981).

ARCP 12(b)(6) which tests the sufficiency of a pleading, must be read in conjunction with subdivision (a)(2) of this rule; accordingly, in a suit by a real estate broker against defaulting purchasers to recover the commission it would have recovered from the seller under the contract, a complaint containing allegations which were merely conclusions of law and failed to state facts upon which relief could be granted as required by subdivision (a)(2) of this rule was properly dismissed under ARCP 12(b)(6). *Thompson-Holloway Agency, Inc. v. Gribben*, 3 Ark. App. 119, 623 S.W.2d 528 (1981).

A tort claim of outrage against various church members, which alleged only that they willfully and wantonly breached a contract for repair of a church organ which caused the repairers emotional distress, was not sufficient to withstand a motion to dismiss for failure to state a claim upon which relief can be granted. The claim alleged mere conclusions and not facts. *Rabalaia v. Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985).

Where complainants' only allegation amounted to a conclusion of law and not a statement of facts upon which relief could be granted and complaint was dismissed without prejudice. *Spire v. Members of Election Comm'n*, 302 Ark. 407, 790 S.W.2d 167 (1990); *McKinney v. City of El Dorado*, 308 Ark. 284, 824 S.W.2d 826 (1992).

### Conditions Precedent.

The contention by insureds that the failure to file a proof of loss was an affirmative defense under subsection (c) of this rule and should have been specifically and particularly pleaded by the insurer under subsection (c) of this rule was unsupported by either convincing argument or citation to legal authority. *Hill v. Farmers Union Mut. Ins. Co.*, 15 Ark. App. 222, 691 S.W.2d 196 (1985).

### Construction of Pleadings.

Pleadings are to be liberally construed and are sufficient if they advise a party of its obligations and allege a breach of them. *Bethel Baptist Church v. Church Mut. Ins. Co.*, 54 Ark. App. 262, 924 S.W.2d 494 (1996).

Dismissal of surgeon's breach of contract action against a hospital was reversed and remanded because the surgeon not only pled that he benefitted from the services contract between the hospital and the limited liability company (LLC), but he also pled sufficient facts from which a reasonable inference could have been drawn that LLC and the hospital intended to benefit him and other individual physicians. *Perry v. Baptist Health*, 358 Ark. 238, 189 S.W.3d 54 (2004).

Even though property owners' action was captioned as a declaratory judgment action, the pleadings were to be liberally construed because the relief sought was the appeal of the decision of the board of adjustment denying nonconforming use status; property owners were not attempting to have the board decide the issue anew, rather, they were simply trying to reinstate their appeal that had been improperly dismissed and the rules did not provide for such procedure. *Wright v. City of Little Rock*, 366 Ark. 96, 233 S.W.3d 644 (2006).

Trial court did not err in dismissing a patient's claim against a hospital for intentional interference with a business advantage under Ark. R. Civ. P. 12(b)(6) because the complaint, taken as true and construed liberally under subsection (f) of this rule, failed to allege improper interference; further, a conversion claim failed as the hospital's refusal to cash a draft did not equate to dominion over the funds. *Alvarado v. St. Mary-Rogers Mem'l Hosp., Inc.*, 99 Ark. App. 104, 257 S.W.3d 583 (2007).

Judgment's entry was not reversible error as although the title of the judgment should not have been "default judgment" because an answer had been filed, all pleadings had to be liberally construed as to do substantial justice under this rule. *Vill. Ventures Realty, Inc. v. Cross*, 2011 Ark. App. 655, — S.W.3d —, 2011 Ark. App. LEXIS 712 (Nov. 2, 2011).

### Denials.

A denial of a material allegation is generally thought to be a denial of a material factual allegation, while avoidance of a claim because of operation of law is generally thought to require the filing of an affirmative defense. *Kolb v. Morgan*, 313 Ark. 274, 854 S.W.2d 719 (1993).

### Effect of Failure to Deny.

Where a default judgment was entered against a defendant for money owed by defendant and plaintiff to a third party, failure to introduce evidence to establish the amount of the judgment was reversible error, since the amount of damages cannot, under this rule, be deemed admitted when not denied in the responsive pleadings, so that it must be established by proof, and this requirement is not changed by subsection (b) of Rule 55. *Rice v. Kroeck*, 2 Ark. App. 223, 619 S.W.2d 691 (1981).

It is well established that in Arkansas, a default judgment establishes liability but not the extent of damages. *Tharp v. Smith*, 326 Ark. 260, 930 S.W.2d 350 (1996).

After a default judgment has been entered, proof is still required to establish the amount of damages, and the defendant has the right to cross-examine the plaintiff's witnesses, to introduce evidence in mitigation of damages,



and to question on appeal the sufficiency of the evidence to support the amount of damages awarded. *Jean-Pierre v. Plantation Homes of Crittenden County, Inc.*, 350 Ark. 569, 89 S.W.3d 337 (2002).

Mere denial of a factual allegation by insurer that venue was proper in a particular county was not sufficient to raise the defense of improper venue; although insurer specifically mentioned the affirmative defenses listed in subsection (c) of this rule, it did not specifically mention the defense of venue or Ark. R. Civ. P. 12(b) and, thus, waived its venue objection. *Gayley v. Allstate Ins. Co.*, 362 Ark. 568, 210 S.W.3d 40 (2005).

### **Fraud.**

In suit by a charity concert promoter against a booking agent when a promised well known entertainer failed to perform at a benefit concert, an allegation of fraud was stated with sufficient particularity where the complaint alleged a material representation and its falsity, reliance on the representation, the right to so rely and resulting damages. *Jim Halsey Co. v. Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985).

Where a charity concert promoter amended the complaint to allege fraud and negligence in a suit against a booking agent when a promised performer failed to appear at a benefit concert, the amendments related back and there could have been no statute of limitations objection to the amendment without a showing of undue delay or prejudice. *Jim Halsey Co. v. Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985).

When evidence of fraud is admitted and the issue is tried without objection, the pleading is regarded as amended to conform to the proof; while evidence of fraud must be pleaded, the conclusion of fraud need not be. *Tucker v. Durham*, 285 Ark. 264, 686 S.W.2d 402 (1985).

### **Issue of Fact.**

For an alleged issue of fact to be decided, there must be an appropriate prayer for relief; for an appropriate prayer for relief, there must be a genuine issue of fact extant. *Walker v. Hyde*, 303 Ark. 615, 798 S.W.2d 435 (1990).

### **John Doe Pleadings.**

Status as an undocumented immigrant alone was not enough to permit a party to proceed anonymously because unlawful or problematic immigration status is simply not the type of personal information of the utmost intimacy that warranted abandoning the presumption of openness in judicial proceedings. *Doe v. Weiss*, 2010 Ark. 150, — S.W.3d —, 2010 Ark. LEXIS 176 (Apr. 1, 2010).

### **Jurisdiction.**

Jurisdiction must be determined entirely from the pleadings, and if jurisdiction is not

established by the pleadings, the court is not to proceed further. *McKinney v. City of El Dorado*, 308 Ark. 284, 824 S.W.2d 826 (1992).

### **Limitations Plea.**

The plea of limitations is personal to the party pleading it; therefore, it is not a common defense and cannot inure to the benefit of a party who does not plead it. *Smallwood v. Ellis Gin Co.*, 10 Ark. App. 41, 661 S.W.2d 410 (1983).

The plea of limitations made by the bank in foreclosure action applied only to the issues between it and another mortgage holder and the plea of limitations made by the bank did not inure to the landowner's benefit. *Smallwood v. Ellis Gin Co.*, 10 Ark. App. 41, 661 S.W.2d 410 (1983).

### **Response Unnecessary.**

In action to set aside tax deed, failure of plaintiff to respond to defenses of laches, estoppel and abandonment was of no consequence since no response to such averments is required by the Rules of Civil Procedure. *Garvan v. Potlatch Corp.*, 278 Ark. 414, 645 S.W.2d 957 (1983).

A rule-against-perpetuities argument raised to counter a defense raised in the answer in a partition action was not untimely, even though it was not raised until trial, since the plaintiffs were not required to file a responsive pleading to the answer. *Nash v. Scott*, 62 Ark. App. 8, 966 S.W.2d 936 (1998).

### **Statement of Grounds for Relief.**

Where the direct complaint of the plaintiff against the third-party defendant did not state in ordinary and concise language that plaintiff was entitled to relief on the theory of negligence, the complaint was properly dismissed. *Harvey v. Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981).

Where both the complaint and the amended complaint in a tort action failed to make a statement in ordinary and concise language of facts showing that the pleader was entitled to relief because neither contained a factual allegation of any act of negligence, they were correctly dismissed under ARCP 12(b)(6) for failure to state facts upon which relief could be granted. *Ratliff v. Moss*, 284 Ark. 16, 678 S.W.2d 369 (1984).

Unlike the comparable federal rule, subsection (a) of this rule requires a statement of facts showing the pleader is entitled to relief. *Treat v. Kreutzer*, 290 Ark. 532, 720 S.W.2d 716 (1986).

Arkansas does not follow the federal rule which allows "notice pleading"; instead, this rule requires a statement of facts showing the pleader is entitled to relief. *McKinney v. City of El Dorado*, 308 Ark. 284, 824 S.W.2d 826 (1992).

Subdivision (a)(1) of this rule and ARCP 12(b)(6) must be read together in testing the

sufficiency of a complaint; facts, not mere conclusions, must be alleged. *Hollingsworth v. First Nat'l Bank & Trust Co.*, 311 Ark. 637, 846 S.W.2d 176 (1993).

The pleading requirements under subdivision (a)(1) of this rule were not met in a cause of action for malicious prosecution. *Hollingsworth v. First Nat'l Bank & Trust Co.*, 311 Ark. 637, 846 S.W.2d 176 (1993).

Inmate's conclusory allegations that prison officials acted with malice toward him when they enacted and enforced a new prison grooming policy failed to entitle the inmate to relief. *Fegans v. Norris*, 351 Ark. 200, 89 S.W.3d 919 (2002).

Pursuant to subsection (a) of this rule, the Arkansas Department of Environmental Quality's (DEQ) complaint was bereft of any factual allegations that, at the time of disposal, any of the customers of the corporation, which had improperly disposed of hazardous substances, caused hazardous substances to be disposed of at a hazardous substance site or selected a hazardous substance site for disposal of the hazardous substances, and the general assembly, in enacting the Remedial Action Trust Fund Act (RAFTA), § 8-7-501 et seq., provided that no person, including the state, could recover under the authority of § 8-7-515(b) for any remedial action costs or damages resulting solely from an act or omission of a third party, in this case the corporation. *Ark. Dep't of Env'tl. Quality v. Brighton Corp.*, 352 Ark. 396, 102 S.W.3d 458 (2003).

Trial court properly found that a complaint sufficiently alleged breach of contract where the complaint asserted the existence of an enforceable contract, the obligation of the defendant under the contract, a violation by the defendant, and damages resulting to the plaintiff from the breach. *Smith v. Eisen*, 97 Ark. App. 130, 245 S.W.3d 160 (2006).

#### **Subsequent Claim by Non-Party.**

In a personal injury action where the insured settled with the tortfeasor and the suit was dismissed with prejudice, and the insurer later sought a subrogation action against the insured, the court had no jurisdiction over the subrogation claim as the insurer was not a party to the litigation because it had not filed pleadings stating its claim. *Carnathan v. Farm Bureau Ins. Co.*, 288 Ark. 399, 705 S.W.2d 885 (1986).

#### **Supersession of Statute.**

Section 16-63-208, which sets forth the requirements for pleading actions on written obligations, does not conform with this rule, and therefore, § 16-63-208 is deemed to be superseded by this rule. *Borg-Warner Acceptance Corp. v. Kesterson*, 288 Ark. 611, 708 S.W.2d 606 (1986); *Griffin-Payne, Inc. v. Union Bank*, 289 Ark. 182, 710 S.W.2d 201 (1986).

**Cited:** *Goode v. First Nat'l Bank*, 269 Ark. 755, 600 S.W.2d 436 (1980); *Wright v. Langdon*, 274 Ark. 258, 623 S.W.2d 823 (1981); *Worch v. Kelly*, 276 Ark. 262, 633 S.W.2d 697 (1982); *Sellers v. West-Ark Constr. Co.*, 283 Ark. 341, 676 S.W.2d 726 (1984); *Dunlap v. McCarty*, 284 Ark. 5, 678 S.W.2d 361 (1984); *Gaulden v. Emerson Elec. Co.*, 284 Ark. 149, 680 S.W.2d 92 (1984); *Joey Brown Interest, Inc. v. Merchants Nat'l Bank*, 284 Ark. 418, 683 S.W.2d 601 (1985); *Stacy v. St. Charles Custom Kitchens of Memphis, Inc.*, 284 Ark. 441, 683 S.W.2d 225 (1985); *Guthrie v. Tyson Foods, Inc.*, 285 Ark. 95, 685 S.W.2d 164 (1985); *Vogel v. Simmons First Nat'l Bank*, 15 Ark. App. 69, 689 S.W.2d 576 (1985); *Arkansas Iron & Metal Co. v. First Nat'l Bank*, 16 Ark. App. 245, 701 S.W.2d 380 (1985); *Strout Realty, Inc. v. Burghoff*, 19 Ark. App. 176, 718 S.W.2d 469 (1986); *USAA Life Ins. Co. v. Boyce*, 294 Ark. 575, 745 S.W.2d 136 (1988); *Sevenprop Assocs. v. Harrison*, 295 Ark. 35, 746 S.W.2d 51 (1988); *Bridges v. Bridges*, 24 Ark. App. 147, 750 S.W.2d 412 (1988); *Wensel v. Flatte*, 27 Ark. App. 5, 764 S.W.2d 627 (1989); *Burge v. Pack*, 301 Ark. 534, 785 S.W.2d 207 (1990); *Northwestern Nat'l Life Ins. Co. v. Heslip*, 302 Ark. 310, 790 S.W.2d 152 (1990); *Culpepper v. Smith*, 302 Ark. 558, 792 S.W.2d 293 (1990), questioned *Newton v. Etoch*, 332 Ark. 325, 965 S.W.2d 96 (1998); *Medi-Stat, Inc. v. Kusturin*, 303 Ark. 45, 792 S.W.2d 869 (1990), limited *Kenning v. St. Paul Fire & Marine Ins. Co.*, 990 F. Supp. 1104 (W.D. Ark. 1997); *Ward v. Russell*, 32 Ark. App. 86, 796 S.W.2d 588 (1990); *Forrest City Mach. Works, Inc. v. Erwin*, 304 Ark. 321, 802 S.W.2d 140 (1991); *West v. Searle & Co.*, 305 Ark. 33, 806 S.W.2d 608 (1991); *Nelms v. Morgan Portable Bldg. Corp.*, 305 Ark. 284, 808 S.W.2d 314 (1991); *Goldsby v. Fairley*, 309 Ark. 380, 831 S.W.2d 142 (1992); *Weidrick v. Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992), limited, *Thomas v. Cornell*, 316 Ark. 366, 872 S.W.2d 370 (1994); *Westark Specialties, Inc. v. Stouffer Family Ltd. Partnership*, 310 Ark. 225, 836 S.W.2d 354 (1992); *Gurley v. Mathis*, 313 Ark. 412, 856 S.W.2d 616 (1993); *Perrodin v. Rooker*, 322 Ark. 117, 908 S.W.2d 85 (1995); *Clark v. Michael Motor Co.*, 322 Ark. 570, 910 S.W.2d 697 (1995); *State Farm Mut. Auto. Ins. Co. v. Brown*, 48 Ark. App. 136, 892 S.W.2d 519 (1995); *Little Rock Cleaning Sys. v. Weiss*, 326 Ark. 1007, 935 S.W.2d 268 (1996); *Bradford v. Bradford*, 52 Ark. App. 81, 915 S.W.2d 723 (1996); *Slaton v. Slaton*, 330 Ark. 287, 956 S.W.2d 150 (1997); *Wilson v. Adkins*, 57 Ark. App. 43, 941 S.W.2d 440 (1997); *Ragar v. Brown*, 332 Ark. 214, 964 S.W.2d 372 (1998); *Hames v. Cravens*, 332 Ark. 437, 966 S.W.2d 244 (1998); *Morse v. Morse*, 60 Ark. App. 215, 961 S.W.2d 777 (1998); *Grine v. Board of Trustees*, 338 Ark. 791, 2 S.W.3d 54 (1999); *Heartland Community Bank v. Holt*, 68 Ark.



App. 30, 3 S.W.3d 30 (1999); *City of Dover v. City of Russellville*, 352 Ark. 299, 100 S.W.3d 689 (2003); *Scamardo v. Jaggars*, 356 Ark. 236, 149 S.W.3d 311 (2004); *Branscumb v. Freeman*, 360 Ark. 171, 200 S.W.3d 411 (2004); *Ison Props., LLC v. Wood*, 85 Ark. App. 443, 156 S.W.3d 742 (2004); *Biedenharn v. Thicksten*, 361 Ark. 438, 206 S.W.3d 837 (2005); *Burkett v. Burkett*, 95 Ark. App. 314, 236 S.W.3d 563 (2006); *Ark. Game & Fish Comm'n v. Mills*, 371 Ark. 317, 265 S.W.3d 760 (2007); *Statewide Outdoor Adver., LLC v. Town of Avoca*, 104 Ark. App. 10, 289 S.W.3d 111 (2008); *McWhorter v. McWhorter*, 2009 Ark. 458, 344 S.W.3d 64 (2009); *Desoto Gathering Co., LLC v. Smallwood*, 2010 Ark. 5, 362 S.W.3d 298 (2010); *Foremost Ins. Co. v. Miller County Circuit Court, Third Div.*, 2010 Ark. 116, 361 S.W.3d 805 (2010); *Tucker v.*

*Sullivant*, 2010 Ark. 170, — S.W.3d —, 2010 Ark. LEXIS 200 (Apr. 15, 2010); *Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292, — S.W.3d —, 2010 Ark. LEXIS 345 (June 17, 2010); *All Creatures Animal Hosp., Inc. v. Finova Capital Corp.*, 2010 Ark. App. 18, — S.W.3d —, 2010 Ark. App. LEXIS 13 (2010); *Gorman v. Gilliam*, 2010 Ark. App. 118, — S.W.3d —, 2010 Ark. App. LEXIS 130 (Feb. 11, 2010); *Rose v. Etoch*, 2010 Ark. App. 305, — S.W.3d —, 2010 Ark. App. LEXIS 308 (Apr. 7, 2010); *Pack v. Clark*, 2010 Ark. App. 756, — S.W.3d —, 2010 Ark. App. LEXIS 806 (Nov. 10, 2010); *Forever Green Ath. Fields, Inc. v. Lasiter Constr., Inc.*, 2011 Ark. App. 347, — S.W.3d —, 2011 Ark. App. LEXIS 390 (May 11, 2011); *Harrill & Sutter, PLLC v. Farrar*, 2012 Ark. 180, — S.W.3d —, 2012 Ark. LEXIS 195 (Apr. 26, 2012).

## Rule 9. Pleading special matters.

(a) *Capacity*. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) *Fraud, Mistake, Condition of the Mind*. In all averments of fraud, mistake, duress or undue influence, the circumstances constituting fraud, mistake, duress or undue influence shall be stated with particularity. Malice, intent, knowledge and other condition [conditions] of mind of a person may be averred generally.

(c) *Conditions Precedent*. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) *Official Document or Act*. In pleading an official document or official act, it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) *Judgment*. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) *Time and Place*. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) *Special Damage*. When items of special damage are claimed, they shall be specifically stated.

**Publisher's Notes.** The bracketed word "conditions" in subsection (b) was inserted by the compiler.

**Reporter's Notes to Rule 9: 1.** With certain exceptions, Rule 9 substantially follows

FRCP 9. Few changes in Arkansas law are effected by this rule. Section (a) requires that any party desiring to raise an issue as to the capacity or authority of a party do so by specific, negative averment. This is closely

akin to superseded *Ark. Stat. Ann.* 27-1121 (2) (Repl. 1962) which provided that an allegation as to the status of a party was taken as admitted unless specifically denied. While lack of authority or capacity is not treated as an affirmative defense under the Federal Rule, it is analogous to an affirmative defense in that the objection is waived unless specifically asserted. *Summers v. Interstate Tractor & Equipment Co.*, 446 F. 2d 42 (C.C.A. 9th, 1972); *Carver v. Hooker*, 369 F. Supp. 204 (D.C., N.H., 1973).

2. Omitted in Section (a) is the provision found in FRCP 9(a) which requires that capacity or status of a party be alleged when required to show the court's jurisdiction. This provision does not appear to be necessary under Arkansas practice, particularly in view of Rule 8(a)(1) which requires a statement of the grounds upon which venue and jurisdiction depend.

3. Section (b) adds the requirement not found in FRCP 9(b) that duress or undue influence be plead with particularity. This is in keeping with prior Arkansas law. *Jansen v. Blissenbach*, 210 Ark. 22, 193 S.W.2d 814 (1946); *Ledwidge v. Taylor*, 200 Ark. 447, 139 S.W.2d 238 (1940).

4. Section (c) is generally in accord with prior Arkansas law. Superseded *Ark. Stat. Ann.* 27-1147 (Repl. 1962) required that in pleading the performance of a condition precedent in a contract, a party need only state generally that he had performed all conditions on his part. This rule is broader in scope

and applies to all actions, whether contractual or not. It should have the effect of removing such requirements as pleading notice of breach of warranty as a condition precedent to maintaining such a claim. *L.A. Green Seed Co. of Arkansas v. Williams*, 246 Ark. 463, 438 S.W.2d 717 (1969).

5. Section (e) is essentially the same as superseded *Ark. Stat. Ann.* 27-1146 (Repl. 1962) and does not affect any changes in Arkansas law.

6. Section (f) provides that the allegations as to time and place are material as opposed to the old common law rule which treated them as immaterial and thus subject to variance at the trial. The purpose of this provision is to enable a party to raise such defenses as statute of limitations and laches based upon dates alleged by the opposing party. See Wright & Miller, *Federal Practice & Procedure*, Section 1308. In short, a party is bound by the dates and places alleged in his pleadings.

7. Section (g) follows the common law rule that special damages must be pleaded specifically. Arkansas has recognized this rule, but has not always adhered to it. *Arkansas Power & Light Co. v. Harper*, 249 Ark. 606, 460 S.W.2d 75 (1970); *Ark-La Gas Co. v. McGaughey Bros., Inc.*, 250 Ark. 1083, 468 S.W.2d 754 (1971).

8. Omitted from Rule 9 is Section (h) of FRCP 9 which deals with admiralty and maritime claims under federal law.

## RESEARCH REFERENCES

**Ark. L. Rev.** Brill, Harvey v. Eastman Kodak Company: Faculty Note, 34 Ark. L. Rev. 722.

## CASE NOTES

### ANALYSIS

Averments.  
Capacity.  
Fraud.  
Special damages.

### Averments.

Appellant's argument for reversal, based upon the false premise that the circuit-court complaint, which failed to aver circumstances constituting the alleged fraud with particularity, raised claims in tort or fraud, held without merit. *Wordlaw v. Laster*, 323 Ark. 30, 912 S.W.2d 924 (1996).

Court of appeals did not need to decide whether appellants' claims for "economic loss" were covered by the Uniform Commercial Code, Ark. Code Ann. § 4-2-725, instead of the Arkansas Product Liability Act, Ark. Code

Ann. § 16-116-103, because appellants failed to plead or present evidence as to its lost profits or lost goodwill, matters that had to be specifically pled under subdivision (g) of this rule. *IC Corp. v. Hoover Treated Wood Prods.*, 2011 Ark. App. 589, — S.W.3d —, 2011 Ark. App. LEXIS 637 (Oct. 5, 2011).

### Capacity.

Although this rule provides that lack of capacity must be by specific negative averment, it does not provide that the defense is waived if not asserted in the first response to the complaint. *Tribco Mfg. Co. v. People's Bank of Imboden*, 67 Ark. App. 268, 998 S.W.2d 756 (1999).

### Fraud.

Constructive fraud was insufficiently pled under this rule to establish venue pursuant to



§ 16-60-113(b). *Evans Indus. Coatings, Inc. v. Chancery Court*, 315 Ark. 728, 870 S.W.2d 701 (1994).

Where plaintiff alleged that he was not provided an accounting or paid funds, in violation of the terms of his agreement, that was an allegation of a broken promise, was clearly conclusory, and was insufficient as an allegation of actual fraud. *Evans Indus. Coatings, Inc. v. Chancery Court*, 315 Ark. 728, 870 S.W.2d 701 (1994).

Subsequent to entering into a release and retirement agreement with a store's employee, who was acting as a corporate officer, the store discovered that the employee allegedly misappropriate the store's cash and property; the allegations that the employee breached his fiduciary duty to the corporation, and that the agreement and the release were fraudulently induced, were sufficiently pleaded to withstand the employee's motion to dismiss. *Wal-Mart Stores, Inc. v. Coughlin*, 369 Ark. 365, 255 S.W.3d 424 (2007).

#### Special Damages.

In a breach of warranty and contract action, defendant claimed the trial court erred in

permitting evidence of plaintiff's lost profits because they were special damages which were required to be specifically pled, which plaintiff failed to do; however, assuming that lost profits were special damages, the parties tried the issue without objection and, thus, the complaint was properly amended to conform to the proof so as to allege special damages. *Neste Polyester, Inc. v. Burnett*, 92 Ark. App. 413, 214 S.W.3d 882 (2005).

**Cited:** *Glasgow v. Greenfield*, 9 Ark. App. 224, 657 S.W.2d 578 (1983); *Woods v. Hopmann Mach., Inc.*, 301 Ark. 134, 782 S.W.2d 363 (1990); *Goldsby v. Fairley*, 309 Ark. 380, 831 S.W.2d 142 (1992); *Prairie Implement Co. v. Circuit Court*, 311 Ark. 200, 844 S.W.2d 299 (1992); *McAdams v. Ellington*, 333 Ark. 362, 970 S.W.2d 203 (1998); *Ison Props., LLC v. Wood*, 85 Ark. App. 443, 156 S.W.3d 742 (2004); *Foremost Ins. Co. v. Miller County Circuit Court*, Third Div., 2010 Ark. 116, 361 S.W.3d 805 (2010).

### Rule 10. Form of pleadings.

(a) *Caption; Names of Parties.* Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number and a designation as in Rule 7(a). In the complaint, the title of the action shall include the names of all the parties, but in other pleadings, it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) *Paragraphs; Separate Statements.* All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense.

(c) *Adoption by Reference; Exhibits.* Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

(d) *Required Exhibits.* A copy of any written instrument or document upon which a claim or defense is based shall be attached as an exhibit to the pleading in which such claim or defense is averred unless good cause is shown for its absence in such pleading.

**Reporter's Notes to Rule 10:** 1. Section (a) of Rule 10 is identical to FRCP 10(a) and generally follows prior Arkansas law. Superseded *Ark. Stat. Ann.* 27-1113 (Repl. 1962) dealt with captions in complaints and superseded *Ark. Stat. Ann.* 27-1121 (Repl. 1962) dealt with captions in answers. Also, the use

of only one plaintiff, defendant or other party when there are multiple parties was previously permitted by superseded *Ark. Stat. Ann.* 27-1121 (1) (Repl. 1962).

2. Section (b) is identical to FRCP 10(b) with the exception of the omission of the phrase "whenever a separation facilitates the

clear presentation of the matters set forth" found in the second sentence. This rule makes it mandatory that each claim founded upon a separate transaction or occurrence and each defense other [than] denials be stated in separate counts or defenses. This is consistent with the requirements contained in superseded *Ark. Stat. Ann.* 27-1114 (Repl. 1962) and superseded *Ark. Stat. Ann.* 27-1121 (4) (Repl. 1962).

3. The purpose of Section (c) is to permit the incorporation by reference of prior allegations and thus encourage short and concise pleadings.

4. Section (d) marks a deviation from

FRCP 10 in that the attachment of exhibits is here made mandatory unless good cause is stated in the pleading to justify their absence. This provision is similar to superseded *Ark. Stat. Ann.* 27-1144 (Repl. 1962), except there is no requirement here that the best evidence of a written instrument be filed in the absence of the original. No attempt has been made by the Committee to define good cause which justifies the failure to attach an exhibit to a pleading; instead, the courts are given the discretion to make such determination. It is the intent, however, that exhibits should be attached to pleadings in all but exceptional cases.

## CASE NOTES

### ANALYSIS

Adoption by reference.

Attachments.

Exhibits.

Names of parties.

### Adoption by Reference.

Although plaintiff lacked standing to sue when she filed the original complaint because she had not yet been appointed the administrator of decedent's estate and she was not the sole heir, upon being appointed administrator six days later, she was deemed to be a new party when she filed the timely amended complaint; the original complaint remained a document setting out allegations satisfying the fact-pleading requirements for a complaint set out in *Ark. R. Civ. P.* 8(a)(1) and the facts pled in the original complaint were adopted by reference under subsection (c) of this rule into the amended complaint. *Hackelton v. Malloy*, 364 Ark. 469, 221 S.W.3d 353 (2006).

### Attachments.

Because a general contractor and its surety sought to hold a subcontractor liable for contractual obligations in a contract that was not attached to the complaint or amended complaint, but was attached only to the second amended complaint, and no good cause for failure to attach the contract was alleged, the requirements of subsection (d) of this rule were not met. *Ray & Sons Masonry Contrs., Inc. v. United States Fid. & Guar. Co.*, 353 Ark. 201, 114 S.W.3d 189 (2003).

Trial court erred in awarding summary judgment to a debtor in a company's action to recover the balance due on a credit card account where the company did not violate subsection (d) of this rule by failing to attach to the complaint individual charge slips signed by the debtor; the complaint was accompanied by numerous documents on which

its claim was based. *Cavalry SPV, LLC v. Anderson*, 99 Ark. App. 309, 260 S.W.3d 331 (2007).

Subsection (d) of this rule does not require a party to attach to its complaint each and every document that may lend support to its claim. *Cavalry SPV, LLC v. Anderson*, 99 Ark. App. 309, 260 S.W.3d 331 (2007).

In a nursing home negligence action, appellants preserved the right to plead arbitration, despite not attaching the arbitration agreement to their answer, because appellants did attach the agreement to their motion to compel, in accordance with subsection (d) of this rule, filed the motion to compel within three months of the commencement of litigation, and there was no prejudice to appellee. *Advocat, Inc. v. Heide*, 2010 Ark. App. 826, — S.W.3d —, 2010 Ark. App. LEXIS 859 (Dec. 8, 2010).

### Exhibits.

Trial court did not err by admitting documents to rebut the assertion that an estate had an interest in a partnership because the fact that the exhibits were not appended to a pleading did not mean that they were inadmissible; further, there was no showing that an executor was prejudiced by the trial court's decision to admit the documents. *Harrison v. Harrison*, 82 Ark. App. 521, 120 S.W.3d 144 (2003).

In a construction case, a trial court did not err by not dismissing a complaint for failure to attach a contract as an exhibit under subsection (d) of this rule because a construction company failed to act diligently, failed to timely file a motion, and waived its right by its own conduct to demand dismissal. No prejudice resulted from the failure to attach the contract as it was authored by the construction company. *D & D Parks Constr., Co. v. Martin*, — Ark. App. —, — S.W.3d —, 2012 Ark. App. LEXIS 465 (May 16, 2012).



**Names of Parties.**

Order granting judgment on the pleadings in favor of a city, county, and others in a 42 U.S.C.S. § 1983 wrongful death action was affirmed as, when the original complaint was filed, the plaintiff, the decedent's daughter, was not yet the administratrix of the estate and the caption did not list the heirs individually, as required by Fed. R. Civ. P. 10(a) and subsection (a) of this rule; the complaint did not identify the heirs as parties and did not meet the requirements of § 16-62-102(b), thus, the daughter lacked standing to sue. *Williams v. Bradshaw*, 459 F.3d 846 (8th Cir. 2006).

Status as an undocumented immigrant alone was not enough to permit a party to proceed anonymously because unlawful or problematic immigration status is simply not

the type of personal information of the utmost intimacy that warranted abandoning the presumption of openness in judicial proceedings. *Doe v. Weiss*, 2010 Ark. 150, — S.W.3d —, 2010 Ark. LEXIS 176 (Apr. 1, 2010).

**Cited:** *Travelodge Int'l, Inc. v. Handleman Nat'l Book Co.*, 288 Ark. 368, 705 S.W.2d 440 (1986); *Arkansas Appliance Distrib. Co. v. Tandy Elecs., Inc.*, 292 Ark. 482, 730 S.W.2d 899 (1987); *Rachel v. Rachel*, 294 Ark. 110, 741 S.W.2d 240 (1987); *Henry v. Gaines-Derden Enters., Inc.*, 314 Ark. 542, 863 S.W.2d 828 (1993); *Tri-State Ins. Co. v. B & L Prods., Inc.*, 61 Ark. App. 78, 964 S.W.2d 402 (1998); *James v. Williams*, 372 Ark. 82, 270 S.W.3d 855 (2008); *Foremost Ins. Co. v. Miller County Circuit Court, Third Div.*, 2010 Ark. 116, 361 S.W.3d 805 (2010).

**Rule 11. Signing of pleadings, motions, and other papers; sanctions.**

(a) Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and that it complies with the requirements of Rule of Civil Procedure 5(c)(2) regarding redaction of confidential information from case records submitted to the court. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(b) A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (a). It shall be served as provided in Rule 5 but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. (Amended July 1, 1986,

effective September 15, 1986; amended November 18, 1996, effective March 1, 1997; amended October 23, 2008, effective January 1, 2009.)

**Reporter's Notes to Rule 11:** 1. With minor changes, Rule 11 is substantially identical to FRCP 11. Omitted from Rule 11 is the provision in the Federal Rule which abolished the old equity rule as to quantum of proof required where an answer is under oath. Arkansas has not followed this rule; therefore, there is no need to have a provision which abolished it.

2. Superseded *Ark. Stat. Ann.* 27-1105 (Repl. 1962) required that a complaint, answer and reply be verified. Under Rule 11, only those few pleadings and motions specifically required by these rules to be verified need be verified. Under this and the Federal Rule, verification of pleadings is the exception and not the rule.

3. Under FRCP 11, the signature of an attorney to a pleading amounts to an affirmation that he believes the pleading to have merit. *Russo v. Sofia Bros., Inc.*, 2 F.R.D. 1 (D.C. N.Y., 1941). It is a breach of an attorney's duty to file pleadings which create issues that counsel does not believe to have basis in fact. *Arena v. Luckenbach Steamship Co.*, 279 F.2d 186 (C.C.A. 1st, 1960).

4. Omitted from Rule 11 are the words "as sham and false" found in FRCP 11. These words do not add any particular import to the rule, hence their omission. Also, the word "served" as used in FRCP 11 has been deleted and the word "filed" substituted therefor.

**Addition to Reporter's Notes, 1986 Amendment:** Rule 11 has been completely rewritten. It is now substantially identical to Federal Rule 11, as amended in 1983. As adopted in 1979, Arkansas Rule 11 was virtually identical to its federal counterpart, providing for the striking of pleadings and imposition of disciplinary sanctions to check abuses in the signing of pleadings. Experience under original Rule 11 in the federal courts demonstrated that the rule was not effective in deterring abuses, and confusion existed as to the circumstances that could trigger striking a pleading or taking disciplinary action, the standard of conduct expected of attorneys who sign pleadings and other papers, and the range of available sanctions. The amended rule is intended to reduce the reluctance of the courts to impose sanctions by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions.

As amended, Rule 11 expressly applied to pleadings, motions, and other papers. It therefore includes discovery requests, discovery motions, and any other paper that must be filed and served under Rule 5, Ark. R. Civ. P. Moreover, amended Rule 11 provides that,

in addition to disciplinary sanctions, the trial judge may impose other sanctions upon an offending attorney, including a reasonable attorney's fee for the opposing party. The assessment of attorney's fees for violation of procedural rules is currently found in other Rules of Civil Procedure, e.g., Rules 37(a)-(d), 56(g), and 26(b) & (c).

Amended Rule 11 states that the signature of an attorney constitutes a certificate by him "that to the best of his knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." This language is substantially stronger than in the former rule. In addition, the recently adopted Arkansas Rules of Professional Conduct emphasize that a lawyer may not ethically bring or defend a proceeding or an issue unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. See Rule 3.1, Arkansas Rules of Professional Conduct.

Under the former version of Rule 11, the signature of an attorney certified that the suit or motion was not interposed for purposes of delay. The new rule is broader in stating that the pleading, motion or other paper "is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." This provision is consistent with the newly adopted ethical rules. For example, Rule 3.2 of the Arkansas Rules of Professional Conduct provides that a lawyer "shall make reasonable efforts to expedite litigation consistent with the interest of the client."

**Addition to Reporter's Notes, 1997 Amendment:** The rule has been amended by designating the former text as subdivision (a) and by adding new subdivision (b), which is based [on] Rule 11(c) (1) of the Federal Rules of Civil Procedure, as amended in 1993. In addition, the second sentence of subdivision (a) has been revised to require a party not represented by counsel to provide his telephone number, if any, along with his address.

New subdivision (b) provides that requests for sanctions must be made as a separate motion, rather than simply be included as an additional prayer for relief in another motion. The motion for sanctions is not to be filed until at least 21 days, or other such period as the court may set, after being served. If the alleged violation is corrected during this period, the motion should not be filed with the court. This provision is intended to provide a



type of “safe harbor” against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party’s motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation.

To emphasize the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the new subdivision provides that the “safe harbor” period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a

letter or telephone call, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

#### **Addition to Reporter’s Notes, 2008**

**Amendment:** Subdivision (a) has been amended by adding a new element to the certifications made by a pro se party or an attorney when that person signs a pleading, motion, or other paper. The attorney or party is now also certifying compliance with Administrative Order 19’s mandate for redaction of necessary and relevant confidential information in the case record being filed. The incorporation of Administrative Order 19’s mandate here gives the circuit court a ready method for enforcing this mandate.

### RESEARCH REFERENCES

**Ark. L. Rev. Note,** Firestone Tire and Rubber Co. v. Little: Overextension of the Common Defense Doctrine, 35 Ark. L. Rev. 328.

Note, Rule 11 in the Federal Courts — Unanswered Questions in Arkansas, 43 Ark. L. Rev. 847.

Crocetti v. Brown, P.A. V. Wilson — Rule 11: Sanctions and Arkansas Attorneys, 49 Ark. L. Rev. 853.

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### CASE NOTES

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#### **Purpose.**

The primary purpose of sanctions set out by this rule is to deter future litigation abuse, and the award of attorney’s fees is but one of several methods of achieving this goal. *Hodges v. Cannon*, 68 Ark. App. 170, 5 S.W.3d 89 (1999).

#### **Applicability.**

Allegations that petition filed in trial court was in disrespect of and disregarded supreme court’s authority and prior decisions must be addressed to trial court under this rule, and

not in a motion filed with the supreme court for sanctions under RAP-Civ 11. *Jones v. Jones*, 329 Ark. 320, 947 S.W.2d 6 (1997).

#### **Authority.**

Appellant’s arguments were not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law under this rule as appellant cited no authority to support its complaint that a judgment entered on a contempt motion created no condition on the use of the money. *Vill. Ventures Realty, Inc. v. Cross*, 2011 Ark. App. 655, — S.W.3d —, 2011 Ark. App. LEXIS 712 (Nov. 2, 2011).

#### **Discovery Violations.**

Issue of whether sanctions for discovery violations would be appropriate was not reached in proceeding for sanctions brought under this rule, where court found appellants were not pursuing a claim not reasonably based in fact or law. *Chlanda v. Killebrew*, 329 Ark. 39, 945 S.W.2d 940 (1997).

#### **Discretion of Court.**

The trial court has discretion in determining whether a violation of this rule has occurred. *Whetstone v. Chadduck*, 316 Ark. 330,

871 S.W.2d 583 (1994); *Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995).

This rule contemplates some discretion on the part of the trial court in determining what the sanction shall be, but neither the language of the rule nor our prior holdings supports the proposition that a pro se litigant shall be subject to a lesser sanction. *Whetstone v. Chaddock*, 316 Ark. 330, 871 S.W.2d 583 (1994).

In deciding an appropriate sanction, trial courts have broad discretion not only in determining whether sanctionable conduct has occurred, but also what an appropriate sanction should be. *Crockett & Brown v. Wilson*, 321 Ark. 150, 901 S.W.2d 826 (1995).

Trial court did not err in admonishing husband about filing frivolous motions and warning him that future frivolous motions would result in an award of attorney's fees to his former wife where he had filed a number of motions and petitions in the instant case and in past proceedings; in fact, the trial court had awarded the wife attorney's fees on at least two prior occasions. *Schueller v. Schueller*, 86 Ark. App. 347, 185 S.W.3d 107 (2004).

#### **Good Faith.**

"Good faith" enters into an attorney error inquiry only when the law relied on is incorrect. *Cortinez v. Brighton*, 320 Ark. 88, 894 S.W.2d 919 (1995).

Where petitioner's interpretation of a visitation order was reasonable, if not prevailing, and even though she had other avenues of relief apart from filing a contempt motion, she had no improper motives or absence of a factual or legal foundation in making her motion, and therefore the award of attorney's fees as a sanction was improper. *Jones v. Jones*, 320 Ark. 449, 898 S.W.2d 23 (1995).

#### **Pleadings Privileged.**

Statements in pleadings in judicial proceedings are absolutely privileged, even if the statements are false and made maliciously, as long as the statements are relevant and pertinent to the issues raised in the case; the same privilege that extends to pleadings extends to the attorneys who prepare them. Thus, where pleadings charged defendant, a county judge, with misappropriation of county equipment, plaintiffs and their attorney were immune from liability for libel. *Pogue v. Cooper*, 284 Ark. 202, 680 S.W.2d 698 (1984).

#### **Review.**

Notwithstanding the language in ARCP 52 that makes findings of fact and conclusions of law unnecessary in decisions on motions, the better practice is for the trial court to give an explanation of its decision on motions filed pursuant to this rule sufficient for the appellate courts to review. *Bratton v. Gunn*, 300

Ark. 140, 777 S.W.2d 219 (1989).

The Supreme Court reviews a trial court's determination of whether a violation of this rule occurred under an abuse of discretion standard. *Ward v. Dapper Dan Cleaners & Laundry, Inc.*, 309 Ark. 192, 828 S.W.2d 833 (1992).

Abstracts of the trial court's sanction ruling are required for an appellate court to determine whether the trial court erred in denying fees and costs pursuant to this rule; appellate courts will not review the record to make this determination. *McPeck v. White River Lodge Enters.*, 325 Ark. 68, 924 S.W.2d 456 (1996).

The court would reject the contention that sanctions were improperly imposed for oral conduct that did not involve the signing of a pleading or document that must be filed, where the appellant filed several notices of appeal which were never perfected with the court of appeals and many postjudgment motions and pleadings while the plaintiff was attempting to execute on a judgment for which the appellant had no authority from his client to file. *Williams v. Martin*, 335 Ark. 163, 980 S.W.2d 248 (1998).

In challenging the denial of sanctions in a workers' compensation proceeding, appellant was ordered to submit a substituted brief that contained an abstract of the hearing denying his motion for sanctions because it was apparent that the hearing held on appellant's motion was not abstracted in accordance with Ark. Sup. Ct. & Ct. App. R. 4-2(a)(8); a copy of the transcript from the hearing was improperly included in the addendum. *Calaway v. Dickson*, 360 Ark. 463, 201 S.W.3d 931 (2005).

#### **Sanctions.**

Trial court did not abuse its discretion in denying motion for sanctions. *Miles v. Southern*, 297 Ark. 274, 760 S.W.2d 868 (1988); *Jenkins v. Goldsby*, 307 Ark. 558, 822 S.W.2d 842 (1992); *Miller v. Leathers*, 311 Ark. 372, 843 S.W.2d 850 (1992).

The imposition of sanctions is a serious matter to be handled with circumspection, and the trial court's decision is due substantial deference. *Jenkins v. Goldsby*, 307 Ark. 558, 822 S.W.2d 842 (1992).

Where counsel need only to have checked the pocket part of volume 16 of the Arkansas Code to discover that the prejudgment attachment provisions, §§ 16-110-104 to 16-110-111, had been ruled unconstitutional, counsel failed to make a reasonable inquiry into the applicable law prior to signing plaintiff's petition for prejudgment attachment, and the trial court abused its discretion in denying defendant's motion for sanctions under this rule. *Ward v. Dapper Dan Cleaners & Laundry, Inc.*, 309 Ark. 192, 828 S.W.2d 833 (1992).

When a violation of this rule occurs, the rule makes sanctions mandatory. *Ward v.*



Dapper Dan Cleaners & Laundry, Inc., 309 Ark. 192, 828 S.W.2d 833 (1992).

Where the taxpayer obviously made reasonable inquiry into the law, but in arguing that law below and on appeal, the courts thoroughly disagree with his construction of the applicable constitutional and statutory provisions and the precedents interpreting them, he certainly had a right to urge reversal of certain decisions under this rule. *Miller v. Leathers*, 311 Ark. 372, 843 S.W.2d 850 (1992).

To obtain an attorney's fee pursuant to § 16-22-309(a)(1), a prevailing party must show there was a complete absence of a justifiable issue of either law or fact raised by the losing party or his attorney; to obtain an attorney's fee or other sanction pursuant to this rule, it must be shown that an attorney or party signed a pleading not grounded in fact, not warranted by existing law, without a good faith argument for a change in the law, or filed for an improper purpose. *Cowan v. Schmidle*, 312 Ark. 256, 848 S.W.2d 421 (1993).

Imposition of sanction upheld. *Brough v. Brough*, 41 Ark. App. 211, 850 S.W.2d 337 (1993).

Motions requesting sanctions under this rule are collateral to the merits of the underlying action and do not constitute "claims for relief" as that term is used in ARCP 54(b). *Spring Creek Living Ctr. Ltd. Partnership v. Sarrett*, 318 Ark. 173, 883 S.W.2d 820 (1994).

This rule does not require that the legal theory espoused in a filing prevail. A trial court should not impose sanctions for advocacy of a plausible legal theory, particularly when the law is arguably unclear. *Crockett & Brown v. Wilson*, 321 Ark. 150, 901 S.W.2d 826 (1995).

Sanctions were not appropriate against attorney who was representing client at the same time she was attempting to take his property by adverse possession. *Kinhead v. Estate of Kinhead*, 51 Ark. App. 159, 912 S.W.2d 442 (1995).

Sanctions imposed even though the single violation was not that egregious where the overall case had dragged on for twelve years and had been filled with vitriolic allegations, pleadings and hearings. *Schwarz v. Moody*, 55 Ark. App. 6, 928 S.W.2d 800 (1996).

The trial court properly assessed "additional punitive damages" in imposing sanctions against the appellant to deter future litigation abuse. *Williams v. Martin*, 335 Ark. 163, 980 S.W.2d 248 (1998).

Jail sentence for an attorney for the attorney's failing to pay a contempt order was voided where the judge plainly, manifestly, and grossly abused his discretion in using criminal contempt as a penalty for the failure to pay the sanctions imposed by the judge in

the civil proceeding. *Ivy v. Keith*, 351 Ark. 269, 92 S.W.3d 671 (2002).

Because it was "patently clear" that the attorney's Pulaski County suit over disputed contingency fees from a former client's settlement with the insurer had no chance of success where the settlement was entered in Cleburne County and the proper venue was in Cleburne County, and because the attorney attempted to manufacture venue by claiming unwarranted costs and expenses, the trial court did not abuse its discretion in imposing sanctions against the attorney under this rule. *Pomtree v. State Farm Mut. Auto. Ins. Co.*, 353 Ark. 657, 121 S.W.3d 147 (2003).

Where attorney filed a complaint against county officials on behalf of a taxpayer, and the complaint was identical to a previously litigated complaint against the same parties that had failed, the later complaint was barred by the doctrine of *res judicata* and the trial court properly imposed sanctions on the attorney for filing a baseless complaint. *Parker v. Perry*, 355 Ark. 97, 131 S.W.3d 338 (2003).

Judge was required to recuse himself from the sanctions imposed on the attorney under this section because of the judge's obvious bias toward the attorney; among other things, the judge told the attorney that he was not up there to answer his questions, stated that he could do anything because he was the judge, and continuously cut off the attorney when he was speaking. *Allen v. Rutledge*, 355 Ark. 392, 139 S.W.3d 491 (2003).

Trial court was not justified in assessing sanctions against plaintiff as the issues presented by the litigation were not so simple that the result could or should have been readily ascertainable by plaintiff's counsel when the complaint was filed; although the trial judge ultimately ruled in respondent's favor, the answers to the factual and legal issues presented for the court's consideration were not foregone conclusions without thorough examination. *Harrison v. Loyd*, 87 Ark. App. 356, 192 S.W.3d 257 (2004).

While appellant did send a letter to appellate on March 17, 2004, which was more than 21 days before the motion for sanctions was filed with the circuit court, that letter was not sufficient to discharge appellant's duties under this rule; although the letter described the specific conduct alleged to violate this rule and was "served" by certified mail, subsection (b) of this rule specifically required that the motion itself be served. *Calaway v. Dickson*, 361 Ark. 346, 206 S.W.3d 807 (2005).

Award of fees as sanctions was reversed because oral representations could not be the basis for sanctions under this rule; further, in light of the uncertainty in the statutes, the trial court erred in finding that § 18-15-

605(b) was inapplicable. *City of Fort Smith v. Carter*, 364 Ark. 100, 216 S.W.3d 594 (2005).

In a suit filed by an attorney against opposing counsel for sanctions, the trial court's award of sanctions in an amount less than what was proper as this rule did not require attorney's fees to be awarded, and the fees requested by the attorney were not for expenses paid by the attorney to another lawyer, but for his own time; while the attorney did not actually incur these expenses, he would have charged the client for the amount of time he expended defending his own lawsuit. *Sanford v. Harris*, 367 Ark. 589, 242 S.W.3d 277 (2006).

While an attorney denied ever being hired by a purported client, the purported client's current counsel did not determine whether a complaint against the attorney was well-grounded in fact; because the attorney properly complied with subsection (b) of this rule and was given a "safe harbor" in filing a motion for sanctions, the trial court did not abuse its discretion in granting the motion. *Courier v. Woodruff*, 2011 Ark. App. 659, — S.W.3d —, 2011 Ark. App. LEXIS 708 (Nov. 2, 2011).

#### **Signature by Different Attorney.**

The appellants' notice of appeal was not defective because the signature of the attorney was entered by another attorney at the direction of the one whose name was signed, where there was no fraud on the court or any party and no prejudice whatever to the appellees. *Sloss v. Farmers Bank & Trust Co.*, 290 Ark. 304, 719 S.W.2d 273 (1986).

#### **Test.**

There is no longer a subjective component to a review of attorney error; the test is an objective one: would the attorney have discovered the mistake of law or fact upon reasonable inquiry? *Cortinez v. Brighton*, 320 Ark. 88, 894 S.W.2d 919 (1995).

#### **Verification.**

Where ex-husband argued that, although the signature on the entry of appearance and waiver, the waiver of corroboration of grounds, and the separation agreement appear to be his, he did not "sign" the waiver and entry of appearance because he signed the verification portion of the document and, therefore, the trial court never acquired jurisdiction over him, the husband still signed a valid entry of appearance when he signed the portion labeled "verification"; there was no requirement under Ark. R. Civ. P. 4(d)(8) or this rule that such entry of appearance be verified and, thus, the language of the verification portion of the document was mere surplusage. *Morehouse v. Lawson*, 90 Ark. App. 379, 206 S.W.3d 295 (2005).

Pursuant to subsection (a) of this rule and § 5-64-505(g)(4), a party in a civil forfeiture

action is required to give a personal verification; therefore, a default judgment was properly entered for the state in a case where an owner's answer was merely signed by his attorney. *Solis v. State*, 371 Ark. 590, 269 S.W.3d 352 (2007).

#### **Violation Not Shown.**

Where it was obvious from the parties' arguments, the trial court's thorough opinion, and the parties' written briefs on appeal that the plaintiffs made a reasonable inquiry into the facts and law and a good faith argument that defendant had waived its defenses, the defendant failed in meeting the burden of proving a violation of this rule or showing its entitlement to attorney's fees under § 16-22-309. *Farm Bureau Mut. Ins. Co. v. Campbell*, 315 Ark. 136, 865 S.W.2d 643 (1993).

Even though supreme court rejected arguments for extension of tort liability to landlords, petitioner had the right to advocate such a change in the law, and the trial court did not abuse its discretion in denying motion for sanctions. *Bryant v. Putnam*, 322 Ark. 284, 908 S.W.2d 338 (1995).

Fact that complaint was conclusory, standing alone, was not enough to conclude that the trial court abused its discretion in denying sanctions. *Hunt v. Riley*, 322 Ark. 453, 909 S.W.2d 329 (1995).

Where supreme court determined there were disputed issues of material fact, reversing trial court's grant of summary judgment, it could not be said that plaintiff's were pursuing a claim not grounded in fact and that defendant was entitled to attorney's fees under this rule or § 16-22-309. *Chlanda v. Kilbrew*, 329 Ark. 39, 945 S.W.2d 940 (1997).

Although counsel for the opponent of the will should have known that she could not prevail on her complaint seeking to establish the existence of a contract to make a will, an award of sanctions would be reversed since (1) such claim was consolidated with a claim that the decedent lacked testamentary capacity at the time of the execution of the will at issue and such claim had some chance of success, and (2) the length of the trial and amount of attorney fees would not have been significantly affected if the contract claim was not made. *Hodges v. Cannon*, 68 Ark. App. 170, 5 S.W.3d 89 (1999).

In a dependency and neglect proceeding, the trial court abused its discretion in finding that the attorney for the mother of the child at issue violated the rule where (1) in a motion for recusal, the attorney stated that the trial court referred to the child's mother as a "murderer" with respect to the bathtub drowning of another child in the family, based on the trial notes of another attorney and his confirmation of those notes through a conversation with that attorney, (2) the attorney retracted the assertion at the outset of the hearing on



recusal after he learned that the trial court did not use the word “murderer” and, instead, referred the fact that the child had been “killed,” and (3) a professor at the University of Arkansas School of Law testified that use of the term “killed” rather than “murder” did not change his view that it was proper for the attorney to file a motion to recuse. *Ver Weire v. Arkansas Dep’t of Human Servs.*, 71 Ark. App. 11, 26 S.W.3d 132 (2000).

Where injured person rejected driver’s offer and a jury later found the driver zero percent at fault, the appellate court held the driver’s offer of one dollar was not a bona fide or good faith offer as required to trigger an award of costs under Ark. R. Civ. P. 68 and the trial court erred in granting the driver’s post-trial motion for costs; however, because the law regarding what kind of offer was required to trigger costs was not settled at the time driver made the offer of judgment, injured person’s motion for sanctions was properly denied. *Warr v. Williamson*, 359 Ark. 234, 195 S.W.3d 903 (2004).

Trial judge abused his discretion by ordering sanctions where the allegations in a motion to recuse were held to be true; the trial judge had an interest in a radio station, which could have been a conflict of interest, the trial judge did not deny having an ex parte communication with a mayor, and the trial judge improperly took a statement regarding judge shopping out of context and relied upon it when making the decision to impose sanctions. *Weaver v. City of West Helena*, 367 Ark. 159, 238 S.W.3d 74 (2006).

#### **Violation Shown.**

Sanctions imposed even though the single violation was not that egregious where the overall case had dragged on for twelve years and had been filled with vitriolic allegations, pleadings and hearings. *Schwarz v. Moody*, 55 Ark. App. 6, 928 S.W.2d 800 (1996).

Sanction upheld where a series of errors, whether intentional or not, moved beyond mere negligence and entered the realm of harassment and intimidation, and this conduct was prejudicial to the administration of justice. *Fink v. Neal*, 328 Ark. 646, 945 S.W.2d 916 (1997).

It was an abuse of discretion for the court to award sanctions against the appellant in favor of his former client because the former client was not an “other party” within the meaning of the rule and because of the “safe harbor” amendment to the rule. *Williams v. Martin*, 335 Ark. 163, 980 S.W.2d 248 (1998).

Because motion to set aside a settlement order was frivolous, sanctions were properly imposed upon appellants and their counsel; appellants sought to set aside settlement order despite having put the settlement on the record of the lower court, agreeing that the entire settlement was on the record, and

having the settlement order issued by the lower court track the language of the record. *Reeve v. Carroll County*, 373 Ark. 584, 285 S.W.3d 242 (2008).

As appellee was required to expend fees in defending an unwarranted breach-of-contract claim that appellant and her attorney should have known was barred by the doctrine of res judicata, the trial court did not abuse its discretion in ordering appellant to pay attorneys fees as a sanction under this rule. *Crockett v. C.A.G. Invs., Inc.*, 2011 Ark. 208, — S.W.3d —, 2011 Ark. LEXIS 198 (May 12, 2011).

Trial court’s imposition of sanctions under this rule on a neighbor for the neighbor’s act in filing a motion alleging that the judge threw the neighbor’s case against a property owner because the judge once dated the neighbor’s ex-wife was proper as the motion was not based on belief formed after reasonable inquiry that was well grounded in fact; instead, it was based on the neighbor’s subconscious belief that the judge did not like him because he once dated the neighbor’s ex-wife. *Strother v. Mitchell*, 2011 Ark. App. 224, — S.W.3d —, 2011 Ark. App. LEXIS 222 (Mar. 16, 2011).

Circuit court did not abuse its discretion in imposing sanctions under this rule against an employee for suing two former co-workers due to privileged statements the co-workers gave to their employer during its investigation or during depositions that implicated the employee in selling drugs because the employee could point to no actual damage the co-workers had caused her and, in the complaints and at the hearings, the employee’s attorney used extremely inflammatory language about one co-worker that bore scant relation to the substance of the employee’s claim for slander. *Lancaster v. Red Robin Int’l, Inc.*, 2011 Ark. App. 706, — S.W.3d —, 2011 Ark. App. LEXIS 758 (Nov. 16, 2011).

In a foreclosure case involving a construction loan, sanctions against the borrower and guarantor were warranted for asserting counterclaims that were clearly time-barred. *Grand Valley Ridge, LLC v. Metro. Nat’l Bank*, 2012 Ark. 121, — S.W.3d —, 2012 Ark. LEXIS 143 (Mar. 15, 2012).

**Cited:** *Hammock v. Grayson*, 284 Ark. 367, 681 S.W.2d 352 (1984); *Rachel v. Rachel*, 294 Ark. 110, 741 S.W.2d 240 (1987); *State ex rel. Robinson v. Craighead County Bd. of Election Comm’rs*, 300 Ark. 405, 779 S.W.2d 169 (1989); *Carmical v. City of Beebe*, 302 Ark. 339, 789 S.W.2d 453 (1990); *Baldwin v. Club Prods. Co.*, 302 Ark. 404, 790 S.W.2d 166 (1990); *Smith v. MRCC Partnership*, 302 Ark. 547, 792 S.W.2d 301 (1990); *Carpetland of N.W. Ark., Inc. v. Howard*, 304 Ark. 420, 803 S.W.2d 512 (1991); *Egg City of Ark., Inc. v. Rushing*, 304 Ark. 562, 803 S.W.2d 920 (1991);

Davison v. McNeil, 305 Ark. 18, 804 S.W.2d 369 (1991); Smith v. National Cashflow Sys., 309 Ark. 101, 827 S.W.2d 146 (1992); Crockett & Brown v. Wilson, 314 Ark. 578, 864 S.W.2d 244 (1993); Security Pac. Hous. Servs., Inc. v. Friddle, 315 Ark. 178, 866 S.W.2d 375 (1993); Wright v. Keffer, 319 Ark. 201, 890 S.W.2d 271 (1995); Spring Creek Living Ctr. v. Sarrett, 319 Ark. 259, 890 S.W.2d 598 (1995); Wright v. Eddinger, 320 Ark. 151, 894 S.W.2d 937 (1995); Whetstone v. Chadduck, 321 Ark. 327, 900 S.W.2d 558 (1995); State Farm Mut. Auto. Ins. Co. v. Brown, 48 Ark. App. 136, 892 S.W.2d 519 (1995); Anthony v. Kaplan, 324 Ark. 52, 918 S.W.2d 174 (1996); Townsend v. Arkansas State Hwy. Comm'n, 326 Ark. 731, 933 S.W.2d 389 (1996); Benton v. Barnett, 53 Ark. App. 146, 920 S.W.2d 30 (1996); Steward

v. Wurtz, 327 Ark. 292, 938 S.W.2d 837 (1997); Jones v. Jones, 328 Ark. 97, 940 S.W.2d 881 (1997); Cortinez v. Supreme Court Comm., 332 Ark. 456, 966 S.W.2d 251 (1998); Henderson v. Henderson, 334 Ark. 523, 975 S.W.2d 831 (1998); Jones v. Abraham, 67 Ark. App. 304, 999 S.W.2d 698 (1999), aff'd, 341 Ark. 66, 15 S.W.3d 310 (2000), overruled in part, Lamontagne v. Ark. Dep't of Human Servs., 2010 Ark. 190, — S.W.3d — (2010); Jones v. Abraham, 341 Ark. 66, 15 S.W.3d 310 (2000); Turner v. Farnam, 82 Ark. App. 489, 120 S.W.3d 616 (2003); Hayes v. Hayes, 2010 Ark. App. 796, — S.W.3d —, 2010 Ark. App. LEXIS 842 (Dec. 1, 2010); Kuelbs v. Hill, 2011 Ark. App. 628, — S.W.3d —, 2011 Ark. App. LEXIS 674 (Oct. 26, 2011).

## **Rule 12. Defenses and objections — When and how presented — By pleading or motion — Motion for judgment on the pleadings.**

### **(a) *When Presented.***

(1) A defendant shall file his or her answer within 30 days after the service of summons and complaint upon him or her. A defendant served under Rule 4(f) shall file an answer within 30 days from the date of first publication of the warning order. A defendant incarcerated in any jail, penitentiary, or other correctional facility in this state, however, shall file an answer within 60 days after service. A party served with a pleading stating a cross-claim or counterclaim against him or her shall file an answer or reply thereto within 30 days after service upon the party. The court may, upon motion of a party, extend the time for filing any responsive pleading.

(2) The filing of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be filed within 10 days after notice of the court's action; (B) if the court grants a motion for a more definite statement, the responsive pleading shall be filed within 10 days after service of the more definite statement. Provided, that nothing herein contained shall prevent a defendant summoned in accordance with Rule 4(f) from being allowed, at any time before judgment, to appear and defend the action; and, upon a substantial defense being disclosed, from being allowed a reasonable time to prepare for trial.

(3) When any case is removed to federal court and subsequently remanded, the plaintiff shall file a certified copy of the order of remand with the clerk of the circuit court and shall forthwith give written notice of such filing to all parties in accordance with Rule 5. Any adverse party shall have 30 days from the receipt of such notice within which to file an answer or a motion permitted under this rule.

(b) *How Presented.* Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts upon which



relief can be granted, (7) failure to join a party under Rule 19, (8) pendency of another action between the same parties arising out of the same transaction or occurrence. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) *Motion for Judgment on the Pleadings.* After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

(d) *Preliminary Hearings.* The defenses specifically enumerated (1)-(8) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) *Motion for More Definite Statement.* If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion is directed or make such order as it deems just.

(f) *Motion to Strike.* Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 30 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

(g) *Consolidation of Defenses in Motion.* A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule, but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds therein stated.

(h) *Waiver or Preservation of Certain Defenses.*

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or pendency of another action between the same parties arising out of the same transaction

or occurrence is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in the original responsive pleading. Objection to venue may be made, however, if the action is dismissed or discontinued as to a defendant upon whose presence venue depends.

(2) A defense of failure to state facts upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits. The defense of lack of jurisdiction over the subject matter is never waived and may be raised at any time.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. Upon a determination that venue is improper, the court shall dismiss the action or direct that it be transferred to a county where venue would be proper, with the plaintiff having an election if the action could be maintained in more than one county.

(i) *Response to Motions; Reply.* Any response in opposition to a motion under this rule and any reply to such a response shall be made as provided in Rules 6(c) and 7(b).

(j) *Further Pleading.* Attorneys will be notified of action taken by the court under this rule, and, if appropriate, the court will designate a certain number of days in which a party is to be given to plead further. (Amended July 9, 1984, effective September 1, 1984; amended July 6, 1987, effective September 21, 1987; amended November 18, 1996, effective March 1, 1997; amended January 27, 2000; amended February 1, 2001; amended May 24, 2001, effective July 1, 2001; amended January 24, 2002; amended March 13, 2003; amended January 22, 2004; amended July 1, 2011.)

**Publisher's Notes.** The Arkansas Supreme Court stated in its per curiam of May 16, 1983, that subsection (a) of this rule supersedes § 23-63-302. See *In re Amendments to Rules of Civil Procedure*, 279 Ark. 470, 651 S.W.2d 63 (1983).

**Reporter's Notes to Rule 12:** 1. Rule 12(a) is a revised and condensed version of FRCP 12(a). Its purpose is to prescribe the mechanics and timetable for filing responsive pleadings. Its substance is substantially the same as the Federal Rule.

2. The times prescribed in Section (a) for filing responsive pleadings are taken in part from the Federal Rule and in part from prior Arkansas law. Superseded *Ark. Stat. Ann.* 27-1135 (Repl. 1962) provided that a defendant must plead to a complaint or cross-complaint on the first day after the expiration of twenty days where service was made inside this State and thirty days where service was made outside the State. Thus, a defendant had twenty-one or thirty-one days within which to file a response depending upon

where service was effected. Under Section (a), the "extra" day for filing a response is eliminated.

3. This rule allows a nonresident of this State a period of thirty days to plead regardless of where service was effected and regardless of whether service was effected through a resident agent in this State.

4. Where a defendant is served by warning order, the thirty day period commences upon the date of the first publication of the warning order. This compares with superseded *Ark. Stat. Ann.* 27-1135 (3) (Repl. 1962) which provided that an appearance must have been made after thirty days had elapsed from the making of the warning order and appointment of the attorney *ad litem*.

5. Rule 12 substitutes the word "file" for serve and requires that the responsive pleading be filed within the time prescribed by this rule as opposed to serving the pleading as is the case under FRCP 12. By using this terminology, it is believed that arguments can be avoided as to when a pleading was served.

5 [6]. Section (a) follows the Federal Rule



and superseded *Ark. Stat. Ann.* 27-1135 and 27-1137 (Repl. 1962) by allowing a period of twenty days within which to file a responsive pleading to a cross-claim or counterclaim.

6 [7]. Section (a) follows the Federal Rule by permitting the trial court to extend the time for filing any responsive pleading. This is in accord with prior Arkansas practice.

7 [8]. Section (b) sets forth the defenses which may be raised by motion prior to filing a responsive pleading. These defenses are essentially the same as those previously raised by motions to quash service and demurrers. This section is identical to Section (b) of the Federal Rule with the exception of the addition of (b)(8) which is a defense previously allowed under *Ark. Stat. Ann.* 27-1115 (3) (Repl. 1962). One important feature of this section is that it abolishes the distinction between general and special appearances; thus, it is not (is not) necessary to make a special appearance in order to challenge the jurisdiction of the person, process or venue. *Blank v. Bither*, 135 F. 2d 962 (C.C.A. 7th, 1943); *Product Promotions, Inc. v. Cousteau*, 495 F. 2d 483 (C.C.A. 5th, 1974).

10 [9]. Sections (c) through (h) track FRCP 12(c) through (h) with the exception that Section (h)(1) takes into account the additional defense designed as (8) in 12(b) relating to the pendency of another action between the parties.

**Addition to Reporter's Notes, 1984 Amendment:** Rule 12(h)(1) is amended to make it clear that the stated "waivable" defenses must be raised by motion pursuant to this rule or in the first responsive pleading or they are waived. The final sentence in this subsection excepts the objection to venue in the circumstances described in *Ark. Stat. Ann.* § 27-614 (Repl. 1979), which is now superseded.

**Addition to Reporter's Notes, 1987 Amendment:** Two new sections, based on provisions of the Uniform Rules for Circuit and Chancery [Chancery] Courts, have been added to Rule 12 in the interest of clarity and simplification. New section (i), which sets forth the time in which responses to motions must be filed, as well as the time period for the movants to file replies, tracks Uniform Rule 2(c) and (d). Though this requirement is also found in Rule 78(b) of the Rules of Civil Procedure, it is repeated here in a more conspicuous manner to assist users of the Rules. New section (j), borrowed from Rule 2(f) of the Uniform Rules, simply states that the court is to specify the time in which further pleading is allowed in the event the court grants a motion to dismiss and the deficiency can be remedied. These new provisions do not alter prior Arkansas practice.

**Addition to Reporter's Notes, 1997 Amendment:** Paragraph (3) of subdivision

(h) has been amended by adding a new sentence authorizing the court to transfer the case in the event that venue is improper. Rather than dismiss the action, the court may transfer it to any county where venue would be proper, with the plaintiff having an election if venue would lie in more than one county. The revised provision is generally consistent with Arkansas case law and the practice in the federal courts. See *Terminal Oil Co. v. Gautney*, 202 Ark. 748, 152 S.W.2d 309 (1941); *Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989); 28 U.S.C. § 1406(a).

**Addition to Reporter's Notes, 2000 Amendment:** The second sentence of subdivision (h)(3) has been amended by replacing the introductory phrase "whenever it appears" with "upon a determination." This change eliminates the unintended suggestion in the original version of the sentence that a motion to dismiss for improper venue, like a motion to dismiss for lack of subject matter jurisdiction, can be made at any time. As subdivision (h)(1) of the rule makes plain, improper venue is a waivable defense.

**Addition to Reporter's Notes, [February] 2001 Amendment:** As adopted in 1987, the first sentence of subdivision (i) referred to "a motion made under this or any other rule." The words "or any other" have been deleted because of the 2001 amendment to Rule 56(c) establishing time frames for summary judgment motions and responses. Other motions are covered by Rule 78(b).

**Addition to Reporter's Notes, [May] 2001 Amendment:** Paragraph (3) of subdivision (h) has been amended to reflect Constitutional Amendment 80, under which the circuit court is the single court of general jurisdiction in the state. A clause in the first sentence providing for transfer in the event that the court lacks subject matter jurisdiction has been deleted because there are no longer separate circuit, chancery, and probate courts. Left intact, however, is language directing the court to dismiss the action whenever it appears that subject matter jurisdiction is lacking. This provision comes into play when, for instance, the Constitution assigns original jurisdiction to another court. By way of example, the Supreme Court has original jurisdiction to determine the sufficiency of state initiative and referendum petitions and proposed constitutional amendments.

Furthermore, while state courts generally have concurrent jurisdiction with the federal courts to decide cases arising under federal law, state courts are without subject matter jurisdiction if Congress has made federal jurisdiction exclusive. See, e.g., 28 U.S.C. § 1338(a) (patent and copyright cases).

**Addition to Reporter's Notes, 2002 Amendment:** Subdivision (i) of the rule pre-

viously included time periods for serving responses to motions and replies to responses. These matters are now governed by Rule 6(c), and subdivision (i) has been amended to provide a cross-reference to that provision. There has also been added a cross-reference to Rule 7(b), which governs the content of motions, responses, and replies.

#### **Addition to Reporter's Notes, 2003**

**Amendment:** Under revised subdivision (a), a person "incarcerated in any jail, penitentiary, or other correctional facility in this state" has 30 days in which to respond to a complaint. This additional time helps ensure that such a defendant has an opportunity to obtain counsel and to be heard in the action.

Subdivision (h)(2) has been amended to provide that the defense of lack of subject matter jurisdiction is never waived and may be asserted at any time. The new sentence simply restates settled law.

#### **Addition to Reporter's Notes, 2004**

**Amendment:** Subdivision (a) has been divided into three paragraphs and other stylistic changes made. The two departures from prior law appear in what are now paragraphs (1) and (3). Under the first paragraph, the time for an incarcerated defendant to file an answer has been increased from 30 days to 60 days. This change recognizes the role of prison employees under Rule 4(d)(4) in delivering the summons and complaint, the possibility that delays in such delivery may occur, and the likelihood that securing legal representation will take longer for incarcerated persons than for other defendants.

Paragraph (3) deals with an issue previously covered in Rule 55(f), *i.e.*, the time period for responding to a complaint after a

federal court has remanded a removed case to state court. The new paragraph expands that period from 10 to 20 days and states more clearly the point at which the time begins to run. *See NCS Healthcare v. W.P. Malone, Inc.*, 350 Ark. 520, 88 S.W.3d 852 (2002). Because of new language in Rule 55(f), a defendant who filed an answer or Rule 12 motion in federal court while the case was pending there need not, following remand, take the same action in state court within the 20-day grace period to avoid a default judgment. *See Addition to Reporter's Notes to Rule 55 (2004 amendment).*

#### **Addition to Reporter's Notes, 2011**

**Amendment:** Subdivision (a)(1) has been amended to require that both resident and nonresident defendants file a response within 30 days after service of the summons and complaint. The rule previously required that the resident defendant file the response within 20 days. On occasion the different response times led to the issuance of an incorrect summons by the clerk's office and subsequent issues as to the sufficiency of process. In addition, modern means of communication and electronic transmission diminish the need to distinguish between response times for resident and nonresident defendants. The amendment to subdivision (a)(3) extends to 30 days from the date of receipt of the remand notice the time within which a defendant must respond to a complaint when a case is remanded from federal court. Subdivision 12(f) similarly is amended to require that a motion to strike be filed within 30 days of service of the pleading upon a party.

## **RESEARCH REFERENCES**

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Note, *Default Judgments in Arkansas*, 43 Ark. L. Rev. 921.

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# CASE NOTES

## ANALYSIS

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## In General.

Pleadings are to be liberally construed and are sufficient if they advise a party of its obligations and allege a breach of them. *Bethel Baptist Church v. Church Mut. Ins. Co.*, 54 Ark. App. 262, 924 S.W.2d 494 (1996).

## Construction.

Subdivision (b)(6) of this rule provides for the dismissal of a complaint and must be read in conjunction with Rule 8, which sets out the requirements of a complaint. *Spires v. Members of Election Comm'n*, 302 Ark. 407, 790 S.W.2d 167 (1990).

Where the circuit court granted two motions to dismiss which contained motions for judgment on the pleadings, but it was unclear whether the circuit court entered a judgment on the pleadings pursuant to subsection (c) of this rule or a dismissal pursuant to subdivision (b)(6) of this rule, the appellate court concluded that the circuit court entered two subdivision (b)(6) dismissal orders; in reaching this conclusion the appellate court observed that judgments on the pleadings are traditionally not favored, and there was abundant use of language from subdivision (b)(6) by the trial court, including reference to a failure to state facts upon which relief could be granted, and use of the word dismissal. *Poston v. Fears*, 318 Ark. 659, 887 S.W.2d 520 (1994).

Dismissal of surgeon's breach of contract action against a hospital was reversed and remanded because the surgeon not only pled that he benefitted from the services contract between the hospital and the limited liability company (LLC), but he also pled sufficient facts from which a reasonable inference could have been drawn that LLC and the hospital intended to benefit him and other individual physicians. *Perry v. Baptist Health*, 358 Ark. 238, 189 S.W.3d 54 (2004).

## Applicability.

The Arkansas Public Service Commission in an administrative proceeding and an appellate court reviewing a Public Service Commission decision may look to this rule for guidance but are not required to do so. *Brandon v. Ark. Western Gas Co.*, 76 Ark. App. 201, 61 S.W.3d 193 (2001).

## Affirmative Defenses.

Although the preferred method to assert an affirmative defense such as *res judicata* is in an answer and not in a motion to dismiss, when raised in a motion to dismiss the defense of *res judicata* may be treated as if it were properly raised. *Amos v. Amos*, 282 Ark. 532, 669 S.W.2d 200 (1984).

Affirmative defense of intervening cause should have been specifically pled. *Mercer v. Nelson*, 293 Ark. 430, 738 S.W.2d 417 (1987).

There is no logical reason why a setoff should not serve as an affirmative defense to a counterclaim as well as to an original complaint, a crossclaim, or a third-party claim. *Turner v. Eubanks*, 26 Ark. App. 22, 759 S.W.2d 37 (1988).

Laches and limitations are affirmative defenses under ARCP 8(c), and are not listed as

defenses that may be the subject of a motion to dismiss under this rule. *Davenport v. Pack*, 35 Ark. App. 40, 812 S.W.2d 487 (1991).

The defense of lack of capacity is not included in subsection (h) of this rule as a defense that must be asserted in the original answer in order to avoid the doctrine of waiver. *Tribco Mfg. Co. v. People's Bank of Imboden*, 67 Ark. App. 268, 998 S.W.2d 756 (1999).

Statutes of limitations can be raised and considered by the court on a motion to dismiss under subdivision (b)(6) of this rule. *Martin v. Equitable Life Assur. Soc'y of the United States*, 344 Ark. 177, 40 S.W.3d 733 (2001).

Although the buyer argued that the sellers' motion to strike the buyer's affirmative defense of fraud was untimely, an objection of failure to state a legal defense to a claim may be made at the trial on the merits under subdivision (h)(2) of this rule. *Ison Props., LLC v. Wood*, 85 Ark. App. 443, 156 S.W.3d 742 (2004).

#### **Answer Filed by Codefendant.**

It has been settled in this state for almost a century and a half that the answer of one codefendant inures to the benefit of the other codefendants. *Aldridge v. Watling Ladder Co.*, 275 Ark. 225, 628 S.W.2d 322 (1982).

#### **Answer Filed by Others.**

A nonparty may not file a responsive pleading. *Reynolds v. Guardianship of Sears*, 327 Ark. 770, 940 S.W.2d 483 (1997).

#### **Appearances.**

The distinction between general and special appearances was abolished with the adoption of the Arkansas Rules of Civil Procedure in 1979. *Arkansas Dep't of Human Servs. v. Farris*, 309 Ark. 575, 832 S.W.2d 482 (1992).

The last vestiges of the distinction between "special appearance" and "general appearance" were abolished with the adoption of subsection (b) of this rule, which provides for raising various defenses, including "lack of jurisdiction over the person," by motion or in a responsive pleading at the option of the pleader; the distinction between special appearance and general appearance no longer exists. *Fausett v. Host*, 315 Ark. 527, 868 S.W.2d 472 (1994).

#### **Appellate Review.**

The denial of a motion for summary judgment is neither reviewable nor appealable. *Amalgamated Clothing & Textile Workers Int'l Union v. Earle Indus., Inc.*, 318 Ark. 524, 886 S.W.2d 594 (1994).

Where the motion to dismiss was effectively converted to one for summary judgment under subsection (b) of this rule by the presentation of matters outside the pleadings, its denial was not subject to review on appeal. *Amalgamated Clothing & Textile Workers*

*Int'l Union v. Earle Indus., Inc.*, 318 Ark. 524, 886 S.W.2d 594 (1994).

In a case in which the trial court's order certifying a suit as a class action was reversed on appeal, the trial court's denial of defendant's motion to dismiss plaintiff's suit pursuant to subdivision (b)(6) of this rule was not an appealable order under RAP-Civ 2. *Lenders Title Co. v. Chandler*, 353 Ark. 339, 107 S.W.3d 157 (2003).

#### **Assertion of Defenses.**

By specifically reserving his objections to jurisdiction and service of process and reserving the right to plead further in his original responsive pleading, the appellee "asserted" those defenses, as required by subsection (b) of this rule. *Wallace v. Hale*, 341 Ark. 898, 20 S.W.3d 392 (2000).

There is no reported Arkansas case that promulgates a specificity requirement with regards to a motion to dismiss based on insufficiency of process; therefore, a hospital's objection to the sufficiency of process and service of process in a responsive pleading was sufficient to raise and preserve the issues. *Shotzman v. Berumen*, 363 Ark. 215, 213 S.W.3d 13 (2005).

Although an answer generally requested dismissal of the complaint pursuant to subsection (b) of this rule, it did not specifically identify the subsection (b) defenses of insufficient process and insufficient service of process. Therefore, it did not meet the specificity requirement of Ark. R. Civ. P. 8(b) or subsection (h) of this rule, and the subsection (b) defenses were not preserved. *Holliman v. Johnson*, 2012 Ark. App. 354, — S.W.3d —, 2012 Ark. App. LEXIS 470 (May 23, 2012).

Generally pleading dismissal pursuant to subsection (b) of this rule, without further specificity, fails to preserve the defenses under subsection (b). *Holliman v. Johnson*, 2012 Ark. App. 354, — S.W.3d —, 2012 Ark. App. LEXIS 470 (May 23, 2012).

#### **Class Certification.**

Precertification dismissal was only binding on the named parties since those dismissals were less likely to unfairly prejudice either the unnamed members of the potential class or the defendants to the action and did not reflect a determination on the merits; because the resolution of motions under subdivision (b)(6) of this rule promoted the administration of justice and did not unfairly prejudice any of the parties to the action, such actions were proper prior to class certification. *Speights v. Stewart Title Guar. Co.*, 358 Ark. 59, 186 S.W.3d 715 (2004).

#### **Conclusions of Law.**

Subdivision (b)(6) of this rule must be read in conjunction with ARCP 8(a)(2), which deals with the contents of the pleading; accordingly, in a suit by a real estate broker against



defaulting purchasers to recover the commission it would have recovered from the seller under the contract, a complaint containing allegations which were merely conclusions of law and failed to state facts upon which relief could be granted as required by ARCP 8(a)(2), was properly dismissed under subdivision (b)(6) of this rule. *Thompson-Holloway Agency, Inc. v. Gribben*, 3 Ark. App. 119, 623 S.W.2d 528 (1981).

A tort claim of outrage against various church members, which alleged only that they willfully and wantonly breached a contract for repair of a church organ which caused the repairers emotional distress, was not sufficient to withstand a motion to dismiss for failure to state a claim upon which relief can be granted. The claim alleged mere conclusions and not facts. *Rabalais v. Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985).

The facts constituting the cause of action must be pleaded in direct and positive allegations, not by way of argument, inference, or belief; statements of generalities and conclusions of law are not sufficient to state a cause of action. *Big A Whse. Distribs., Inc. v. Rye Auto Supply, Inc.*, 19 Ark. App. 286, 719 S.W.2d 716 (1986); *McKinney v. City of El Dorado*, 308 Ark. 284, 824 S.W.2d 826 (1992).

Where complainants' only allegation was in actuality a conclusion of law and not a statement of facts upon which relief could be granted, complaint was dismissed without prejudice. *Spires v. Members of Election Comm'n*, 302 Ark. 407, 790 S.W.2d 167 (1990).

Complaint failed to state facts upon which relief could be granted pursuant to the respondeat superior theory of vicarious liability, but did state facts upon which relief could be granted for negligent entrustment. *LeClaire v. Commercial Siding & Maintenance Co.*, 308 Ark. 580, 826 S.W.2d 247 (1992).

### Counterclaim.

A counterclaim or third party complaint is not a defense. *Arkansas Game & Fish Comm'n v. Lindsey*, 292 Ark. 314, 730 S.W.2d 474 (1987).

This rule allows a defendant to answer to the merits in the same pleading in which he raises the issue of venue, but it does not authorize a defendant to couple a counterclaim with a venue motion. *Arkansas Game & Fish Comm'n v. Lindsey*, 292 Ark. 314, 730 S.W.2d 474 (1987).

Where defendant attempted to preserve its defense of lack of service of process, by filing a permissive counterclaim, defendant entered its appearance. *Arkansas Intercollegiate Conference v. Parnham*, 309 Ark. 170, 828 S.W.2d 828 (1992).

### Failure to File Answer.

Where defendants' attorney failed to answer complaint within 20 days as required by

this rule, but alleged that he had mailed copies to the court clerk and both attorneys for plaintiffs, although the three denied receiving them, the court could properly excuse the failure under ARCP 6, even though ARCP 55 mandates a default judgment and gives the court no discretion. *Hensley v. Brown*, 2 Ark. App. 175, 617 S.W.2d 867 (1981).

The trial court did not err in striking an untimely answer where no evidence justifying the delay was presented in the trial court, and, even if defendant had made a threshold showing of mistake, inadvertence, or excusable neglect, she failed to show that she had a meritorious defense to the cause of action. *Martin v. Jetkins*, 320 Ark. 478, 897 S.W.2d 567 (1995).

Interlocutory appeal of a default judgment would not lie when seed company failed to answer farmers' and farming companies' complaint; seed company company had been properly served with the complaint, and had 30 days under subsection (a) of this rule, as a non-resident corporation, to respond. *Tri-State Delta Chems., Inc. v. Crow*, 347 Ark. 255, 61 S.W.3d 172 (2001).

Homeowner's belated answer was untimely to rebut the factual allegations in the complaint upon default regarding liability and, therefore, the factual responses were immaterial under subsection (f) of this rule; the harm levied against homeowner in striking his answer was the entry of default judgment, but he remained free to counter any proof of damages, which had to be proved by the worker at trial. *Israel v. Oskey*, 92 Ark. App. 192, 212 S.W.3d 45 (2005).

### Failure to File Response.

Where estate failed to file its response to alleged pretermitted heirs' complaint within 20 days as required by this rule, the probate judge properly rejected heirs' motion for default judgment since the Probate Code's procedural sections, § 28-1-101 et seq., govern in cases concerning the filing of petitions for the determination of heirship. *King v. King*, 273 Ark. 55, 616 S.W.2d 483 (1981).

Dismissal under subdivision (b)(6) of this rule should be granted when taking all the facts alleged in the complaint as true, the complainant is not entitled to the relief sought. *Brandt v. St. Vincent Infirmary*, 287 Ark. 431, 701 S.W.2d 103 (1985).

An attempt by the executor of the will of a victim of a murder-suicide, to relitigate the issues adjudicated in the earlier phases of the case and affirmed in the first appeal, was dismissed for failure to state facts upon which relief could be granted. *Luecke v. Mercantile Bank*, 289 Ark. 477, 712 S.W.2d 306 (1986).

In considering a motion under subdivision (b)(6) of this rule for judgment on the pleadings for failure to state facts upon which relief can be granted, the facts alleged in the com-

plaint are treated as true and are viewed in the light most favorable to the party seeking relief. *Big A Whse. Distribs., Inc. v. Rye Auto Supply, Inc.*, 19 Ark. App. 286, 719 S.W.2d 716 (1986).

#### **Failure to State Claim.**

Where the complaint of a voter who challenged the election results merely stated that voting machines malfunctioned and that election officials refused to supply paper ballots that could be used in place of the machines, and the complaint contained no allegation that the election result would have been different if the votes of the plaintiff and the class he represented had been counted, and no allegation that the malfunctions of the voting machines or the failure of the election officials to provide remedies were due to fraud on anyone's part, the complaint failed to state a cause of action and was properly dismissed by the trial court. *Files v. Hill*, 268 Ark. 106, 594 S.W.2d 836 (1980).

A pleading which merely alleges the conclusion that the contestant received more legal votes than the contestee without alleging facts which would disclose that the result of the election was actually different from that shown by the returns does not state a cause of action and may be subject to a motion to dismiss under subdivision (b)(6) of this rule. *Files v. Hill*, 268 Ark. 106, 594 S.W.2d 836 (1980).

Where both the complaint and the amended complaint in a tort action failed to make a statement in ordinary and concise language of facts showing that the pleader was entitled to relief because neither contained a factual allegation of any act of negligence, they were correctly dismissed under subdivision (b)(6) of this rule for failure to state facts upon which relief could be granted. *Ratliff v. Moss*, 284 Ark. 16, 678 S.W.2d 369 (1984).

When a complaint fails to state sufficient facts, an appellate court may recognize that flaw and sustain the trial court if its result is correct. *Carter v. F.W. Woolworth Co.*, 287 Ark. 39, 696 S.W.2d 318 (1985).

When a complaint is dismissed under subdivision (b)(6) of this rule for failure to state facts upon which relief can be granted, the dismissal should be without prejudice; the plaintiffs then have the election to either plead further or appeal. *Hollingsworth v. First Nat'l Bank & Trust Co.*, 311 Ark. 637, 846 S.W.2d 176 (1993).

Complaint alleging actual fraud and constructive fraud against the attorney for an opposing party in prior litigation dismissed for failure to state claim under subdivision (b)(6) of this rule. *Wiseman v. Batchelor*, 315 Ark. 85, 864 S.W.2d 248 (1993).

In reviewing a trial court's decision on a motion to dismiss under subdivision (b)(6) of this rule, the reviewing court treats the facts

alleged in the complaint as true and views them in the light most favorable to the party who filed the complaint. *Neal v. Wilson*, 316 Ark. 588, 873 S.W.2d 552 (1994).

Where the complaint attempted to follow the elements of a negligent entrustment cause of action, but set forth virtually no facts which corresponded to those elements, the court's dismissal was proper. *Mann v. Orrell*, 322 Ark. 701, 912 S.W.2d 1 (1995), overruled *Shannon v. Wilson*, 329 Ark. 143, 947 S.W.2d 349 (1997).

Where amended complaint of teacher for Department of Correction School District, if taken as true, established a cause of action against the Department for violation of the Teacher Fair Dismissal Act, the trial court erred in dismissing the complaint under subdivision (b)(6) of this rule. *Allred v. Arkansas Dep't of Cor. Sch. Dist.*, 322 Ark. 772, 912 S.W.2d 4 (1995).

Even when complaint was liberally construed, it alleged only conclusions and alleged no facts whatsoever, as required by ARCP 8(a)(1), and therefore failed to state a claim; although the complaint should have been dismissed under subdivision (b)(6) of this rule, the claim should not have been dismissed with prejudice. *Malone v. Trans-States Lines*, 325 Ark. 383, 926 S.W.2d 659 (1996).

Claim for tax refund under § 26-18-406 survived a motion to dismiss under subdivision (b)(6) of this rule. *Little Rock Cleaning Sys. v. Weiss*, 326 Ark. 1007, 935 S.W.2d 268 (1996).

Where complaint alleged that telephone company had been unjustly enriched by providing and charging customers for an optional service without authorization, but did not allege that the telephone company had violated any law, order, rule, or regulation of the Commission, the complaint failed to state a cause of action, and suit was correctly dismissed. *Bryant v. Arkansas Pub. Serv. Comm'n*, 53 Ark. App. 114, 919 S.W.2d 522 (1996).

In order to properly dismiss a complaint, the trial court has to find that the complaining parties either (1) failed to state general facts upon which relief could have been granted or (2) failed to include specific facts pertaining to one or more of the elements of one of its claims after accepting all facts contained in the complaint as true and in the light most favorable to the non-moving party. *Bethel Baptist Church v. Church Mut. Ins. Co.*, 54 Ark. App. 262, 924 S.W.2d 494 (1996).

Despite the stringent grants of dismissals under subdivision (b)(6) of this rule, the trial court properly dismissed an action for breach of a contract for the sale of human organs because the contract was in violation of federal law. *Wilson v. Adkins*, 57 Ark. App. 43, 941 S.W.2d 440 (1997).



Municipal corporation has standing to challenge an annexation election as a property owner; therefore, a trial court erred in dismissing the case for failure to state a claim. *City of Dover v. City of Russellville*, 352 Ark. 299, 100 S.W.3d 689 (2003).

When a complaint is dismissed under subdivision (b)(6) of this rule for failure to state facts upon which relief can be granted, the dismissal should be without prejudice; however, because plaintiff, the Arkansas Department of Environmental Quality, appealed the judgment, it waived the right to plead further and the complaint was modified to be dismissed with prejudice. *Ark. Dep't of Env'tl. Quality v. Brighton Corp.*, 352 Ark. 396, 102 S.W.3d 458 (2003).

Trial court properly granted the insurer's motion to dismiss appellants' personal injury action against the insurer for failure to state a claim where a prior decision relating to a fetus under the wrongful death statute was only applicable to actions arising after that decision became final, and appellants' action was brought before that time period. *McCoy v. Crumby*, 353 Ark. 251, 106 S.W.3d 462 (2003).

Motion filed under subdivision (b)(6) of this rule to dismiss taxpayer's class action challenging the constitutionality of a session law that enacted a compensation use tax was improperly denied where the law had already been found to be valid in previous litigation filed by taxpayers challenging the same law on the same bases. *Barclay v. Waters*, 357 Ark. 386, 182 S.W.3d 91 (2004).

Former client's legal malpractice claim against a former attorney and the attorney's firm was properly dismissed for failure to state a claim where the client's complaint was based on the attorney's court-approved withdrawal and the client had not appealed from the withdrawal order. *Bright v. Zega*, 358 Ark. 82, 186 S.W.3d 201 (2004).

Dismissal of owner's petition to set aside a statutory foreclosure sale of property by the bank was affirmed because an assertion that the land to be foreclosed on was primarily used for agricultural purposes was precisely the kind of claim or defense that must be raised prior to the sale or be forever barred and terminated, under § 18-50-116(d)(2), and the owner did not raise the agricultural-lands defense until well after the auction sale. *Cockrell v. Union Planters Bank*, 359 Ark. 8, 194 S.W.3d 178 (2004).

Appellate court chose not to recognize a cause of action for educational malpractice in Arkansas and the trial court did not err in dismissing a mother's suit against a school for breach of contract, outrage, breach of fiduciary duty, negligence, and gross negligence where, even if the handbook was a part of the "agreement" that the mother had with the school, its terms were so vague and general

that they were not enforceable; in addition, the trial court did not err in dismissing mother's suit against a school for breach of fiduciary duty where that duty did not exist between a student and his teachers. *Key v. Coryell*, 86 Ark. App. 334, 185 S.W.3d 98 (2004).

Trial court erred in granting doctor's motion to dismiss a complaint that alleged sufficient facts to state a claim for medical malpractice where the complaint alleged that (1) the doctor required plaintiff mother, after achieving maximum dilation, to go through over four hours of hard labor before performing a caesarean section, (2) the doctor's failure to timely schedule and perform a caesarean section was a breach of the applicable standard of care, and (3) the child suffered neurological damage and the mother suffered injury to her bladder and associated nerves. *Thomas v. Pierce*, 87 Ark. App. 26, 184 S.W.3d 489 (2004).

Trial court did not err in dismissing a patient's claim against a hospital for intentional interference with a business advantage under subdivision (b)(6) of this rule because the complaint, taken as true and construed liberally under Ark. R. Civ. P. 8(f), failed to allege improper interference; further, a conversion claim failed as the hospital's refusal to cash a draft did not equate to dominion over the funds. *Alvarado v. St. Mary-Rogers Mem'l Hosp., Inc.*, 99 Ark. App. 104, 257 S.W.3d 583 (2007).

In a wrongful death suit stemming from allegedly deficient nursing home care, the trial court properly granted the motion to dismiss of the corporation's chief executive officer (CEO) under subdivision (b)(6) of this rule because the complaint's allegations were silent with respect to the CEO's personal involvement in the operation of the nursing home and were likewise silent with respect to the CEO's personal involvement in the decedent's care. While the complaint alleged that the CEO was responsible for the overall corporate philosophy that caused deficient staffing and supplies that resulted in harm to the decedent, the administrator of the decedent's estate never produced any facts specifically relevant to the CEO's direct personal involvement with the level of staffing and supplies used or denied in the decedent's care. *Bayird v. Floyd*, 2009 Ark. 455, 344 S.W.3d 80 (2009).

#### **Foreign Corporations.**

Foreign corporations do not become Arkansas residents by registering to do business in Arkansas and they are entitled, as provided by this rule, to 30 days to respond to a complaint. *Citicorp Indus. Credit, Inc. v. Wal-Mart Stores, Inc.*, 305 Ark. 530, 809 S.W.2d 815 (1991).

**Further Pleading.**

Where a party was not given the chance to plead further, pursuant to subsection (j) of this rule, the dismissal of its complaint with prejudice was modified to a dismissal without prejudice. *Hubbard v. Shores Group, Inc.*, 313 Ark. 498, 855 S.W.2d 924 (1993).

Where defendant elected the option of asserting the defense, pursuant to ARCP 4(i), of lack of jurisdiction of the person and insufficiency of service of process in its original responsive pleading, then under subsections (b) and (h) of this rule, it has preserved these defenses by including them in its original responsive pleading. *Farm Bureau Mut. Ins. Co. v. Campbell*, 315 Ark. 136, 865 S.W.2d 643 (1993).

**Hearing on Motion.**

Circuit court erred in granting the Department of Correction's motion to dismiss an inmate's complaint under § 12-28-604 for failure to state a claim under subdivision (b)(6) of this rule because the circuit court granted the motion without holding a hearing or considering the inmate's written response, which was timely filed under Ark. R. Civ. P. 6 and Ark. R. Civ. P. 78(b). *Loveless v. Agee*, 2010 Ark. 53, — S.W.3d —, 2010 Ark. LEXIS 67 (Feb. 4, 2010).

**Indispensable Parties.**

In store's action to recover on a charge account, contrary to the store's argument, the customer's daughter who purportedly made the charges was not an indispensable party; the daughter's conduct was not relevant to the determination of the customer's obligations under the charge card agreement and the customer's declaratory action for a determination of whether she owed any amount of the alleged indebtedness on charges for which she did not sign charge slips was improperly dismissed under subdivision (b)(7) of this rule. *Wilmans v. Sears, Roebuck & Co.*, 355 Ark. 668, 144 S.W.3d 245 (2004).

**Insufficiency of Process.**

None of the circumstances which would have warranted granting the company and its officers' motion for reconsideration under Fed. R. Civ. P. 60 were present because although the company and its officers argued that despite the misstatement of law in their summonses, they complied with the form set forth in Ark. R. Civ. P. 4(b), the court did not believe that requiring the company and its officers to correctly state the response times clearly set forth in subsection (a) of this rule led to an absurd result or defied common sense; rather, the company and its officers were simply expected to accurately state the procedural rules as set forth in Ark. R. Civ. P. 4(b) and subsection (a) of this rule. Moreover, the fact that the LLC and its owner suffered no prejudice as a result of the error did not save the

defective summonses at issue. *Charkoma Res., LLC v. JB Energy Explorations, LLC*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 114336 (W.D. Ark. Dec. 8, 2009).

**Judgment on the Pleadings.**

In considering a motion for a judgment on the pleadings for failure to state facts upon which relief can be granted, the facts alleged in the complaint must be treated as true and viewed in the light most favorable to the party seeking relief. *Smith v. American Greetings Corp.*, 304 Ark. 596, 804 S.W.2d 683 (1991).

Motions for judgments on the pleadings are not favored by the courts. Such a judgment should be entered only if the pleadings show on their face that there is no defense to the suit. When considering the motion, the facts alleged in the complaint are viewed as true, and in the light most favorable to the party seeking relief. *Estate of Hastings v. Planters & Stockmen Bank*, 307 Ark. 34, 818 S.W.2d 239 (1991).

Resolution of a question of law is not the same as entering judgment as a matter of law. *Little Rock Cleaning Sys. v. Weiss*, 326 Ark. 1007, 935 S.W.2d 268 (1996).

Circuit court correctly granted the city's and city planning commission's motion on the pleadings as to the property owner's complaint where the owner waited over two years to file an appeal of the city's decision to the circuit court; the appeal was well outside the 30-day requirement of AICR 9 [now ADCR 9] and was thus untimely because those particular counts had to do with action by the city council and the circuit court did not have jurisdiction over those counts. *Ingram v. City of Pine Bluff*, 355 Ark. 129, 133 S.W.3d 382 (2003).

**More Definite Statement.**

Where the defendants argued that the plaintiff's complaint was conclusory but failed to move for a more definite statement under subsection (e) of this rule, and instead answered the original complaint, they could not later complain that they were prejudiced. *White v. Welsh*, 327 Ark. 465, 939 S.W.2d 299 (1997).

**Motion to Dismiss.**

Under the Rules of Civil Procedure the purpose formerly accomplished by a pleading called a demurrer is now accomplished by a pleading called a motion to dismiss. *Farm Bureau Mut. Ins. Co. v. Southall*, 281 Ark. 141, 661 S.W.2d 383 (1983).

Where insurer did not stand on its motion to dismiss and permit the entry of judgment for the insured, it was not entitled to a decision in Supreme Court, on petition for writ of review, about whether the plaintiff's complaint stated a cause of action. *Farm Bureau Mut. Ins. Co. v. Southall*, 281 Ark. 141, 661 S.W.2d 383 (1983).



It was improper for the trial court to look beyond the complaint to decide a motion to dismiss pursuant to subdivision (b)(6) of this rule unless it were treating the motion as one for summary judgment; even had the trial court treated the motion as one for summary judgment, it would have been incorrect to base the decision on allegations in briefs and attached exhibits. *Guthrie v. Tyson Foods, Inc.*, 285 Ark. 95, 685 S.W.2d 164 (1985).

Trial court erred in granting judgment as a matter of law. *Continental Ozark, Inc. v. Lair*, 29 Ark. App. 25, 779 S.W.2d 187 (1989).

In an action to collect unpaid hospital bills, the trial court erred in entering judgment based on the statute of limitations under subsection (b) of this rule by considering facts not in the record without developing any factual record. *University Hosp. v. Undernehr*, 307 Ark. 445, 821 S.W.2d 26 (1991).

In considering a motion to dismiss under subdivision (b)(6) of this rule, the facts alleged in the complaint are treated as true and viewed in the light most favorable to the party seeking relief, and it is improper for the trial court to look beyond the complaint to decide a motion to dismiss, unless it is treating the motion as one for summary judgment. *Deutsch v. Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992).

The defendant government officials were not entitled to dismissal since they were not immune from suit under the doctrine of sovereign immunity as sufficient allegations of malicious conduct were alleged in the complaint where the plaintiff alleged that the defendants conspired to have him arrested for the malicious purpose of embarrassing him and damaging his professional reputation and with knowledge that no probable cause existed, that the allegations in the arrest warrant were false, and that no prosecution would ensue. *Heigle v. Miller*, 332 Ark. 315, 965 S.W.2d 116 (1998).

Refusal of the circuit court to grant the bank's motion to dismiss pursuant to subsection (b) of this rule and ARCP 13 was improper where the farmers' action involving conversion of wheat and oat crop arose out of the same set of circumstances as the bank's complaint; therefore, it must have been brought as a compulsory counterclaim. *First Nat'l Bank of Dewitt v. Cruthis*, 352 Ark. 292, 100 S.W.3d 703 (2003).

Circuit court properly dismissed the buyer's complaint for failure of valid process under subsection (b) of this rule; the dismissal was mandatory under the plain language of ARCP 4(i) and case law interpreting that rule because service of the summonses on the car dealership and its successor was improper. *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 120 S.W.3d 525 (2003).

Dismissal of the surety's declaratory judgment action against the State Highway Commission and the State Highway and Transportation Department was proper where it was barred by the doctrine of sovereign immunity; the surety was seeking to control the action of the state and a ruling on the surety's liability on the performance bond would have determined whether the state could seek damages based upon a breach of the performance bond. *Travelers Cas. & Sur. Co. of Am. v. Ark. State Highway Comm'n*, 353 Ark. 721, 120 S.W.3d 50 (2003).

Where taxpayers failed to file their protests on additional sales and individual tax assessments imposed against them by the Department of Finance and Administration until after more than a year had passed since said assessments were paid, dismissal of their complaint was warranted. *Mac v. Weiss*, 360 Ark. 384, 201 S.W.3d 897 (2005).

Trial court did not err in granting contractor's motion to dismiss subcontractor's action, based on a forum selection clause, and in dismissing subcontractor's unjust enrichment claim against property developer because subcontractor's lien was untimely under the 120-day time limit provided in § 18-44-117 and, thus, the lien was not perfected and the complaint could not have been an in rem action; further, once the contractor posted a bond pursuant to § 18-44-118, the lien had been discharged. *Servewell Plumbing, LLC v. Summit Contrs., Inc.*, 362 Ark. 598, 210 S.W.3d 101 (2005).

There was nothing to indicate that insured or insurer intended chiropractor to be a third-party beneficiary to a personal injury protection provision in patient insured's policy; consequently, he did not have standing to bring suit directly against insurer for breach of contract, and, if anything, the chiropractor was merely an incidental beneficiary who did not possess the right to bring a direct action against the insurer. *Elsner v. Farmers Ins. Group*, 364 Ark. 393, 220 S.W.3d 633 (2005).

### Multiple Theories of Action.

A complaint that alleges facts to support a cause of action under more than one theory is not demurrable if a cause of action on at least one theory is stated; thus, where a complaint was sufficient to support an action for the breach of a timber sales contract, it was not open to a motion to dismiss for failure to state facts upon which relief could be granted merely because it also alleged some facts which would support a reformation theory. *Williams v. J.W. Black Lumber Co.*, 275 Ark. 144, 628 S.W.2d 13 (1982).

### Nonresident Insurers.

Section 23-63-302, governing service of process on the commissioner of insurance as process agent for an insurer, is deemed super-

seded by subsection (a) of this rule, which makes no allowance for requiring out-of-state insurers to answer in less time than other out-of-state defendants. In re Amendments to Rules of Civil Procedure, 279 Ark. 470, 651 S.W.2d 63 (1983).

#### **Pendency of Another Action.**

Where a wife brought a divorce action in a county chancery court, without knowledge that her husband had filed a divorce action against her in Bolivia, where he was domiciled, the husband could not, under subdivision (b)(8) of this rule, have his wife's suit dismissed based upon the pendency of an action arising out of the same transaction, since that rule only applies where both courts have concurrent jurisdiction, which was not true as between the county circuit court and the Bolivian divorce court. *Cotton v. Cotton*, 3 Ark. App. 158, 623 S.W.2d 540 (1981).

When a case is dismissed because of pendency of another action, under subdivision (b)(8) of this rule, the pending action may be pursued. *Cory v. Mark Twain Life Ins. Corp.*, 286 Ark. 20, 688 S.W.2d 934 (1985).

Where insurer initiated a second suit, in its own name and pertaining to the same underlying cause of action as the first suit, in which insurer had sought to intervene, prior to the dismissal of the first suit, the subsequent dismissal of the first suit before the trial court determined the sufficiency of defendant's motion to dismiss the second suit precluded the application of subdivision (b)(8) of this rule to second suit because there was no other action pending. *Allstate Ins. Co. v. Redman Homes, Inc.*, 302 Ark. 335, 789 S.W.2d 454 (1990).

Dismissal held proper where appellee filed his complaint in one county while there was pending in the court of appeals an appeal from another county, initiated by appellee, concerning not only the same transaction or occurrence but three issues that were identical, involving alimony, child support, and disposition of marital home. *Tortorich v. Tortorich*, 324 Ark. 128, 919 S.W.2d 213 (1996).

Subdivision (b)(8) of this rule will not be applied to dismiss an Arkansas circuit court action on the ground that the action is simultaneously pending between the same parties in a federal court. *National Bank of Commerce v. Dow Chem. Co.*, 327 Ark. 504, 938 S.W.2d 847 (1997).

It was error for the circuit court to dismiss a petition for habeas corpus on the basis of the pendency of a Rule 37 petition because the petition for habeas corpus was filed before the Rule 37 petition was filed and because the circuit court was not the sentencing court as to the charges. *Armstrong v. Norris*, 337 Ark. 169, 989 S.W.2d 157 (1999).

A paternity action filed in juvenile court was subject to dismissal where a divorce pro-

ceeding involving the child's mother, in which paternity was raised as an issue, was pending in chancery court. *Patterson v. Isom*, 338 Ark. 234, 992 S.W.2d 792 (1999).

Arkansas trial court did not err in refusing to dismiss a party's counterclaim under subdivision (b)(8) of this rule for preliminary injunction on the ground that there was a pending federal-court action between the same parties involving the same issues because: (1) subdivision (b)(8) of this rule only prohibited identical cases from proceeding in two different Arkansas courts, and (2) the two cases actually involved different parties and different issues. *Potter v. City of Tontitown*, 371 Ark. 200, 264 S.W.3d 473 (2007).

#### **Probate Proceedings.**

Where a petition for determination of heirship under § 28-53-101 was filed in July, 1980 and the executor filed his response in September, 1980, beyond the 20-day period provided for in this rule, but before the hearing, it was proper for the probate judge to deny petitioner's motion to strike the response since objections by the defendant are not governed by this rule in probate proceedings and may be made at any time, up to and including the day of the hearing, unless a special order or general rule of the court under § 28-1-110 requires a written objection as a prerequisite to the arguments being heard by the court. *King v. King*, 273 Ark. 55, 616 S.W.2d 483 (1981).

#### **Reduction of Time to File Answer.**

A trial court cannot set a trial date in a plenary proceeding, which would effectively cause a reduction in a party's time to file an answer. *Foster v. Whitlow*, 4 Ark. App. 319, 630 S.W.2d 559 (1982).

#### **Removal to Federal Court.**

The time period in which responsive pleadings are due in the state court is tolled from the time the federal court removal petition is filed until the case is remanded to the state court. *Allstate Ins. Co. v. Bourland*, 296 Ark. 488, 758 S.W.2d 700 (1988), cert. denied 490 U.S. 1006, 109 S. Ct. 1640, 104 L. Ed. 2d 156 (1989).

While there is no longer a need to comply with state court filing deadlines to avoid default if the case is removed to the federal court, removal is not effected unless the removal documents are filed promptly with the state court. *Allstate Ins. Co. v. Bourland*, 296 Ark. 488, 758 S.W.2d 700 (1988), cert. denied 490 U.S. 1006, 109 S. Ct. 1640, 104 L. Ed. 2d 156 (1989).

Following a remand from federal court, the effect to be given to pleadings filed in the federal court is a matter of state policy and is not subject to federal determination. *Allstate Ins. Co. v. Bourland*, 296 Ark. 488, 758 S.W.2d 700 (1988), cert. denied 490 U.S. 1006, 109 S. Ct. 1640, 104 L. Ed. 2d 156 (1989).



**Responsive Pleading.**

The arguments raised by the defendant and its directors, i.e., that it was too late to certify a class, were not ones required to be made in the initial responsive pleading. *Arkansas County Farm Bureau v. McKinney*, 334 Ark. 582, 976 S.W.2d 945 (1998).

**Review on Defense Motion.**

In considering a motion for judgment on the pleadings for failure to state facts upon which relief can be granted, under subdivision (b)(6) of this rule, the facts alleged in the complaint are treated as true and are viewed in the light most favorable to the party seeking relief. *McAllister v. Forrest City St. Imp. Dist.*, No. 11, 274 Ark. 372, 626 S.W.2d 194 (1981); *Gordon v. Planters & Merchants Bancshares, Inc.*, 310 Ark. 11, 832 S.W.2d 492 (1992).

**Service of Process.**

Under this rule, the defense of insufficiency of service of process shall be asserted in the responsive pleading or, at the option of the pleader, it may be made by motion. The defense of insufficiency of service of process is waived if it is neither made by motion under this rule nor included in the original responsive pleading. *Lawson v. Edmondson*, 302 Ark. 46, 786 S.W.2d 823 (1990).

Plaintiffs' motion to strike and motion for a default judgment against a corporate defendant were denied where the plaintiffs failed to issue an appropriate summons in compliance with ARCP 4(d)(5). *Thompson v. Potlach Corp.*, 326 Ark. 244, 930 S.W.2d 355 (1996).

Subdivisions (b)(5) and (h)(1) of this rule clearly set forth the procedure for raising an "insufficiency of service of process" defense. *Sublett v. Hipps*, 330 Ark. 58, 952 S.W.2d 140 (1997).

Debtor's motion to dismiss a bank's action to collect an unpaid account based on the bank's failure to effect service of the complaint within 120 days of filing, as required by ARCP 4(i), or to make a timely application for an extension of time was sufficient to allow the debtor to challenge a default judgment entered against the debtor for failing to respond to the bank's complaint within 20 days of service, as required by subsection (a) of this rule, because the judgment was void and the debtor could challenge the trial court's jurisdiction even though her own response was also untimely. *Williams v. Citibank, N.A.*, 80 Ark. App. 42, 90 S.W.3d 451 (2002).

Defects in the summons, which included the doctor's wrong address, the incorrect amount of time for an out-of-state defendant to file a pleading, and the incorrect date rendered the process void and, even though the doctor was aware of the action and filed an answer before the defective service, estoppel did not apply; in addition, pursuant to subsection (h) of this rule, the doctor reserved

the right to assert insufficiency of process as well as insufficiency of service of process in the doctor's answer. *Vinson v. Ritter*, 86 Ark. App. 207, 167 S.W.3d 162 (2004).

Summons issued to the doctor was clearly defective in two respects: (1) the summons was incorrectly dated September 5, 2000, exactly three months prior to the filing of the complaint on December 5, 2000, and (2) the summons incorrectly stated that the doctor had only 20 days to answer rather than 30 days, which was contrary to subsection (a) of this rule; thus, the trial court properly granted the doctor's motion to dismiss the complaint. *Vinson v. Ritter*, 86 Ark. App. 207, 167 S.W.3d 162 (2004).

Because the service requirements imposed by the Ark. R. Civ. P. 4 and this rule had to be strictly construed and compliance had to be exact, and appellant's summons incorrectly stated that a foreign corporation only had 20 days to file an answer, the circuit court properly dismissed the complaint for failure of service of valid process under subdivision (b) of this rule. *Trusclair v. McGowan Working Ptnrs*, 2009 Ark. 203, 306 S.W.3d 428 (2009).

**Statement of Grounds for Relief.**

Where the direct complaint of the plaintiff against the third-party defendant did not state in ordinary and concise language that plaintiff was entitled to relief on the theory of negligence, the complaint was properly dismissed. *Harvey v. Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981).

Since subdivision (b)(6) of this rule tests the sufficiency of the pleadings, it is necessary to read it in conjunction with ARCP 8 which deals with the contents of the pleading. *Harvey v. Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981).

In an action in trover for the conversion of personal property, the failure to plead either that the plaintiff had a property interest in the subject goods or that the defendant wrongfully converted them was fatally defective upon a motion under subdivision (b)(6) of this rule, even though it could be cured by a verdict. *Big A Whse. Distribs., Inc. v. Rye Auto Supply, Inc.*, 19 Ark. App. 286, 719 S.W.2d 716 (1986).

Where the petitioners alleged the defendant school district knew of the presence of specific rules and regulations for the removal of asbestos and failed and refused to follow such procedures, and knowingly misrepresented and/or concealed the dangerous asbestos condition, the complaint recited more than mere conclusory allegations, and sufficient facts were alleged to state a cause of action for the tort of outrage. *Deutsch v. Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992).

ARCP 8(a)(1) and subdivision (b)(6) of this rule must be read together in testing the sufficiency of a complaint; facts, not mere

conclusions, must be alleged. *Hollingsworth v. First Nat'l Bank & Trust Co.*, 311 Ark. 637, 846 S.W.2d 176 (1993).

Claim involving land sales contract and statute of frauds stated facts upon which relief could be granted. *Van Dyke v. Glover*, 326 Ark. 736, 934 S.W.2d 204 (1996).

### **Subject-Matter Jurisdiction.**

Child-custody jurisdiction is a matter of subject-matter jurisdiction, which is a defense that cannot either be waived by the parties at any time, or conferred by the parties' consent; thus the fact that a father may have entered a general appearance before the Texas court does not waive his right to contest the Texas court's subject-matter jurisdiction. *Moore v. Richardson*, 332 Ark. 255, 964 S.W.2d 377 (1998).

Legal malpractice action brought against an attorney in the small claims division of the municipal court was really a claim based on fraud and, as such, the municipal court lacked subject-matter jurisdiction pursuant to § 16-17-704; in addition, the circuit court's summary judgment in favor of the attorney was proper because it did not acquire subject-matter jurisdiction on appeal. *French v. Webb*, 80 Ark. App. 357, 96 S.W.3d 740 (2003).

Although citizens who objected to the issuance of a commercial disposal well permit without timely proof of financial assurance did not specifically mention the words "financial assurance," the issue was not waivable under subdivision (h)(3) of this rule because it involved the subject-matter jurisdiction of the Arkansas Oil and Gas Commission. *Capstone Oilfield Disposal of Ark., Inc. v. Pope County*, 2012 Ark. App. 231, — S.W.3d —, 2012 Ark. App. LEXIS 344 (Apr. 4, 2012).

### **Summary Judgment.**

Under some circumstances, the summary judgment motion is an extension of the motion to dismiss for failure to state a claim; while the motion to dismiss alleges the failure to state a claim, the motion for summary judgment alleges the failure to have a claim. *Joey Brown Interest, Inc. v. Merchants Nat'l Bank*, 284 Ark. 418, 683 S.W.2d 601 (1985).

Neither ARCP 56 nor this rule authorizes the trial court to summarily dismiss a complaint where there are matters before the court that show there is an issue of fact to be decided. *Maas v. Merrell Assocs.*, 13 Ark. App. 240, 682 S.W.2d 769 (1985); *Dickson v. Delhi Seed Co.*, 26 Ark. App. 83, 760 S.W.2d 382 (1988).

If a dismissal motion or motion for judgment on the pleadings is treated as one for summary judgment, it should not be granted if a fact question remains. *Sisson v. Ragland*, 294 Ark. 629, 745 S.W.2d 620 (1988).

When summary judgment is granted in the trial court because of failure to have a claim,

but is affirmed on the basis of failure to state a claim, the judgment is modified to make the dismissal without prejudice in order to afford the plaintiff-appellant a chance to plead further. *West v. Searle & Co.*, 305 Ark. 33, 806 S.W.2d 608 (1991).

By going beyond the complaint in considering the first subsection (b) motion under this rule, the trial court converted that motion to one for summary judgment under ARCP 56, according to the peremptory language of subsection (b) of this rule. *Godwin v. Churchman*, 305 Ark. 520, 810 S.W.2d 34 (1991).

Under subsection (b) of this rule, if matters outside the pleadings are presented and not excluded by the court, a motion to dismiss will be treated as one for summary judgment. *Rankin v. Farmers Tractor & Equip. Co.*, 319 Ark. 26, 888 S.W.2d 657 (1994), questioned *Privett v. Excel Specialty Prods.*, 76 Ark. App. 527, 69 S.W.3d 445 (2002); *Clark v. Ridgeway*, 323 Ark. 378, 914 S.W.2d 745 (1996).

Once the third-party complaint became moot, the summary judgment motion, with respect to the third-party complaint, should have been denied without addressing its merits, and the third-party complaint dismissed without prejudice on the grounds of mootness of the issues, lack of jurisdiction and non-justiciable nature of the issues as presented. *Martin Farm Enters., Inc. v. Hayes*, 320 Ark. 205, 895 S.W.2d 535 (1995).

Summary judgment on the basis of failure to have a claim results in a dismissal with prejudice. *Mertz v. Pappas*, 320 Ark. 368, 896 S.W.2d 593 (1995).

Summary judgment based upon a failure to state a claim upon which relief can be granted is different from summary judgment based upon a lack of disputed material facts which results in a party's entitlement to the judgment as a matter of law; the first is a failure to state a claim, while the second is the failure to have a claim. *Mertz v. Pappas*, 320 Ark. 368, 896 S.W.2d 593 (1995).

Where there were no questions of fact to be determined and the parties agreed upon and stipulated to the relevant facts and exhibits, thereby acknowledging the truth of such facts, the chancellor clearly treated the motion as one to dismiss for failure to state facts upon which relief could be granted, rather than as a motion for summary judgment. *Daniel v. Jones*, 332 Ark. 489, 966 S.W.2d 226 (1998).

A motion to dismiss was converted into a motion for summary judgment when the court considered affidavits and other documents outside the pleadings. *Stapleton v. M.D. Limbaugh Constr. Co.*, 333 Ark. 381, 969 S.W.2d 648 (1998).

Where wrongful-death complaint was not in compliance with § 16-62-102 and the statute of limitations had run barring heirs from



commencing a wrongful-death action against a doctor, the wife of the deceased was also barred from pursuing a separate claim for loss of consortium, which was derivative to the wrongful-death action. *Sanderson v. McCollum*, 82 Ark. App. 111, 112 S.W.3d 363 (2003).

Grant of summary judgment against the bankruptcy trustee was improper where there was no evidence of an intent to manipulate the judicial process; further, because the parties presented affidavits and other matters outside the pleadings of the circuit court on a motion to dismiss, the motion was treated as one for summary judgment. *Dupwe v. Wallace*, 355 Ark. 521, 140 S.W.3d 464 (2004).

Writ of prohibition was granted because a circuit court was wholly without jurisdiction to decide whether the Arkansas Workers' Compensation Act applied since there was a conflict over the narrow exception to the exclusivity doctrine; moreover, there was no adequate remedy since a motion for summary judgment was not subject to appeal. A motion to dismiss was treated as such since matters outside of the pleadings were considered. *Get Rid of It Ark., Inc. v. Hughes*, 368 Ark. 535, 247 S.W.3d 838 (2007).

Former patient argued that trial court's dismissal of her complaint against a hospital should have been treated as based on summary judgment under Ark. R. Civ. P. 56(c); however, because the trial court proceeding was at all times treated as a hearing on a motion to dismiss under subdivision (b)(6) of this rule and the patient never asked the trial court to consider the hospital's motion as one for summary judgment, that argument was not considered on appeal. *Alvarado v. St. Mary-Rogers Mem'l Hosp., Inc.*, 99 Ark. App. 104, 257 S.W.3d 583 (2007).

Trial court's consideration of evidentiary materials beyond the pleadings converted what was essentially a request under subsection (c) of this rule for relief into a summary-judgment situation pursuant to Ark. R. Civ. P. 56. Because the trial court notified the parties of its intentions, and both parties responded by submitting evidentiary materials along with their legal arguments, it did not err as a matter of procedure in considering whether the issues in question were ripe for summary judgment. *York v. York*, 2010 Ark. App. 343, — S.W.3d —, 2010 Ark. App. LEXIS 347 (Apr. 21, 2010).

## Time.

### —Extension.

A motion for additional time in which to answer does not automatically extend the time for filing an answer under subsection (a) of this rule. *Friend v. Goslee*, 276 Ark. 484, 637 S.W.2d 568 (1982).

In an action for breach of restrictive covenants, appellants were incorrect to rely on statements made by the trial clerk regarding an extension of time because a motion for additional time in which to answer a complaint did not extend the time for filing an answer to a motion to strike; hence, appellee's motion for a default judgment was properly granted. *Adams v. Moody*, 2009 Ark. App. 474, 324 S.W.3d 348 (2009).

### —Reply.

Where the plaintiffs brought an action for the specific performance of an oral contract for the sale of land and the defendants filed a timely counterclaim for ejectment or unlawful detainer, the trial court erred in proceeding to trial of the cause before the plaintiffs' 20 days expired within which they had to respond to the counterclaim. *Foster v. Whitlow*, 4 Ark. App. 319, 630 S.W.2d 559 (1982).

A rule-against-perpetuities argument raised to counter a defense raised in the answer in a partition action was not untimely, even though it was not raised until trial, since the plaintiffs were not required to file a responsive pleading to the answer. *Nash v. Scott*, 62 Ark. App. 8, 966 S.W.2d 936 (1998).

Trial court erred in refusing the Arkansas concrete company's motion to strike the Kansas paint company's answer because the answer was filed by the paint company's president, who was not an attorney licensed to practice law in Arkansas and, thus, the answer was a nullity which was not cured by the subsequent filing of an answer by retained counsel; the effect of striking the paint company's answer left the paint company with no initial responsive pleading of record other than its amended answer, which was filed more than 7 months after the paint company was served with process, making it untimely under the 30-day limit for non-resident responsive pleadings, although even an untimely answer could be adequate to preserve the defense of lack of personal jurisdiction where it raised that defense. *Concrete Wallsystems of Ark., Inc. v. Master Paint Indus. Coating Corp.*, 95 Ark. App. 21, 233 S.W.3d 157 (2006).

### Timing of Default Motion.

The fact that the plaintiff's motion for a default judgment was filed prior to the expiration of time for filing an answer did not prohibit the trial court from entering a default judgment after the expiration of time to answer, when the defendant actually was in default. *Friend v. Goslee*, 276 Ark. 484, 637 S.W.2d 568 (1982).

### Transfer for Lack of Jurisdiction.

Subdivision (h)(3) of this rule does not change the rule that, by failing to make a timely motion to transfer a case from equity to law, a party waives the right to make the

motion unless the equity court is wholly incompetent to grant the relief sought; an alleged lack of jurisdiction based wholly upon the purported adequacy of a remedy at law is not a jurisdictional question of the type over which equity court has no power to act whatsoever. *McCune v. Brown*, 8 Ark. App. 51, 648 S.W.2d 811 (1983).

As is provided by Arkansas's statutory law and court rules, the municipal court had authority to transfer cause to the county circuit court after concluding that the replevin action exceeded the jurisdictional amount. *Bonnell v. Smith*, 322 Ark. 141, 908 S.W.2d 74 (1995).

#### **Venue.**

This rule has abolished the distinction between special and general appearances. A defendant need no longer appear specially to attack venue. *Arkansas Game & Fish Comm'n v. Lindsey*, 292 Ark. 314, 730 S.W.2d 474 (1987).

Motion to dismiss for improper venue must be filed no later than the time at which the original responsive pleading is due. *Inmon Truck Sales, Inc. v. Wright*, 294 Ark. 397, 743 S.W.2d 793 (1988).

The trial court correctly granted motion to dismiss pursuant to subdivision (b)(3) of this rule, for failure to state proper venue. *Fraser Bros. v. Darragh Co.*, 316 Ark. 297, 871 S.W.2d 367 (1994).

Although the land over which the land owners established a prescriptive easement was in Perry County, pursuant to § 16-60-101, venue was proper in Conway County because a transitory claim, the request for an injunction prohibiting the servient property owners from interfering with the land owners use of the gate in Conway County, was included in the complaint; thus, the trial court's refusal to dismiss on the basis of venue was correct. *River Bar Farms, L.L.C. v. Moore*, 83 Ark. App. 130, 118 S.W.3d 145 (2003).

Mother in guardianship proceeding waived her argument that venue was not proper in Jefferson County because she did not object to venue at the trial level and did not object to venue in her initial responsive pleading; an objection to venue was waived if it was not raised in the defendant's answer or in a motion filed prior to or simultaneously with the answer. *Moore v. Sipes*, 85 Ark. App. 15, 146 S.W.3d 903 (2004).

Mother properly raised a venue argument in her first responsive pleading; however, the issue was without merit because the provisions of Ark. Code Ann. § 9-10-113 were inapplicable in a case where a minor child no longer resided in Arkansas. *Thomas v. Avant*, 370 Ark. 377, 260 S.W.3d 266 (2007).

Because a circuit court had the authority to transfer an attorney's cause of action for attorney fees to the county circuit court that heard the underlying trust litigation under

subdivision (h)(3) of this rule as a result of venue being proper in such county, the attorney's petition for a writ of prohibition or a writ of certiorari seeking to keep the action in the current circuit court was denied. *Evans v. Blankenship*, 374 Ark. 104, 286 S.W.3d 137 (2008).

Dismissal of a medical malpractice claim against out-of-county service providers for lack of proper venue under subdivision (b)(3) of this rule was proper where the patient received treatment from providers in two different counties and, under § 16-55-213(e), each provider had to be sued in the county where the services were provided. *Clark v. Johnson Reg'l Med. Ctr.*, 2010 Ark. 115, 362 S.W.3d 311 (2010).

#### **Waiver of Defenses.**

Where the insureds filed an action on their policy in Saline County and then, realizing that Saline County was not the proper venue, permitted the case to remain on the Saline County docket and refiled their action in Pulaski County, the insurance company's response in the Saline County action, that venue was improper, did not constitute a waiver of the insurance company's right to claim in the Pulaski County action that the same action was pending in Saline County, and that therefore the Pulaski County action should be dismissed. *Mark Twain Life Ins. Corp. v. Cory*, 283 Ark. 55, 670 S.W.2d 809 (1984).

A bank waived any defect or irregularity in the service of process of the writ of garnishment both by its failure to file a motion to dismiss for lack of jurisdiction of the person under subsections (b) and (h) of this rule, and by submitting the case to the court on the merits without having filed such a motion. *Searcy Steel Co. v. Mercantile Bank*, 19 Ark. App. 220, 719 S.W.2d 277 (1986).

Improper venue was waived by asserting a third party complaint. *Arkansas Game & Fish Comm'n v. Lindsey*, 292 Ark. 314, 730 S.W.2d 474 (1987).

Assertion of a compulsory counterclaim does not constitute a waiver of objection to venue because of the nonvoluntary character of the compulsory counterclaim. *Arkansas Game & Fish Comm'n v. Lindsey*, 292 Ark. 314, 730 S.W.2d 474 (1987).

Where defendant failed to file motion to dismiss for improper venue within twenty days after service of process upon him, he waived his right to object to venue. *Inmon Truck Sales, Inc. v. Wright*, 294 Ark. 397, 743 S.W.2d 793 (1988).

Where plaintiff, an Arkansas resident, executed an employment agreement with a Texas corporation which included a clause stating the contract was to be performed wholly or partly within the State of Texas and the plaintiff consented to the jurisdiction of the



Texas court in connection with any dispute or controversy arising out of the agreement, the plaintiff admittedly waived any right to be sued in the county of his residence, and consented to Texas as the proper venue for any proceeding arising out of this agreement. *Nelms v. Morgan Portable Bldg. Corp.*, 305 Ark. 284, 808 S.W.2d 314 (1991).

Appellant's failure to assert lack of personal jurisdiction as a defense until midway through his second trial amounted to a waiver of the defense. *Blankenship v. Office of Child Support Enforcement*, 58 Ark. App. 260, 952 S.W.2d 173 (1997).

The defendant owner of a truck involved in a motor vehicle accident waived the defense of insufficiency of process where it filed an answer, but did not raise the defense until it later filed a response to the plaintiff's motion for default judgment. *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998).

Where defendants failed to raise the defense of improper venue by motion or responsive pleading within 20 days after service of process, defendants waived their right to object to venue. *Higgins v. Burnett*, 349 Ark. 130, 76 S.W.3d 893 (2002).

Appellant's failure to assert the defense of insufficient service of process in his initial pleading resulted in a waiver of that defense. *Dunklin v. First Magnus Fin. Corp.*, 79 Ark. App. 246, 86 S.W.3d 22 (2002).

Where a non-resident defendant was served on November 30, 2001, and did not file a motion to dismiss for improper venue within 30 days after it was served the summons and complaint, the non-resident defendant waived its improper venue defense. *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004).

Where insurer neither raised the defense of improper venue in its answer or in a motion filed prior to or simultaneously with its answer, nor did it specifically reserved its objection to improper venue in its answer, it waived its venue objection; therefore, transfer of the case from the Phillips County Circuit Court to the Craighead County Circuit Court was an abuse of discretion. *Gailey v. Allstate Ins. Co.*, 362 Ark. 568, 210 S.W.3d 40 (2005).

Where ex-husband signed both the property settlement agreement and the divorce decree, indicating his approval of their terms, the decree stated that he waived the service of process and entered his appearance, and the waiver of corroboration recognized the case in court and amounted to the husband entering his appearance in the action, ex-husband waived any defect in the service of process and the decree was not void. *Morehouse v. Lawson*, 90 Ark. App. 379, 206 S.W.3d 295 (2005).

In parents' medical malpractice action against hospital and doctor, the trial court

erred in granting summary judgment for the hospital as the hospital responded to the amended complaint and asserted a limitations defense under Ark. R. Civ. P. 8(c), however, as the hospital never raised the issue of insufficient service of process, the hospital waived that defense; however, the doctor never received the amended complaint or responded to it and, thus, did not waive the defense of insufficient service of process, so summary judgment against parents was proper. *Posey v. St. Bernard's Healthcare, Inc.*, 365 Ark. 154, 226 S.W.3d 757 (2006).

Appellate court declined to address a claim that a mother should have raised venue in a prior custody proceeding because no argument or authority was cited. *Thomas v. Avant*, 370 Ark. 377, 260 S.W.3d 266 (2007).

In a case where relief was sought from a foreclosure proceeding based on defective service under Ark. R. Civ. P. 4, two debtors waived the issue since they recognized the action was in court and made an appearance at the foreclosure proceeding by agreeing to the entry of an order appointing a receiver; therefore, there was no due process violation. Moreover, Rule 4(i) was satisfied because the entry of the order appointing the receiver occurred well within the 120-day period provided for service. *Trelfa v. Simmons First Bank of Jonesboro*, 98 Ark. App. 287, 254 S.W.3d 775 (2007).

Power companies did not waive the defense of improper venue, as it was not available when they made their first motion to dismiss for lack of subject-matter jurisdiction, and they acted quickly upon learning of its availability. *Centerpoint Energy, Inc. v. Miller County Circuit Court*, 372 Ark. 343, 276 S.W.3d 231 (2008).

Trial court properly granted summary judgment in favor of a medical center in a medical malpractice claim on the basis of charitable immunity because the medical center did not waive the defense of charitable immunity by failing to assert the defense in its original answer and the patients failed to properly challenge the assertion of the defense by the filing of a motion alleging prejudice. Under Ark. R. Civ. P. 15(a), with the exception of defenses mentioned in subdivision (h)(1) of this rule, a party could amend its pleadings at any time without leave of the trial court unless, upon motion of the opposing party, the trial court determined that prejudice would result; while charitable immunity was an affirmative defense that had to be specifically asserted in a responsive pleading under Ark. R. Civ. P. 8, it was not a defense listed in subdivision (h)(1) and thus could be raised in an amended answer under Ark. R. Civ. P. 15. *Seth v. St. Edward Mercy Med. Ctr.*, 375 Ark. 413, 291 S.W.3d 179 (2009).

**Cited:** *Pruitt v. Pruitt*, 271 Ark. 404, 609

S.W.2d 84 (1980); *Burge v. Pulaski County Special Sch. Dist.*, 272 Ark. 67, 612 S.W.2d 108 (1981); *Blagg v. Fred Hunt Co.*, 272 Ark. 185, 612 S.W.2d 321 (1981); *Watling Ladder Co. v. Aldridge*, 3 Ark. App. 27, 621 S.W.2d 499 (1981), *aff'd* 275 Ark. 225, 628 S.W.2d 322 (1982); *Walker v. Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981); *McIlroy Bank & Trust v. Zuber*, 275 Ark. 345, 629 S.W.2d 304 (1982); *May v. Barg*, 276 Ark. 199, 633 S.W.2d 376 (1982); *Attwood v. Estate of Attwood*, 276 Ark. 230, 633 S.W.2d 366 (1982); *Stafford v. City of Hot Springs*, 276 Ark. 466, 637 S.W.2d 553 (1982); *Whitlock v. G.P.W. Nursing Home, Inc.*, 283 Ark. 158, 672 S.W.2d 48 (1984); *Gaulden v. Emerson Elec. Co.*, 284 Ark. 149, 680 S.W.2d 92 (1984); *Miller v. Ensco, Inc.*, 286 Ark. 458, 692 S.W.2d 615 (1985); *3-W Lumber Co. v. Housing Auth.*, 287 Ark. 70, 696 S.W.2d 725 (1985); *Majors v. Pulaski County Election Comm'n*, 287 Ark. 208, 697 S.W.2d 535 (1985); *Edwards v. Arkansas Power & Light Co.*, 287 Ark. 403, 700 S.W.2d 52 (1985); *Southern Paper Box Co. v. Houston*, 15 Ark. App. 176, 697 S.W.2d 124 (1985); *Odell v. Arkansas Gen. Indus. Co.*, 288 Ark. 356, 705 S.W.2d 438 (1986); *Lubin v. Crittenden Mem. Hosp.*, 288 Ark. 370, 705 S.W.2d 872 (1986); *Dews v. Halliburton Indus., Inc.*, 288 Ark. 532, 708 S.W.2d 67 (1986); *Carpenter v. Bishop*, 290 Ark. 424, 720 S.W.2d 299 (1986); *Treat v. Kreutzer*, 290 Ark. 532, 720 S.W.2d 716 (1986); *Burdette v. Dietz*, 18 Ark. App. 107, 711 S.W.2d 178 (1986); *Smith v. City of Springdale*, 291 Ark. 63, 722 S.W.2d 569 (1987); *Kilcrease v. Butler*, 291 Ark. 275, 724 S.W.2d 169 (1987); *Earl v. Mosler Safe Co.*, 291 Ark. 276, 724 S.W.2d 174 (1987); *Tapp v. Fowler*, 291 Ark. 309, 724 S.W.2d 176 (1987); *Arkholia Sand & Gravel Co. v. Hutchinson*, 291 Ark. 570, 726 S.W.2d 674 (1987); *King v. King*, 292 Ark. 336, 730 S.W.2d 224 (1987); *Schichtl v. Slack*, 293 Ark. 281, 737 S.W.2d 628 (1987); *Union Nat'l Bank v. Thornton*, 293 Ark. 385, 738 S.W.2d 103 (1987); *Kilcrease v. Butler*, 293 Ark. 454, 739 S.W.2d 139 (1987); *Webb v. Lambert*, 295 Ark. 438, 748 S.W.2d 658 (1988); *Lewis v. Crowe*, 296 Ark. 175, 752 S.W.2d 280 (1988); *Miles v. Southern*, 297 Ark. 274, 760 S.W.2d 868 (1988); *Klinger v. City of Fayetteville*, 297 Ark. 385, 762 S.W.2d 388 (1988); *Battle v. Harris*, 298 Ark. 241, 766 S.W.2d 431 (1989); *Eldridge v. Board of Cor.*, 298 Ark. 467, 768 S.W.2d 534 (1989); *Mid-South Beverages, Inc. v. Forrest City Grocery Co.*, 300 Ark. 204, 778 S.W.2d 218 (1989); *Smith v. Smith*, 28 Ark. App. 56, 770 S.W.2d 205 (1989); *Keck v. Longoria*, 28 Ark. App. 277, 771 S.W.2d 808 (1989); *Woods v. Hopmann Mach., Inc.*, 301 Ark. 134, 782 S.W.2d 363 (1990); *Cundiff v. Crider*, 303 Ark. 120, 792 S.W.2d 604 (1990); *Parks v. Hillhaven Nursing Home*, 303 Ark. 557, 798 S.W.2d 106 (1990), *appeal dismissed*

309 Ark. 106, 827 S.W.2d 148 (1992), *appeal dismissed* 309 Ark. 373, 829 S.W.2d 419 (1992); *Walker v. Hyde*, 303 Ark. 615, 798 S.W.2d 435 (1990); *Neff v. St. Paul Fire & Marine Ins. Co.*, 304 Ark. 18, 799 S.W.2d 795 (1990); *Minton v. Craighead County*, 304 Ark. 141, 800 S.W.2d 707 (1990); *Hoffius v. Maestri*, 31 Ark. App. 13, 786 S.W.2d 846 (1990); *Community Dialysis Ctrs., Inc. v. Mehta*, 32 Ark. App. 121, 797 S.W.2d 480 (1990); *Harrell v. International Paper Co.*, 305 Ark. 490, 808 S.W.2d 779 (1991); *Cross v. Coffman*, 304 Ark. 666, 805 S.W.2d 44 (1991); *Thomas ex rel. City Nat'l Bank v. Valmac Indus., Inc.*, 306 Ark. 228, 812 S.W.2d 673 (1991), *questioned* *Estate of Donley v. Pace Indus.*, 336 Ark. 101, 984 S.W.2d 421(1999), *questioned* *Rohrer v. Hart's Mfg. Co.*, 53 Ark. App. 4, 917 S.W.2d 180 (1996); *Johnson v. Ramsey*, 307 Ark. 4, 817 S.W.2d 200 (1991); *Cowger v. State, Dep't of Aeronautics*, 307 Ark. 92, 817 S.W.2d 427 (1991); *Fisher v. Citizens Bank*, 307 Ark. 258, 819 S.W.2d 8 (1991); *Gullett v. Brown*, 307 Ark. 385, 820 S.W.2d 457 (1991); *Goston v. Craig*, 34 Ark. App. 23, 805 S.W.2d 92 (1991); *Paul M. v. Teresa M.*, 36 Ark. App. 116, 818 S.W.2d 594 (1991); *Malone & Hyde, Inc. v. Chisley*, 308 Ark. 308, 825 S.W.2d 558 (1992), *limited* *Fausett v. Host*, 315 Ark. 527, 868 S.W.2d 472 (1994); *Vachon v. City of Fort Smith*, 308 Ark. 636, 826 S.W.2d 277 (1992); *Poston v. Fears*, 309 Ark. 413, 828 S.W.2d 845 (1992); *Duennenberg v. City of Barling*, 309 Ark. 541, 832 S.W.2d 237 (1992); *Bryant v. Mathis*, 310 Ark. 737, 839 S.W.2d 528 (1992); *Hope Educ. Ass'n v. Hope Sch. Dist.*, 310 Ark. 768, 839 S.W.2d 526 (1992); *Centennial Valley Ranch Mgt., Inc. v. Agri-Tech Ltd. Partnership*, 38 Ark. App. 177, 832 S.W.2d 259 (1992); *Cowan v. Schmiddle*, 312 Ark. 256, 848 S.W.2d 421 (1993); *John Cheeseman Trucking, Inc. v. Pinson*, 313 Ark. 632, 855 S.W.2d 941 (1993); *Forehand v. First Bank*, 315 Ark. 282, 867 S.W.2d 431 (1993); *Coleman's Serv. Ctr., Inc. v. Southern Inns Mgt., Inc.*, 44 Ark. App. 45, 866 S.W.2d 427 (1993); *Davis v. Wausau Ins. Cos.*, 315 Ark. 330, 867 S.W.2d 444 (1993); *Lawhon Farm Supply, Inc. v. Hayes*, 316 Ark. 69, 870 S.W.2d 729 (1994); *West Memphis Sch. Dist. No. 4 v. Circuit Court*, 316 Ark. 290, 871 S.W.2d 368 (1994); *Cramer v. Arkansas Okla. Gas Corp.*, 316 Ark. 465, 872 S.W.2d 390 (1994); *Watkins Motor Lines v. Hedrick*, 316 Ark. 683, 873 S.W.2d 814 (1994); *Cortinez v. Brighton*, 320 Ark. 88, 894 S.W.2d 919 (1995); *Maroney v. City of Malvern*, 320 Ark. 671, 899 S.W.2d 476 (1995); *Tackett v. Crain Automotive*, 321 Ark. 36, 899 S.W.2d 839 (1995); *Swink v. Ernst & Young*, 322 Ark. 417, 908 S.W.2d 660 (1995); *Hunt v. Riley*, 322 Ark. 453, 909 S.W.2d 329 (1995); *Cherepski v. Walker*, 323 Ark. 43, 913 S.W.2d 761 (1996); *Smith v. Hansen*, 323 Ark. 188, 914 S.W.2d 285 (1996); *Haase v. Starnes*, 323 Ark. 263,



915 S.W.2d 675 (1996), appeal dismissed 337 Ark. 193, 987 S.W.2d 704 (1999); Holaday v. Fraker, 323 Ark. 522, 920 S.W.2d 4 (1996); National By-Products, Inc. v. City of Little Rock ex rel. Little Rock Regional Airport Comm'n, 323 Ark. 619, 916 S.W.2d 745 (1996); Hardy Constr. Co. v. Arkansas State Hwy. & Transp. Dep't, 324 Ark. 496, 922 S.W.2d 705 (1996); Rogers v. Tudor Ins. Co., 325 Ark. 226, 925 S.W.2d 395 (1996); Western Waste Indus. v. Purifoy, 326 Ark. 256, 930 S.W.2d 348 (1996); Thompson v. Potlach Corp., 326 Ark. 244, 930 S.W.2d 355 (1996); International Resource Ventures, Inc. v. Diamond Mining Co. of Am., 326 Ark. 765, 934 S.W.2d 218 (1996); Smothers v. Clouette, 326 Ark. 1017, 934 S.W.2d 923 (1996); Gordon v. Planters & Merchants Bankshares, Inc., 326 Ark. 1046, 935 S.W.2d 544 (1996); Milligan v. Burrow, 52 Ark. App. 20, 914 S.W.2d 763 (1996); James v. James, 52 Ark. App. 29, 914 S.W.2d 773 (1996); Cherry v. Tanda, Inc., 327 Ark. 600, 940 S.W.2d 457 (1997); Oldner v. Villines, 328 Ark. 296, 943 S.W.2d 574 (1997); Barber v. Watson, 330 Ark. 250, 953 S.W.2d 579 (1997); Brown v. Tucker, 330 Ark. 435, 954 S.W.2d 262 (1997); Shelter Ins. Co. v. Arnold, 57 Ark. App. 8, 940 S.W.2d 505 (1997); Two Bros. Farm v. Riceland Foods, Inc., 57 Ark. App. 25, 940 S.W.2d 889 (1997); Butler v. Comer, 57 Ark. App. 117, 942 S.W.2d 278 (1997); McQuay v. Guntharp, 331 Ark. 466, 963 S.W.2d 583 (1998); Shepherd v. Washington County, 331 Ark. 480, 962 S.W.2d 779 (1998); Hames v. Cravens, 332 Ark. 437, 966 S.W.2d 244 (1998); Country Corner Food & Drug, Inc. v. First State Bank & Trust Co., 332 Ark. 645, 966 S.W.2d 894 (1998); Layman v. Bone, 333 Ark. 121, 967 S.W.2d 561 (1998); Jolly v. Estate of Jolly, 333 Ark. 394, 970 S.W.2d 394 (1998); Cummings v. Big Mac Mobile Homes, Inc., 335 Ark. 216, 980 S.W.2d 550 (1998); Ford v. Arkansas Game & Fish Comm'n, 335 Ark. 245, 979 S.W.2d 897 (1998); Bice v. Green, 64 Ark. App. 203, 981 S.W.2d 105 (1998); Brown v. Arkansas State Heating, Ventilation, Air Conditioning & Refrigeration Licensing Bd., 336 Ark. 34, 984 S.W.2d 402 (1999); Grine v. Board of Trustees, 338 Ark. 791, 2 S.W.3d 54 (1999); Martin v. Arthur, 339

Ark. 149, 3 S.W.3d 684 (1999); Brown v. Arkansas Dep't of Cor., 339 Ark. 458, 6 S.W.3d 102 (1999); Brown v. Fountain Hill Sch. Dist., 67 Ark. App. 358, 1 S.W.3d 27 (1999); Raymond v. Raymond, 343 Ark. 480, 36 S.W.3d 733 (2001); Ghegan & Ghegan, Inc. v. Barclay, 345 Ark. 514, 49 S.W.3d 652 (2001); Stilley v. James, 347 Ark. 74, 60 S.W.3d 410 (2001); In re Implementation of Amendment 80: Amendments to Rules of Civ. Procedure & Inferior Court Rules, — Ark. —, — S.W.3d —, 2001 Ark. LEXIS 707 (May 24, 2001); Conner v. Simes, 355 Ark. 422, 139 S.W.3d 476 (2003); Cox v. Keahey, 84 Ark. App. 121, 133 S.W.3d 430 (2003); RMP Rentals v. Metroplex, Inc., 356 Ark. 76, 146 S.W.3d 861 (2004); Branscumb v. Freeman, 360 Ark. 171, 200 S.W.3d 411 (2004); Hendrickson v. Carpenter, 88 Ark. App. 369, 199 S.W.3d 100 (2004); Biedenharn v. Thicksten, 361 Ark. 438, 206 S.W.3d 837 (2005); Williams v. Ark. Dep't of Corr., — Ark. —, 207 S.W.3d 519, 2005 Ark. LEXIS 247 (2005), cert. denied 546 U.S. 1018, 126 S. Ct. 647, 163 L. Ed 2d 531 (2005); Fleming v. Cox Law Firm, 363 Ark. 17, 210 S.W.3d 866 (2005); Downen v. Redd, 367 Ark. 551, 242 S.W.3d 273 (2006); Hardy v. United Servs. Auto. Ass'n, 95 Ark. App. 48, 233 S.W.3d 165 (2006); Wade v. Ferguson, 2009 Ark. 618, — S.W.3d —, 2009 Ark. LEXIS 810 (2009); Talley v. City of N. Little Rock, 2009 Ark. 601, — S.W.3d —, 2009 Ark. LEXIS 786 (2009); Twin Springs Group, Inc. v. Karibuni, Ltd., 2009 Ark. App. 649, 344 S.W.3d 100 (2009); Foremost Ins. Co. v. Miller County Circuit Court, Third Div., 2010 Ark. 116, 361 S.W.3d 805 (2010); Matsukis v. Joy, 2010 Ark. 403, — S.W.3d —, 2010 Ark. LEXIS 503 (Oct. 28, 2010); Rose v. Etoch, 2010 Ark. App. 305, — S.W.3d —, 2010 Ark. App. LEXIS 308 (Apr. 7, 2010); Valley v. Helena Nat'l Bank, 2010 Ark. App. 560, — S.W.3d —, 2010 Ark. App. LEXIS 603 (Sept. 1, 2010); Scoggins v. Medlock, 2011 Ark. 194, — S.W.3d —, 2011 Ark. LEXIS 181 (May 5, 2011); Hill v. Hill, 2012 Ark. App. 11, — S.W.3d —, 2012 Ark. App. LEXIS 16 (Jan. 4, 2012); D & D Parks Constr., Co. v. Martin, — Ark. App. —, — S.W.3d —, 2012 Ark. App. LEXIS 465 (May 16, 2012).

### Rule 13. Counterclaim and cross-claim.

(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim which, at the time of filing the pleading, the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other

process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) *Permissive Counterclaim.* A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) *Counterclaim Exceeding Opposing Claim.* A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) *Counterclaim Maturing or Acquired After Pleading.* A claim which either matured or was acquired by the pleader after filing his pleading shall be presented as a counterclaim by supplemental pleading, provided that if such counterclaim matures or is acquired after all issues are joined, it may be asserted by the pleader in a separate action.

(e) *Omitted Counterclaim.* When a pleader fails to assert a counterclaim, he shall be entitled to assert such counterclaim by amended or supplemental pleading subject to the requirements and conditions of Rule 15.

(f) *Cross-Claim Against Co-Party.* A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence which is the subject matter either of the original action or of a counterclaim therein or relating to any property which is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(g) *Joinder of Additional Parties.* Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

(h) *Separate Trials; Separate Judgments.* If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of. (Amended December 10, 1990, effective February 1, 1991.)

**Reporter's Notes to Rule 13:** 1. With the exception of one minor wording change, Sections (a) and (b) are otherwise identical to FRCP 13(a) and (b). The word "serving" found in the Federal Rule is omitted and the word "filing" is substituted therefor. These sections abolish the strict compulsory counterclaim rule in Arkansas as codified in superseded *Ark. Stat. Ann.* 27-1121 (Repl. 1962). Under this and the Federal Rule, the only counterclaims which are compulsory are those which arise out of the same transaction or occurrence. Otherwise, a counterclaim is permissive.

2. Section (c) is identical to FRCP 13(c) and does not change Arkansas law.

3. Section (d) of the Federal Rule is eliminated inasmuch as these rules cannot enlarge one's right to assert a counterclaim against the United States or any officer or agent thereof.

4. Section (d) is a revision of FRCP 13(e) and recognizes those rare occasions where a counterclaim arises after pleadings are served.

5. Section (e) is a revision of FRCP 13(f). Under the Federal Rule, delay in asserting a counterclaim may be fatal to one's right to assert such claim. *Frank Adam Electric Co. [v.] Westinghouse Electric & Mfg. Co.*, 146 F.2d 165 (C.C.A. 8th, 1945). This section follows superseded *Ark. Stat. Ann.* 27-1160 (Supp. 1975), by permitting a counterclaim to be asserted by amended pleading as any other amendment, subject to the conditions of Rule 15.

6. Section (e) is identical to FRCP 13(g). It follows the intent of superseded *Ark. Stat. Ann.* 27-1134.1 (Supp. 1975) by making such claims permissive rather than mandatory.

7. Section (g) follows FRCP 13(h) by allowing other parties to be brought in under the



conditions of Rules 19 and 20. This is essentially what was permitted under superseded *Ark. Stat. Ann.* 27-1134.2 (Supp. 1975).

8. Rule 42(b) gives the court discretion to grant separate trials where two or more competing claims would otherwise have to be tried together. Section (h) of Rule 13, which is identical to Section (i) of the Federal Rule, answers any possible argument that the claim tried last would be barred by *res judicata* by reason of the first claim having been reduced to judgment or dismissed.

**Addition to Reporter's Notes, 1990 Amendment:** The amendment deletes the

last sentence of subdivision (c), which provided that "[i]n the event the amount asserted in the counterclaim exceeds the monetary jurisdiction of the court in which it is filed, the matter shall be transferred to a court of competent jurisdiction to hear the full extent of the claim and counterclaim." This provision created confusion, since the state courts of general jurisdiction do not have monetary jurisdictional limits. While inferior courts have such limits, counterclaims in those courts are governed by Rule 7 of the Inferior Court Rules [now District Court Rules].

## RESEARCH REFERENCES

**Ark. L. Rev. Note**, United-Bilt Homes, Inc. v. Sampson: A New Standard for Compulsory Counterclaims?, 48 *Ark. L. Rev.* 1009.

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## CASE NOTES

### ANALYSIS

Purpose.

Applicability.

Abolition of strict counterclaim rule.

Claim pending in separate litigation.

Compulsory counterclaim.

Counterclaim barred.

Counterclaim not compulsory.

Damage suit not compulsory counterclaim.

Failure to assert counterclaim.

Nonsuit.

*Res judicata*.

Statute of limitations.

Venue.

Voluntary dismissal.

### Purpose.

The reason for this rule is to require parties to present all existing claims simultaneously to the court or be forever barred, thus preventing a multiplicity of suits arising from one set of circumstances. *Bankston v. McKenzie*, 288 *Ark.* 65, 702 *S.W.2d* 14 (1986); *McJunkins v. Lemons*, 52 *Ark. App.* 1, 913 *S.W.2d* 306 (1996).

### Applicability.

Where gubernatorial candidate had sought, in both his motion to intervene and his answer and cross-claim, an order requiring the Secretary of State to certify his name as political party's gubernatorial nominee, candidate sought affirmative relief; therefore the candidate intervened as a plaintiff in the earlier case and this rule would not apply. *Independent Party v. Priest*, 907 *F. Supp.* 1276 (E.D. Ark. 1995).

Where trial court ruled that husband's claim was an untimely compulsory counter-

claim, and the appellate court affirmed the decision in the first appeal, that ruling became the law of the case; thus, when the wife tried to raise the same claim following the first appeal, the trial court properly denied her permission to do so. *Jones v. Double 'D' Props.*, 357 *Ark.* 148, 161 *S.W.3d* 839 (2004).

Non-party notice requirements set out in § 16-55-202(b)(2) apply in addition to state civil procedure rules. Section 16-55-202 should be interpreted as being compatible with § 16-64-122(a), which limits the apportionment of fault to an individual or entity from whom the claiming party seeks to recover damages, which includes individuals and entities that are subject to being brought into a suit pursuant to a cross or third-party claim under this rule or *Ark. R. Civ. P.* 14, but excludes non-parties who are otherwise immune from suit, including employers who are immune pursuant to § 11-9-105(a), the exclusive remedies provision of the Workers' Compensation Act, §§ 11-9-101 to 11-9-1001. *Billings v. Aeropres Corp.*, 522 *F. Supp. 2d* 1121 (E.D. Ark. 2007).

### Abolition of Strict Counterclaim Rule.

The adoption of this rule abolished the strict compulsory counterclaim rule, which had been construed to make all counterclaims mandatory. *Harrison v. Springdale Water & Sewer Comm'n*, 780 *F.2d* 1422 (8th Cir. 1986).

### Claim Pending in Separate Litigation.

When a cause of action which would otherwise of necessity be pleaded as a compulsory counterclaim is also the subject of pending litigation in another court, litigation which had been commenced before the instant action, waiver will not result from the failure to

counterclaim the cause of action in question and the failing party will not thereafter be barred by *res judicata*. *Bowen v. Danna*, 4 Ark. App. 232, 632 S.W.2d 234 (1982).

Where the purchasers of certain property brought an action against the seller for fraud and misrepresentation in the inducement and sale of the property, and while that action was still pending the seller filed a separate action against the purchasers seeking to foreclose a mortgage on the property, the purchasers' action for fraud and misrepresentation was not a compulsory counterclaim in the seller's foreclosure action and, therefore, the purchasers' cause of action was not barred by *res judicata* even though a decree of foreclosure was entered against them in the foreclosure action which was decided prior to a decision on the merits of their claims. *Bowen v. Danna*, 4 Ark. App. 232, 632 S.W.2d 234 (1982).

Where the mortgagee had a pending foreclosure action in chancery court and the chancellor had already ruled that the cause would remain there, all parties recognized that the claim remained in chancery, and the mortgagors raised no argument of prejudice, the mortgagee's voluntary nonsuit of the foreclosure action as a compulsory counterclaim in the circuit court did not operate to bar its claim in chancery. *Bankston v. McKenzie*, 288 Ark. 65, 702 S.W.2d 14 (1986).

Where lawsuit was filed in circuit court by plaintiff several hours before a chancery court action was filed by defendant, the chancery court action was not "pending" within the terms of subdivision (a)(1) of this rule. *Golden Host Westchase, Inc. v. First Serv. Corp.*, 29 Ark. App. 107, 778 S.W.2d 633 (1989).

#### **Compulsory Counterclaim.**

Refusal of the circuit court to grant the bank's motion to dismiss pursuant to ARCP 12(b) and this rule was improper where the farmers' action involving the conversion of wheat and oat crop arose out of the same set of circumstances as the bank's complaint; therefore, it must have been brought as a compulsory counterclaim. *First Nat'l Bank of Dewitt v. Cruthis*, 352 Ark. 292, 100 S.W.3d 703 (2003).

Ex-husband's claim that his ex-wife was barred by the compulsory-counterclaim provision of subsection (a) of this rule from recovering education expenses because she did not raise the issue during a 2002 contempt action ex-husband initiated was rejected as ex-husband was not filing a pleading and asserting a claim under Ark. R. Civ. P. 7 at that time but, rather, he was filing a motion asking the trial court to enforce a previous order; subsection (a) did not apply and, when his ex-wife filed a counter-petition in May 2004 to enforce the decree and recover tuition and education expenses, she was not barred by the compulsory-counterclaim rule because she did not raise

the education-expense issue in response to the ex-husband's first petition filed in 2002. *Morsy v. Deloney*, 92 Ark. App. 383, 214 S.W.3d 285 (2005).

Although the public facility board's claim in an action involving a breach of contract for final clean-up work was required to be brought in a compulsory counterclaim pursuant to subsection (a) of this rule, the appellate court saw no finality problem. The facility board failed to meet its burden of proof on what the final clean-up work would cost and that part of the trial court's decision was construed as one on the merits against the facility board. *Roberts Contr. Co. v. Valentine-Wooten Rd. Pub. Facility Bd.*, 2009 Ark. App. 437, 320 S.W.3d 1 (2009).

Corporation's counterclaim for tortious interference with a business expectancy was a compulsory claim under subsection (a) of this rule given the elements of tortious interference, and the allegations in the counterclaim that a shareholder's complaint and *lis pendens* were improper and interfered with the corporation's business; the corporation would be unable to prove that the shareholder's actions were improper without delving into the merits of the complaint. *Crockett v. C.A.G. Invs., Inc.*, 2010 Ark. 90, 361 S.W.3d 262 (2010).

#### **Counterclaim Barred.**

Where petition for increase in child support was based on one order, and a counterclaim was filed alleging contempt for failure to comply with a different order, the counterclaim was barred by this rule. *McJunkins v. Lemons*, 52 Ark. App. 1, 913 S.W.2d 306 (1996).

Claims by property owners arising from the financing arrangements for a bed-and-breakfast facility constituted compulsory counterclaims in an earlier chancery court action for foreclosure brought by the lender since such claims arose directly from the financing transactions and a logical relationship existed between the foreclosure, the counterclaim, and the subsequent complaint. *Linn v. NationsBank*, 341 Ark. 57, 14 S.W.3d 500 (2000).

Trial court did not err in striking companies' counterclaim that sounded in legal malpractice under this rule and Ark. R. Civ. P. 15 because the prejudice to the lawyers would have been great if the counterclaim was allowed to go forward as it was filed 33 minutes before trial was to begin. *Nameloc, Inc. v. Jack, Lyon & Jones, P.A.*, 362 Ark. 175, 208 S.W.3d 129 (2005).

In a foreclosure case involving a construction loan, the borrower's claim for deceptive trade practices was properly dismissed because it had not been alleged as a compulsory counterclaim. *Grand Valley Ridge, LLC v.*



Metro. Nat'l Bank, 2012 Ark. 121, — S.W.3d —, 2012 Ark. LEXIS 143 (Mar. 15, 2012).

### **Counterclaim Not Compulsory.**

Where the landowners relied upon a conspiracy theory in defending against the county water and sewer commission's condemnation counterclaim in the prior state court proceeding, the landowners' civil rights action for infringement of their constitutional right of access to the courts was not a compulsory counterclaim which should have been asserted in the prior chancery court proceeding; therefore, failure to assert it was not *res judicata*. *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422 (8th Cir. 1986).

Where the transaction or occurrence at issue in the first trial was the disbursement of insurance proceeds for a home repair contract, and the execution of the mortgage and subsequent default thereof was at issue in the second trial, the second action was a separate "transaction or occurrence" not subject to the compulsory counterclaim provisions of subsection (a) of this rule. *United-Bilt Homes, Inc. v. Sampson*, 315 Ark. 156, 864 S.W.2d 861 (1993).

### **Damage Suit Not Compulsory Counterclaim.**

Where successor lessors filed action in chancery court to terminate lease and collect damages from assignor of lease and then filed suit in circuit court to recover damages for failure to comply with and perform the covenants in the lease, the circuit court erred in dismissing the suit before it since the plaintiff lessors were not mandatorily required to join the suits in chancery court under Rule 18 because that rule states that the party may join its claims against the opposing party, and since it was not a compulsory counterclaim under this rule because it sought damages from the assignee as a result of the failure to perform its required duties under the lease. *Baltz v. Security Bank*, 272 Ark. 302, 613 S.W.2d 833 (1981).

### **Failure to Assert Counterclaim.**

In a suit by a payee against a bank for negligence in its failure to notify the payee that checks had been dishonored, the bank's failure to assert by counterclaim that damages should be reduced by the amount the payee recovered from the bad check writer precluded the trial court from reducing the judgment by the amount recovered. *Citizens Bank v. Chitty*, 285 Ark. 55, 684 S.W.2d 814 (1985).

The circuit judge was not correct in dismissing a tort claim on the basis of *res judicata*, but the result reached by the trial court was affirmed where the appellant's claim was precluded by subsection (a) of this rule, which requires that a compulsory counterclaim be

pled. *Estate of Goston v. Ford Motor Co.*, 320 Ark. 699, 898 S.W.2d 471 (1995).

Because taxpayer's claims arose out of the same transaction that was the subject matter of the original action, the taxpayer's claim was really a compulsory counterclaim, pursuant to subsection (a) of this rule, that should have been raised earlier; even assuming that ARCP 15(b) was applicable and the claims should have been considered an amended pleading, the rule only permitted amendments to conform to pleadings when issues were tried by express or implied consent of the parties, and the issues raised by the taxpayer's claims were never so tried and, thus, the trial court did not err in dismissing the claims. *Jones v. Double 'D' Props.*, 352 Ark. 39, 98 S.W.3d 405 (2003).

### **Nonsuit.**

Judgment in favor of a seller in its foreclosure action against purchasers, which also granted the purchasers' motion for nonsuit of its compulsory counterclaims, was not a final, appealable order because the purchasers were not barred from bringing their claims again; therefore, the purchasers' appeal of the judgment was dismissed without prejudice because the record did not contain an order granting Ark. R. Civ. P. 54 certification. *Martin v. Kat's Bar & Grill, LLC*, 2009 Ark. App. 737, — S.W.3d —, 2009 Ark. App. LEXIS 897 (2009).

### **Res Judicata.**

*Res judicata* applies to claims that might have been litigated as cross-claims, as well as to those that were actually litigated in an earlier action. *Lawyers Sur. Co. v. Cagle*, 49 Ark. App. 131, 898 S.W.2d 476 (1995).

When buyer failed to bring breach of contract counterclaim to seller's foreclosure action, the matter was barred by the doctrine of *res judicata*. *Pentz v. Romine*, 75 Ark. App. 274, 57 S.W.3d 235 (2001).

### **Statute of Limitations.**

Assertion of a compulsory counterclaim does not act as a waiver of the statute of limitations. *Smith v. Elder*, 312 Ark. 384, 849 S.W.2d 513 (1993); *TCBY Sys. v. EGB Assocs.*, 2 F.3d 288 (8th Cir. 1993), cert. denied 511 U.S. 1108, 114 S. Ct. 2104, 128 L. Ed. 2d 665 (1994).

### **Venue.**

Where a lessee oil company brought an action to quiet title against the landowners and a subsequent lessee oil and gas company, the complaint was local in nature and the plaintiff oil company properly filed the action in the county where the land was located; that same venue was proper for both a compulsory counterclaim, filed by the defendant oil and gas company against the plaintiff oil company and its president, and for a permissive third

party complaint filed by the president of the defendant oil and gas company against the plaintiff oil company and its president, since both claims involved the same cause of action as the original complaint and had common questions of law and fact. *Wasp Oil, Inc. v. Arkansas Oil & Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983).

#### **Voluntary Dismissal.**

After a compulsory counterclaim has been filed, a plaintiff may once voluntarily dismiss his complaint without prejudice, to refile it within one year. *Lemon v. Laws*, 305 Ark. 143, 806 S.W.2d 1 (1991).

**Cited:** *S. & L. Painting Contractors v. Vickers*, 267 Ark. 109, 589 S.W.2d 196 (1979); *Edwards v. Arkansas Power & Light Co.*, 519 F. Supp. 484 (E.D. Ark. 1981), vacated 683 F.2d 1149 (8th Cir. 1982); *Edwards v. Arkansas Power & Light Co.*, 683 F.2d 1149 (8th Cir.

*1982*); *Martin v. Citizens Bank*, 283 Ark. 145, 671 S.W.2d 754 (1984); *Little Rock Crate & Basket Co. v. Young*, 284 Ark. 295, 681 S.W.2d 388 (1984); *Dalrymple v. Simmons First Nat'l Bank*, 296 Ark. 534, 758 S.W.2d 5 (1988); *Rowell v. White & Assocs.*, 302 Ark. 225, 788 S.W.2d 489 (1990); *Smith v. Ferguson*, 302 Ark. 388, 790 S.W.2d 162 (1990); *Nichols Bros. Inv. v. Rector-Phillips-Morse, Inc.*, 33 Ark. App. 47, 801 S.W.2d 308 (1990); *Hempel v. Bragg*, 313 Ark. 486, 856 S.W.2d 293 (1993); *John Cheeseman Trucking, Inc. v. Pinson*, 313 Ark. 632, 855 S.W.2d 941 (1993); *Travelers Cas. & Sur. Co. of Am. v. Ark. State Highway Comm'n*, 353 Ark. 721, 120 S.W.3d 50 (2003); *JurisDictionUSA, Inc. v. Loislaw.com, Inc.*, 357 Ark. 403, 183 S.W.3d 560 (2004); *McDonald Mobile Homes, Inc. v. BankAmerica Hous. Servs.*, 93 Ark. App. 256, 218 S.W.3d 376 (2005); *Helena-West Helena Sch. Dist. v. Fluker*, 371 Ark. 574, 268 S.W.3d 879 (2007).

### **Rule 14. Third-party practice.**

(a) *When Defendant May Bring in Third Party.* At any time after commencement of the action a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third party plaintiff need not obtain leave to make the service if he files the third party complaint not later than 10 days after he files his answer. Otherwise, he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and the third party complaint, hereinafter called the third-party defendant, shall make his defenses to the third party plaintiff's claim as provided in Rule 12 and his counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in Rule 13. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff and the third party defendant shall thereupon assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third party claim or for its severance or separate trial. A third party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third party defendant.

(b) *When Plaintiff May Bring in Third Party.* When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

**Reporter's Notes to Rule 14:** 1. Rule 14 is substantially the same as FRCP and superseded *Ark. Stat. Ann.* 27-1134.1 (Supp. 1975).

The latter was patterned after the Federal Rule. Omitted are the references in FRCP 14(a) to admiralty and maritime claims. Sec-



tion (c) of the Federal Rule is omitted in its entirety.

2. Superseded *Ark. Stat. Ann.* 27-1134.1 (Supp. 1975) provided that where a third party complaint was not filed within ten days after the filing of the answer, leave of court on motion was required. This rule follows the requirement contained in the Federal Rule that leave of the court must be obtained on motion upon notice to all parties to the action. This will afford the opportunity to parties already in an action to object to the filing of a third party complaint if objection is warranted.

3. The purpose of Rule 14, as construed by

the federal courts, is to facilitate the trial of multiple claims which would otherwise be triable only in separate proceedings. *United States v. Yellow Cab Co.*, 340 U.S. 543, 71 S. Ct. 399 (1951). There is no set time during which a third party action must be initiated by a defendant; rather, the timeliness of defendant's application is left to the discretion of the trial court which must consider whether allowing the third party complaint will result in prejudice to the other parties. *Meilinger v. Metropolitan Edison Co.*, 34 F.R.D. 143 (D.C. Pa., 1963); *Kubik v. Goldfield*, 61 F.R.D. 572 (D.C. Pa., 1974).

## RESEARCH REFERENCES

**Ark. L. Notes.** Watkins, Procedural Rules You Won't Find in the Rules of Civil Procedure, 1992 Ark. L. Notes 53.

## CASE NOTES

### ANALYSIS

Purpose.

Basis for joinder.

Joinder denied.

Relation to other statutes.

Third-party complaint untimely.

### Purpose.

The purpose of this rule is to settle all controversies at one time, thereby avoiding a multiplicity of suits. *Aclin Ford Co. v. Fiat Motors of N. Am., Inc.*, 275 Ark. 445, 631 S.W.2d 283 (1982).

Where insurer brought in third-party tortfeasor and judgment was rendered against both tortfeasor and insurer, insurer's motion to amend judgment to allow it to recover its subrogation claim should have been granted since denial undermined the basic purpose of this rule to promote judicial economy and avoid multiplicity of suits. *Farm Bureau Mut. Ins. Co. v. Riverside Marine Remanufacturing, Inc.*, 278 Ark. 585, 647 S.W.2d 462 (1983).

### Basis for Joinder.

This rule does not require that the third party's liability to the defendant be based on the same theory of law as the defendant's liability to the plaintiff in order for the defendant to bring the third party into the action. *Nichols Bros. Invs. v. Rector-Phillips-Morse, Inc.*, 33 Ark. App. 47, 801 S.W.2d 308 (1990).

### Joinder Denied.

Trial court did not err in dismissing defendant's claim for indemnity against third-party defendants, impleaded under this rule, where defendant had voluntarily settled with plaintiffs and plaintiffs' claims against all defendants had been dismissed. *Carpetland of N.W.*

*Ark., Inc. v. Howard*, 304 Ark. 420, 803 S.W.2d 512 (1991).

### Relation to Other Statutes.

Non-party notice requirements set out in § 16-55-202(b)(2) apply in addition to state civil procedure rules. Section 16-55-202 should be interpreted as being compatible with § 16-64-122(a), which limits the apportionment of fault to an individual or entity from whom the claiming party seeks to recover damages, which includes individuals and entities that are subject to being brought into a suit pursuant to a cross or third-party claim under Ark. R. Civ. P. 13 or this rule, but excludes non-parties who are otherwise immune from suit, including employers who are immune pursuant to § 11-9-105(a), the exclusive remedies provision of the Workers' Compensation Act, §§ 11-9-101 to 11-9-1001. *Billings v. Aeropres Corp.*, 522 F. Supp. 2d 1121 (E.D. Ark. 2007).

### Third-Party Complaint Untimely.

The trial court in action for breach of warranty in automobile purchase did not abuse its discretion in refusing to allow seller to file a third-party complaint against manufacturer on the day of the trial; if this pleading had been allowed at that time it would have surely caused a delay of the trial. *Aclin Ford Co. v. Fiat Motors of N. Am., Inc.*, 275 Ark. 445, 631 S.W.2d 283 (1982).

Implicit in this rule is the assumption that the third-party complaint will be filed before the issues are resolved at trial; otherwise, its provisions allowing the third-party defendant to assert defenses against the original plaintiff would have no meaning; therefore, the trial court in an action for breach of warranty

in an automobile purchase was correct in granting manufacturer's motion to strike the third-party complaint against it since it was filed after trial. *Acllin Ford Co. v. Fiat Motors of N. Am., Inc.*, 275 Ark. 445, 631 S.W.2d 283 (1982).

Permitting a third-party complaint to be filed after the entry of the judgment in the underlying suit was error and required that the ruling be reversed. *Arkansas Bankers Life Ins. Co. v. Tomerlin*, 340 Ark. 701, 13 S.W.3d 581 (2000).

**Cited:** *Big A Whse. Distribs., Inc. v. Rye Auto Supply, Inc.*, 19 Ark. App. 286, 719 S.W.2d 716 (1986); *Wiederkehr Wine Cellars, Inc. v. City Nat'l Bank*, 300 Ark. 537, 780 S.W.2d 551 (1989); *JurisDictionUSA, Inc. v. Loislaw.com, Inc.*, 357 Ark. 403, 183 S.W.3d 560 (2004).

## Rule 15. Amended and supplemental pleadings.

(a) *Amendments.* With the exception of pleading the defenses mentioned in Rule 12 (h)(1), a party may amend his pleadings at any time without leave of the court. Where, however, upon motion of an opposing party, the court determines that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of an amendment, the court may strike such amended pleading or grant a continuance of the proceeding. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 20 days after service of the amended pleading, whichever period is longer, unless the court otherwise orders.

(b) *Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended in its discretion. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) *Relation Back of Amendments.* An amendment of a pleading relates back to the date of the original pleading when:

(1) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(2) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (1) is satisfied and, within the period provided by Rule 4(i) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(d) *Supplemental Pleadings.* A party may at any time without leave of court file a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Where, however, upon motion of an opposing party, the court determines that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of a supplemental pleading, the court



may strike such amended pleading or grant a continuance of the proceeding. A party shall plead in response to a supplemental pleading within the time remaining for response to the original pleading or within 20 days after service of the supplemental pleading, whichever period is longer, unless the court otherwise orders. (Amended July 9, 1984, effective September 1, 1984; amended November 8, 1993, effective January 1, 1994; amended February 1, 2001.)

**Reporter's Notes to Rule 15:** 1. Section (a) of Rule 15 marks a substantial change from FRCP 15(a) and is generally in accord with prior Arkansas law. The Committee believed that amendments to pleadings should be allowed in nearly all instances without special permission from the court. The court is, however, given discretion to strike any amendment which would cause prejudice or unduly prolong the disposition of a case. As an alternative to striking an amendment, a continuance could be granted by the trial court. Under prior Arkansas law, trial courts were given broad discretion to permit an amendment to stand. *Hogue v. Jennings*, 252 Ark. 1009, 481 S.W.2d 752 (1972); *Bridgman v. Drilling*, 218 Ark. 772, 238 S.W.2d 645 (1951). Generally speaking, it is the intent of this rule that amendments to pleadings should be permitted without leave of the court in all instances unless it can be demonstrated that prejudice or delay would result. To this extent, Rule 15 is more liberal than superseded *Ark. Stat. Ann.* 27-1160 (Repl. 1962) and is certainly more liberal than the Federal Rule.

2. [As amended by Per Curiam, February 26, 1996] Section (b) is identical to FRCP 15(b). It follows prior Arkansas law by permitting amendments to conform to the proof adduced at trial. This rule goes somewhat further, however, by more or less making it mandatory that pleadings be amended to conform to the proof where there has been no objection to such proof. *Metropolitan Life Ins. Co. v. Fugate*, 313 F.2d 788 (C.C.A. 5th, 1963); *Bradford Audio Corp. v. Pious*, 329 F.2d 67 (C.C.A. 2nd, 1968). (Emphasis added.) Prior Arkansas law granted the trial court considerable discretion to permit pleadings to be amended to conform to the proof where there had been no objection raised. *Velda Rose Motel, Inc. v. Eason*, 241 Ark. 1041, 411 S.W.2d 502 (1967); *Smith v. F. & C. Engineering Co.*, 225 Ark. 688, 285 S.W.2d 100 (1956). Where a new or different claim or defense was sought to be presented over the objection of the opposing party, the pleadings could not be amended to conform to the proof under prior Arkansas law. *Shelton v. Harris*, 225 Ark. 855, 286 S.W.2d 20 (1956); *O'Guinn Volkswagen, Inc., v. Lawson*, 256 Ark. 23, 505 S.W.2d 213 (1974). This rule does liberalize somewhat prior Arkansas law.

3. With the exception of minor wording

changes, Section (c) is identical to FRCP 15(c). The question of relation back of pleadings normally does not arise unless the statute of limitations is involved. Under this and the Federal Rule, an amendment always relates back when it arises out of the conduct, transaction or occurrence set forth in the original pleading. Under prior Arkansas law, the question of whether a pleading related back was determined by whether the amendment asserted a new cause of action against the defendant. If it did, the amended pleading could not stand or relate back. *Warmack v. Askew*, 97 Ark. 19, 132 S.W. 1013 (1910); *Love v. Couch*, 181 Ark. 994, 28 S.W.2d 1067 (1930).

4. Section (c) also permits changing the party against whom a claim is asserted if the party sought to be brought in received such notice of the action that he would not be prejudiced if brought in and knew or should have known that but for mistake, he would have been made a defendant initially. Prior Arkansas law was somewhat more prohibitive in that where there was a substantial change in identity of the defendant so as to amount to a change of defendants, the amendment would not be permitted to relate back. *Davis v. Chrisp*, 159 Ark. 335, 252 S.W. 606 (1923); *Arkansas Land & Lumber Co. v. Davis*, 155 Ark. 549, 244 S.W. 730 (1922).

5. Omitted from Section (c) is the second paragraph of FRCP 15(c). Such provision is unnecessary under Arkansas practice.

6. Section (d) is identical to Section (d) of the Federal Rule. It is in accord with superseded *Ark. Stat. Ann.* 27-1161 (Repl. 1962). Its purpose is simply to allow a pleading to be supplemented to reflect facts which develop after the filing of the original pleading.

**Addition to Reporter's Notes, 1984 Amendment:** Rule 15(a) is amended so that the first sentence takes account of the amendment to Rule 12(h)(1) making it clear that a waivable defense may not be raised by amendment "at any time."

The Rule is also amended to enlarge from 10 to 20 days the time to respond to an amended pleading.

**Addition to Reporter's Notes, 1993 Amendment:** Subdivision (c) is revised to prevent parties against whom claims are made from taking unfair advantage of otherwise inconsequential pleading errors to sus-

tain a limitations defense. The changes are based on the 1991 amendments to the corresponding federal rule.

Paragraph (1) is simply a restatement of the general "relation back" principle and works no change in the law. However, paragraph (2) effectively overturns the interpretation that had been given FRCP 15 with respect to a misnamed defendant. See *Schiavone v. Fortune*, 477 U.S. 21 (1986), cited with approval in *Harvill v. Community Methodist Hospital Ass'n*, 302 Ark. 39, 786 S.W.2d 577 (1986), and *Southwestern Bell Tel. Co. v. Blastech, Inc.*, 313 Ark. 202, 852 S.W.2d 813 (1993). Under the revised rule, an intended defendant who is notified of an action with the period allowed by Rule 4(i) for service of a summons and complaint may not defeat the action on account of a defect in the pleading with respect to the defendant's name, provided that the requirements of

clauses (A) and (B) have been satisfied. If the notice is received within the period specified in Rule 4(i), including an extension granted pursuant to that rule, a complaint may be amended at any time to correct a formal defect such as a misnomer or mis-identification.

**Addition to Reporter's Notes, 2001 Amendment:** Subdivision (d), which governs supplemental pleadings, is amended to make its terms parallel with those of subdivision (a), which applies to amended pleadings. By virtue of the amendment, permission of the court to file a supplemental pleading is no longer necessary, although the opposing party may move to strike the pleading on grounds of prejudice or undue delay. Also, a response to the supplemental pleading is now required. Under the original version of the rule, a response was to be filed only if the court "deem[ed] it advisable."

## RESEARCH REFERENCES

**Ark. L. Notes.** Newbern, Rule 15(c) of the Federal and Arkansas Rules of Civil Procedure: Amending Pleadings after the Statute of Limitations Has Run, 1984 Ark. L. Notes 5.

Watkins, Procedural Issues in an Annexation Case: A Dissenting Opinion to *Gay v. City of Springdale*, 1986 Ark. L. Notes 55.

**Ark. L. Rev.** Brill, The Election of Remedies Doctrine in Arkansas, 37 Ark. L. Rev. 385.

Note, *Schmidt v. McIlroy Bank & Trust: An Old Twist to a New Rule*, 46 Ark. L. Rev. 433.

Recent Developments — Amendments to the Arkansas Rules of Civil Procedure, 47 Ark. L. Rev. 299.

Recent Developments: Charitable-Immunity Doctrine — Direct-Action Statute, 59 Ark. L. Rev. 199.

**U. Ark. Little Rock L.J.** Arkansas Law Survey, Bradley, Civil Procedure, 8 U. Ark. Little Rock L.J. 107.

Survey, Civil Procedure, 14 U. Ark. Little Rock L.J. 285.

## CASE NOTES

### ANALYSIS

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### In General.

An amended complaint, unless it adopts and incorporates the original complaint, supersedes the original complaint. *Edward J. DeBartolo Corp. v. Cartwright*, 323 Ark. 573, 916 S.W.2d 114 (1996).

Where trustees never filed a second-amended complaint, they could not now raise the argument on appeal that the trial court erred in not permitting an amendment pursuant to subsection (a) of this rule. *Giles v. Harrington, Miller, Neihouse & Krug*, 362 Ark. 338, 208 S.W.3d 197 (2005).

Although plaintiff lacked standing to sue when she filed the original complaint because she had not yet been appointed the administrator of decedent's estate and she was not the sole heir, upon being appointed administrator six days later, she was deemed to be a new party when she filed the amended complaint; further, the filing of an amended complaint by a new party constituted the commencement of a new suit, initiated prior to the expiration of



the statute of limitations period and, thus, there was no need for the suit to “relate back” to the original complaint filed under subsection (c) of this rule. *Hackelton v. Malloy*, 364 Ark. 469, 221 S.W.3d 353 (2006).

Under Ark. Sup. Ct. P. Reg. Prof'l Conduct § 13, the amendment of disbarment petitions was governed by subsection (a) of this rule, and the denial of the attorney's motions to strike amended pleadings was properly denied. *Ligon v. Walker*, 2009 Ark. 136, 297 S.W.3d 1 (2009).

### Construction.

The phrase “at any time” in the first sentence of subsection (a) of this rule does not stand alone; subsection (a) clearly contemplates that the opposing party may object and the court may strike the amended pleading. *Stoltz v. Friday*, 325 Ark. 399, 926 S.W.2d 438 (1996).

Where a wrongful death complaint was a nullity because it was not brought by all of the heirs at law, this rule and Ark. R. Civ. P. 17 did not apply to allow the addition of the half-brother as a party plaintiff after the limitations period had run. *Andrews v. Air Evac EMS, Inc.*, 86 Ark. App. 161, 170 S.W.3d 303 (2004).

### Purpose.

The purpose of subsection (c) of this rule is to avoid dismissal on technical grounds if the added defendant received notice of the litigation before the statute of limitations expired. *Southwestern Bell Tel. Co. v. Blastech, Inc.*, 313 Ark. 202, 852 S.W.2d 813 (1993).

### Additional Matters Preserved.

Where no mention was made of prejudice or undue delay caused by the amended complaint in respondent's motion to dismiss on other grounds, the matter pled in the amendment was properly preserved. *Deitsch v. Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992).

Where appellant did not request a continuance or demonstrate that she would be prejudiced or that undue delay would result if the court should allow the amendment, the trial court did not abuse its discretion in finding that the amended answer did not prejudice appellant. *Turner v. Stewart*, 330 Ark. 134, 952 S.W.2d 156 (1997).

### Amendment Allowed If No Prejudice.

Regardless of the nature of the action, a party should be allowed to amend a pleading at any time as long as it does not prejudice his adversary. *Milne v. Milne*, 266 Ark. 900, 587 S.W.2d 229 (1979).

There was no error in permitting an amendment seeking punitive damages two days before trial, where the trial court found neither prejudice nor delay would be caused by the amendment. *Olson v. Riddle*, 280 Ark. 535, 659 S.W.2d 759 (1983).

A party should be allowed to amend his pleadings absent proof of prejudice by the opposing party, and the failure of the opposing party to seek a continuance is a factor to be considered in determining whether prejudice was shown. *Webb v. Workers' Comp. Comm'n*, 286 Ark. 399, 692 S.W.2d 233 (1985).

Amendments to pleadings should be allowed in nearly all instances without special permission from the court except where on motion of an opposing party the court determines either that prejudice would result or that disposition of the cause would be unduly delayed; in those instances the court may strike such amended pleadings or grant a continuance of the proceedings. *Odaware v. Robertson Aerial-AG, Inc.*, 13 Ark. App. 285, 683 S.W.2d 624 (1985).

Where there was no determination of undue delay or prejudice, trial court erred in dismissing amended answer. *Harris v. First State Bank*, 22 Ark. App. 37, 732 S.W.2d 501 (1987).

A party should be allowed to amend absent prejudice. An important consideration in determining prejudice is whether the party opposing the motion will have a fair opportunity to defend after the amendment. *Pineview Farms, Inc. v. A.O. Smith Harvestore, Inc.*, 298 Ark. 78, 765 S.W.2d 924 (1989).

Where defendant's original counterclaim alleged that plaintiff had expressly guaranteed that combine would properly harvest defendants crops, which combine failed to do, and then amended counterclaim to allege that same sale of combine and plaintiff's conduct surrounding it breached implied warranties of merchantability and fitness for a particular purpose, amendment related back and was not subject to statute of limitations because amended counterclaim arose out of same transaction described in original counterclaim, defendant relied upon the same allegations underlying original counterclaim for breach of express warranty, and because original and amended counterclaim were so closely related there was no undue delay or prejudice. *Woods v. Hopmann Mach., Inc.*, 301 Ark. 134, 782 S.W.2d 363 (1990).

Subsection (a) of this rule clearly provides that a party may amend the pleadings at any time without leave of the court. *Wiseman v. Batchelor*, 315 Ark. 85, 864 S.W.2d 248 (1993).

Trial court properly granted summary judgment in favor of a medical center in a medical malpractice claim on the basis of charitable immunity because the medical center did not waive the defense of charitable immunity by failing to assert the defense in its original answer and the patients failed to properly challenge the assertion of the defense by the filing of a motion alleging prejudice. Under subsection (a) of this rule, with the exception of defenses mentioned in Ark. R. Civ. P.

12(h)(1), a party could amend its pleadings at any time without leave of the trial court unless, upon motion of the opposing party, the trial court determined that prejudice would result; while charitable immunity was an affirmative defense that had to be specifically asserted in a responsive pleading under Ark. R. Civ. P. 8, it was not a defense listed in Ark. R. Civ. P. 12(h)(1) and thus could be raised in an amended answer under this rule. *Seth v. St. Edward Mercy Med. Ctr.*, 375 Ark. 413, 291 S.W.3d 179 (2009).

Trial court misapplied subsection (a) of this rule by dismissing a judgment creditor's amended complaint prior to the trial court's entry of judgment under Ark. R. Civ. P. 58 on its prior oral ruling granting summary judgment to the judgment debtor and her transferees. The trial court also erred in denying the creditor's motion under Ark. R. Civ. P. 59. *Mullen v. Shockley*, 2009 Ark. App. 855, — S.W.3d —, 2009 Ark. App. LEXIS 1023 (2009).

Trial court properly permitted a purchaser to introduce evidence of expenses for repairs the purchaser made to the property under an unjust enrichment theory as a mortgagee did not immediately request a continuance under subsection (b) of this rule; the complaint sought return of the money the purchaser had spent on the repairs; and there was no prejudice in the admission of the evidence. *Deutsche Bank Nat'l Trust Co. v. Austin*, 2011 Ark. App. 531, — S.W.3d —, 2011 Ark. App. LEXIS 564 (Sept. 14, 2011).

#### **Amendments to Conform to Evidence.**

Where the plaintiff did not plead misrepresentation of income from the property as a ground for relief in his complaint, but where there was a great deal of testimony taken at the trial concerning this issue, and when defendant objected to its introduction, the court repeatedly overruled the objection and admitted the evidence, the trial court thus considered the pleadings amended to conform to the proof, which was the proper thing to do under these circumstances. *Hegg v. Dickens*, 270 Ark. 641, 606 S.W.2d 106 (1980).

Where insurance company pleaded affirmative defense of fraudulent misrepresentation, and sufficient evidence was presented at trial to support an instruction on material misrepresentation, the trial court should have required the insurance company to amend its pleading to conform to the facts proved under this rule, and the court should have refused the plaintiff's offered instruction which required the insurance company to show fraud. *Capitol Old Line Ins. Co. v. Gorondy*, 1 Ark. App. 14, 612 S.W.2d 128 (1981), disapproved *Southern Farm Bureau Life Ins. Co. v. Cowger*, 295 Ark. 250, 748 S.W.2d 332 (1988).

Where ex-husband brought action to discontinue support for 18-year-old daughter who had reached majority age, chancellor

raised issue of continued support including college expenses, and ex-husband testified about college expenses and voluntary payments he had made toward college expenses, without obligation, it was not abuse of discretion for chancellor to amend the pleadings to conform with the evidence under this rule. *Mitchell v. Mitchell*, 2 Ark. App. 75, 616 S.W.2d 753 (1981).

Where, from evidence introduced without objection, the jury found the car in question to have been damaged in the sum of \$1,092.77, and the court found that the evidence did not show that the insurer was subrogated to a portion of that amount, the court should have allowed the plaintiff to increase the prayer of his complaint to ask for the full amount of the damages found by the jury, as he was the real party in interest and he was entitled to recovery for all the damages to his car. *Thompson v. Brown*, 5 Ark. App. 111, 633 S.W.2d 382 (1982).

Where on the first day of the residential property purchasers' suit against the vendor builders, the buyers moved to amend their prayer for damages from \$20,000 to \$40,000, and the sellers did not claim surprise nor ask for a continuance, the trial court did not abuse its discretion when it allowed the pleadings to be amended to conform to the proof. *Wingfield v. Page*, 278 Ark. 276, 644 S.W.2d 940 (1983).

The trial court in a breach of warranty action did not abuse its discretion in allowing the plaintiff homeowners to amend their pleadings to conform to the proof after both parties had rested and the matter had been submitted to the court for a decision, where the pretrial pleadings put the defendant builder on notice that he would be required to meet a claim that the foundation was not completed in a workmanlike manner according to standard practices and the amendment simply restated the same claim attaching a different label to it. *Bailey v. Matthews*, 279 Ark. 117, 649 S.W.2d 175 (1983).

Where the insured was prepared to defend against the occupancy clause in an insurance policy, the trial court abused its discretion in refusing to allow the pleadings to be amended to conform to the evidence where the insurer sought to amend the pleadings by his repeated references to lack of surprise or prejudice and by his proffer, although counsel did not specifically announce his desire to have the pleadings conform to the proof. *National Sec. Fire & Cas. Co. v. Shaver*, 14 Ark. App. 217, 686 S.W.2d 808 (1985).

Where affirmative defense was tried by the parties without objection, amendment of the pleadings to conform to evidence was allowed. *Mercer v. Nelson*, 293 Ark. 430, 738 S.W.2d 417 (1987).

The chancellor had authority to award ali-



mony in a divorce proceeding even though the issue was not raised in the pleadings where the issue was clearly tried. *McKay v. McKay*, 66 Ark. App. 268, 989 S.W.2d 560 (1999).

In an action arising from the sale of a used car, the court erred in finding for the plaintiff on the basis of his revocation of acceptance where (1) the plaintiff sought recovery on the basis of fraud, and (2) he presented testimony that the car was nonconforming, but presented no testimony that he revoked his acceptance of the car. *Coran Auto Sales v. Harris*, 74 Ark. App. 145, 45 S.W.3d 856 (2001).

In litigation over a construction contract, the trial court indicated that it viewed the complaint as one requesting judgment for a debt and a lien which also asked for foreclosure, rather than a breach of contract case, and the trial court did not abuse its discretion in allowing the construction company to amend its complaint to conform to the proof where neither a continuance was requested nor a demonstration of any prejudice was shown. *Hickman v. Kralicek Realty & Constr. Co.*, 84 Ark. App. 61, 129 S.W.3d 317 (2003).

Although this rule permits an amendment to the pleadings when the parties have implicitly agreed to the introduction of certain evidence, there was no such agreement in the instant case; the sellers made their position clear by filing their motion to strike the buyer's defense of fraud on the morning of trial, such that the parties' fundamental disagreement on the matter and absence of implied consent could not have been more apparent at trial. *Ison Props., LLC v. Wood*, 85 Ark. App. 443, 156 S.W.3d 742 (2004).

Plaintiff substantially complied with Ark. R. Civ. P. 9(g) where the pleadings were amended to conform to the proof by presenting plaintiff's expert economist's summary-judgment affidavit and trial testimony; moreover, defendant failed to object to the expert's testimony at any time on the basis that plaintiff had failed to specifically plead its lost profits and it was not until defendant's oral motion at trial, seeking to limit plaintiff to the damages mentioned in its complaint and amended complaint, that the issue of lost profits not being specifically pled by plaintiff was raised. *Neste Polyester, Inc. v. Burnett*, 92 Ark. App. 413, 214 S.W.3d 882 (2005).

Trial court did not abuse its discretion in refusing to allow an individual to amend his pleadings under subsection (b) of this rule to include a counterclaim for a prescriptive easement because the proof did not establish a prescriptive easement, given that there was no evidence of overt, adverse use for the statutory period under § 18-61-101. *Myers v. Yingling*, 372 Ark. 523, 279 S.W.3d 83 (2008).

Order modifying a visitation decree by removing a provision restricting the father's visitation to times when he would be physi-

cally present was upheld where the issue of modification of the visitation order was tried by consent of the parties under subsection (b) of this rule; although the mother did not file a petition to modify visitation, she never objected at trial or on appeal that the modification was entered without petition or that consideration of the modification was improper in a contempt proceeding. *Brown v. Ashcraft*, 101 Ark. App. 217, 272 S.W.3d 859 (2008).

Neighbors in a boundary line dispute could properly assert the doctrine of boundary by acquiescence in their post-trial brief because the neighbors had submitted evidence on the issue and presented their argument in a post-trial brief without objection from the adjoining landowner. *Barnett v. Gomance*, 2010 Ark. App. 109, — S.W.3d —, 2010 Ark. App. LEXIS 96 (Feb. 3, 2010).

#### —Express or Implied Consent.

Where trial court struck the amended complaint of the plaintiffs with respect to the issue of whether a majority of voters in an improvement district had consented to the formation of the district if certain lands dedicated to public use were excluded from the computation, but the trial court decided the issue, the issue could be considered tried by the implied consent of the defendant, under subsection (b) of this rule and thus was properly considered on appeal. *Ketcher v. Mayor of N. Little Rock*, 2 Ark. App. 315, 621 S.W.2d 12 (1981).

Issue of material misrepresentation did not become an issue in trial by either the implied or the express consent of parties. *Brooks v. Town & Country Mut. Ins. Co.*, 294 Ark. 173, 741 S.W.2d 264 (1987).

Although there were no pleadings to support the relief awarded the appellee, the appellee was permitted to introduce a substantial amount of testimony regarding the unpled issue without objection by the appellant; the issue was tried by the implied consent of the parties and the pleadings should therefore be treated as amended to conform to the proof, pursuant to subsection (b) of this rule. *Williams ex rel. Tucker v. Titterington*, 46 Ark. App. 322, 881 S.W.2d 226 (1994).

Even though liability insurance carrier did not specifically request reimbursement of the attorney's fees it had expended on behalf of insured driver, ample evidence was introduced by the litigants for the trial court to treat the issue as being tried by the express or implied consent of the parties. *Hartford Fire Ins. Co. v. Carolina Cas. Ins. Co.*, 52 Ark. App. 35, 914 S.W.2d 324 (1996).

Consent to conforming the pleadings to the proof will not be implied merely because evidence relevant to a properly pled issue incidentally tends to establish an unpled one.

Heartland Community Bank v. Holt, 68 Ark. App. 30, 3 S.W.3d 30 (1999).

Although wife did not plead her claim for alimony properly, where it was apparent on the record that throughout the proceeding the parties litigated the case with the full knowledge of wife's desire for alimony, the court erred in granting husband's motion to set aside the award of alimony. *McKay v. McKay*, 340 Ark. 171, 8 S.W.3d 525 (2000).

### Counterclaims.

Although subsection (b) of this rule has been interpreted as permitting a defendant to raise a counterclaim, even after judgment, the cases permitting it have done so where it was clear all the relevant evidence was in the record or the issue was clearly one the parties contemplated as being before the court. *Shinn v. First Nat'l Bank*, 270 Ark. 774, 606 S.W.2d 154 (1980).

Where defendant filed an answer and pleaded affirmative defenses, but never filed a counterclaim against the plaintiff, and the defendant's attorney did not move to have the pleadings conform to the proof, the chancellor erroneously awarded the defendant a money judgment. *Hempel v. Bragg*, 313 Ark. 486, 856 S.W.2d 293 (1993).

Because taxpayer's claims arose out of the same transaction that was the subject matter of the original action, the taxpayer's claim was really a compulsory counterclaim, pursuant to ARCP 13(a), that should have been raised earlier; even assuming that subsection (b) of this rule was applicable and the claims should have been considered an amended pleading, the rule only permitted amendments to conform to pleadings when issues were tried by express or implied consent of the parties, and the issues raised by the taxpayer's claims were never so tried and, thus, the trial court did not err in dismissing the claims. *Jones v. Double 'D' Props.*, 352 Ark. 39, 98 S.W.3d 405 (2003).

Trial court did not err in striking companies' counterclaim that sounded in legal malpractice under this rule and Ark. R. Civ. P. 13 because the prejudice to the lawyers would have been great if the counterclaim was allowed to go forward as it was filed 33 minutes before trial was to begin. *Nameloc, Inc. v. Jack, Lyon & Jones, P.A.*, 362 Ark. 175, 208 S.W.3d 129 (2005).

### Defenses.

This rule does not require a defendant to reallege its defenses. *Farm Bureau Mut. Ins. Co. v. Campbell*, 315 Ark. 136, 865 S.W.2d 643 (1993).

Condominium seller did not waive the affirmative defense of release because he raised it in an amended answer prior to trial pursuant to Ark. R. Civ. P. 8(c), to which the buyer did not object, and evidence regarding the release

defense was received without objection at the trial. *Siegel v. Halley*, 2010 Ark. App. 106, — S.W.3d —, 2010 Ark. App. LEXIS 110 (Feb. 3, 2010).

### Discovery Matters.

Answers to interrogatories, as well as any other information disclosed during discovery, are not a pleading or a defense to a pleading; however, such information may give rise to amendments to pleadings. *National Sec. Fire & Cas. Co. v. Shaver*, 14 Ark. App. 217, 686 S.W.2d 808 (1985).

This rule permits amendments to pleadings and amendments to conform to the proof, but it vests broad discretion in the trial court to allow or refuse to allow such amendments and the exercise of that discretion will be sustained unless it is manifestly abused. *Miller v. Jasinski*, 17 Ark. App. 131, 705 S.W.2d 442 (1986).

### Discretion of Court.

In a personal injury suit resulting from the collision of the plaintiff's car with the defendant's truck which was transporting a house on the highway, the trial court erred in allowing the plaintiff midway through the trial to submit to the jury a highway commission regulation which imposed strict liability on persons transporting houses on the highway, since the complaint was based on various allegations of negligence and the defendant had prepared its case on this theory; accordingly, the defendant's preparations for trial would be materially different in the two situations so that the change of theory was prejudicial and unfair. *T.H. Epperson & Son v. Robinson*, 274 Ark. 142, 622 S.W.2d 668 (1981).

Although this rule permits amendments to pleadings "at any time," no hard and fast rule can be defined to limit amendment, so that the trial judge's discretion must largely determine when it becomes improper and prejudicial to permit a new defense to be introduced late in the trial; accordingly, the chancellor did not abuse his discretion in refusing to allow the defendant to amend his answer to assert the defenses of limitations and laches where the pleadings had been joined for a year, the plaintiffs were stationed in the military in Alaska, all of the parties had testified and the case was close to completion. *Wright v. Langdon*, 274 Ark. 258, 623 S.W.2d 823 (1981).

This rule vests broad discretion in the trial court to permit amendment to pleadings and the exercise of that discretion by the trial court will be sustained unless it is manifestly abused. *Wingfield v. Page*, 278 Ark. 276, 644 S.W.2d 940 (1983).

The trial court is vested with broad discretion in allowing or denying amendments. *Kay v. Economy Fire & Cas. Co.*, 284 Ark. 11, 678



S.W.2d 365 (1984); *Cawood v. Smith*, 310 Ark. 619, 839 S.W.2d 208 (1992).

Absent express or implied consent, the question of whether pleadings may be amended to conform to the evidence is within the sound discretion of the trial court. *Pineview Farms, Inc. v. A.O. Smith Harvestore, Inc.*, 298 Ark. 78, 765 S.W.2d 924 (1989).

No abuse of discretion in denial of request to amend pleadings. *Hubbard v. Jackson*, 298 Ark. 93, 766 S.W.2d 2 (1989); *Cawood v. Smith*, 310 Ark. 619, 839 S.W.2d 208 (1992).

Where plaintiffs violated § 16-114-205 by specifying their damages rather than alleging a general claim for damages, the trial court misapplied subsection (a) of this rule, and abused its discretion by striking plaintiff's amended complaint, for an unspecified amount of damages, and dismissing the original complaint without prejudice, where defendant did not show that the amendment caused any prejudice or undue delay. *Travis v. Houk*, 307 Ark. 84, 817 S.W.2d 207 (1991).

In order to secure a reversal of a trial judge's ruling under this rule, the defendant must show that the trial court manifestly abused his discretion in allowing a plaintiff to amend her pleading to conform to the proof. *John Cheeseman Trucking, Inc. v. Dougan*, 313 Ark. 229, 853 S.W.2d 278 (1993).

Trial judges may properly deny leave to amend if the proposed changes would not save the action. *Thompson v. Dunn*, 319 Ark. 6, 889 S.W.2d 31 (1994).

The trial court did not abuse its discretion in permitting a non-specific motion to permit the plaintiffs to amend their complaint to conform to proof presented at trial of mutual mistake with regard to a contract and deed, notwithstanding the defendant's assertion that he had no notice of the mutual mistake issue, where proof at trial clearly raised such issue. *Hope v. Hope*, 333 Ark. 324, 969 S.W.2d 633 (1998).

The trial judge abused his discretion by denying an amendment to pleadings to conform to the proof on constructive fraud; however, the error was harmless because the plaintiff did not prevail on either a claim of fraud or constructive fraud. *Farm Bureau Policy Holders & Members v. Farm Bureau Mut. Ins. Co.*, 335 Ark. 285, 984 S.W.2d 6 (1998).

Where appellants did not raise the issue of fraudulent concealment until the filing of the fifth amended complaint, almost nine months after the action commenced, and counsel for appellants conceded in oral argument that they were aware of the alleged concealment of records but failed to raise it at an earlier time because it did not appear to be necessary to raise that issue, the trial court did not abuse

its discretion in striking the amended complaint. *Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002).

In an unlawful-detainer action, a store owner was entitled to back rental and treble damages pursuant to § 18-60-309(b)(2) because the trial court did not abuse its discretion under subsection (b) of this rule in refusing to dismiss the owner's treble-damages claim, which was pled the day of trial. It was apparent from the commencement of the proceeding that the property involved was commercial. *Mendez v. Aguilar*, 2010 Ark. App. 268, — S.W.3d —, 2010 Ark. App. LEXIS 272 (Mar. 31, 2010).

### Doctrine of Relation Back.

It is settled that subsection (c) of this rule is to be liberally construed in allowing amendments, but the liberal construction applicable to this rule is limited when prejudice to the adverse party is affirmatively shown; the doctrine of relation back should not be allowed when it operates to cut off a substantial right or defense to new matter introduced by the amendment although connected with the original cause of action. *Ozark Kenworth, Inc. v. Neidecker*, 283 Ark. 196, 672 S.W.2d 899 (1984).

Where a charity concert promoter amended the complaint to allege fraud and negligence in a suit against a booking agent when a promised performer failed to appear at a benefit concert, the amendments related back and there could have been no statute of limitations of objection to the amendment without a showing of undue delay or prejudice. *Jim Halsey Co. v. Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985).

Relation back is dependent upon proof of four factors: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining a defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period. *Southwestern Bell Tel. Co. v. Blastech, Inc.*, 313 Ark. 202, 852 S.W.2d 813 (1993).

Patient failed to comply with the strictures of the rule so as to permit the amended complaint concerning the John Doe defendant to relate back to the time of the filing of the first complaint; the patient was aware that the nurse could have and should have been specifically named as a defendant from the outset of the case, and the failure to name the nurse in the original complaint was not a mere mistake of identity. *Stephens v. Petrino*, 350 Ark. 268, 86 S.W.3d 836 (2002).

Cause of action against a subcontractor

with regard to a particular job was not saved by the relation back doctrine because there was nothing in the original or amended complaints regarding the subcontractor and the job to allow relation back. *Ray & Sons Masonry Contrs., Inc. v. United States Fid. & Guar. Co.*, 353 Ark. 201, 114 S.W.3d 189 (2003).

Term “heirs at law”, as used in § 16-62-102(b), means “beneficiaries”, as used in § 16-62-102(d), and a motion to dismiss a wrongful death action was properly granted because two sisters were not named as parties; the doctrine of relation back under this rule did not help because the original complaint was a nullity. *Brewer v. Poole*, 362 Ark. 1, 207 S.W.3d 458 (2005).

Motion to remand was granted as the complaint for loss of use of personal property, fraud, and unjust enrichment was not a nullity and was subject to amendment under subsection (c) of this rule; the amended complaint related back to the original complaint and, because the action was commenced before the effective date of the Class Action Fairness Act (CAFA), the CAFA did not apply to provide the court with subject matter jurisdiction. *Whitehead v. Nautilus Group, Inc.*, 428 F. Supp. 2d 923 (W.D. Ark. 2006).

Negligence action for a slip and fall was improperly dismissed as being barred by the three-year limitations period of § 16-56-105 because, under this rule, an amendment correcting the name of a wrong owner as defendant related back to the original complaint in that the same allegations were made and the new owner was served within 120 days as set forth in Ark. R. Civ. P. 4(i). *Bell v. Jefferson Hosp. Ass’n*, 96 Ark. App. 283, 241 S.W.3d 276 (2006).

Even though a writ of execution named an original creditor instead of an assignee, a trial court did not err in finding that the assignee’s status as the real party in interest related back to the issuance of the writ because the assignee’s efforts arose out of the same conduct, transaction, or occurrence that existed when the original writ of execution was issued. *Looney v. Raby*, 100 Ark. App. 326, 268 S.W.3d 345 (2007).

In an action arising from a rear-end accident, plaintiff driver could not use the relation-back doctrine in subsection (c) of this rule because the 120-day notice requirement of subsection (c) was not met. The court could not assume defendant driver’s knowledge of the action, after being named in the amended complaint, from the fact that defendant was related to and lived with the original defendant, the owner of the vehicle. *Bennett v. Spaight*, 372 Ark. 446, 277 S.W.3d 182 (2008).

Shareholders attempted to cure the deficiency of their original complaint by joining their bankruptcy trustees as parties plaintiff

in their amended complaint; however, because the shareholders were not the real parties in interest at the time of either the filing of the original complaint or the filing of the amended complaint under Ark. R. Civ. P. 17(a), the joinder of the bankruptcy trustees in the amended complaint had the effect of substituting entirely new plaintiffs, and this was in the nature of filing a new action and was barred by the statute of limitations, and the circuit judge did not err in finding that their amended complaint did not relate back to the filing of their original complaint, under subsection (c) of this rule. *Bibbs v. Cmty. Bank of Benton*, 375 Ark. 150, 289 S.W.3d 393 (2008).

Two purchasers lacked standing based on the fact that two bankruptcy trustees should have filed an action against a bank; therefore, the purchasers’ original complaint was void ab initio. As a result, an amended complaint adding the trustees did not relate back to the original filing, and the limitations period had expired on claims of breach of the covenant of good faith, breach of fiduciary duty, fraud, conversion, unjust enrichment, and intentional infliction of emotional distress. *Bibbs v. Cmty. Bank*, 101 Ark. App. 462, 278 S.W.3d 564 (2008).

Arkansas Supreme Court’s decision in a prior case caused the estate administrator to make an understandable mistake, and not allowing subsection (c) of this rule to apply would have an unfair and prejudicial result; the administrator’s amended complaint related back to his original timely complaint under subsection (c) and as a result, summary judgment as to the medical center’s insurer was reversed and remanded. *Jackson v. Sparks Reg’l Med. Ctr.*, 375 Ark. 533, 294 S.W.3d 1 (2009).

Son, a foreign administrator of his mother’s estate, was subject to the requirements for domiciliary personal representatives found in §§ 28-48-101 through 28-48-109. Because the son had not been appointed administrator of his mother’s estate in any state at the time he filed his original complaint for trespass and conversion of timber, he did not have standing to sue; because the complaint was a nullity, a second complaint could not relate back under subsection (c) of this rule. *Travis Lumber Co. v. Deichman*, 2009 Ark. 299, 319 S.W.3d 239 (2009).

Where a mother and father timely filed wrongful death and survival claims regarding their stillborn child and subsequently filed an amended complaint after the statute of limitations had expired that added the mother in her capacity as the personal representative of their children’s estate, because the original complaint was filed by parties without standing, it was a nullity; as such, the amended complaint could not relate back to rescue the



claims from the operation of the statute of limitations, and the health care providers' motion for summary judgment on the basis that the claims were barred by the two-year statute of limitations was properly granted. *Dachs v. Hendrix*, 2009 Ark. 542, 354 S.W.3d 95 (2009).

Trial court erred by disregarding a nunc pro tunc order entered in the probate court appointing appellants as co-special administrators, effective before the wrongful death action was filed, as: (1) the nunc pro tunc order gave appellants standing under § 16-62-102(b) to bring the wrongful death action; (2) the statute of limitations under § 16-114-203(a) did not bar the wrongful death action; (3) by choosing to ignore the nunc pro tunc order, the trial court effectively invalidated the order, which was beyond its jurisdiction to do; and (4) the case did not involve the relation back doctrine under this rule. *Smith v. Rebsamen Med. Ctr., Inc.*, 2011 Ark. App. 722, — S.W.3d —, 2011 Ark. App. LEXIS 786 (Nov. 30, 2011).

#### —Election Contests.

A complaint contesting a special election which alleged that the proposed change in city government was an initiated procedure and was therefore subject to the provisions of Ark. Const., Amend. 7, could not be amended 44 days after certification of the election to allege the issue had been submitted to the voters under an improper ballot title, because election contests are not subject to subsection (c) of this rule, and, under § 14-38-113, the contestant is limited to the grounds set out in his original complaint, and those grounds cannot be enlarged by subsequent amendment not made within the time required by the statute for contesting. *Hanson v. Garland County Election Comm'n*, 289 Ark. 367, 712 S.W.2d 288 (1986).

#### —Statute of Limitations.

Where an amendment related back to the time of the filing of the original timely complaint, the statute of limitations did not bar the amended claim. *Southwestern Bell Tel. Co. v. Blastech, Inc.*, 313 Ark. 202, 852 S.W.2d 813 (1993).

When an amendment changes the party against whom the claim is asserted or adds a party after the statute of limitations has run, it may relate back to the time of filing of the original complaint. *Southwestern Bell Tel. Co. v. Blastech, Inc.*, 313 Ark. 202, 852 S.W.2d 813 (1993).

An amended complaint, which added the defendant's insurer as a party, did not relate back and, therefore, the plaintiff's claim against the insurer was barred by the statute of limitations because it did not appear that the insurer knew that its omission from the original complaint was a mistake of identity

as to the proper party. *George v. Jefferson Hosp. Ass'n*, 337 Ark. 206, 987 S.W.2d 710 (1999).

Where the Boy Scouts of America failed to inform parents and their injured child about the BSA's insurance coverage and parents failed to include insurer in the suit before the statute of limitations ran, notice was imputed to the insurer; thus, under the circumstances, the second amended complaint related back to the filing of the original complaint and was not barred by the statute of limitations. *Low v. Ins. Co. of N. Am.*, 364 Ark. 427, 220 S.W.3d 670 (2005).

Although the trustees' original complaint and subsequent amendments all related to the same conduct alleged as a trespass against their neighbors, the substitution of the parties in subsequent pleadings did not relate back to the date of the original complaint under this rule as it was not understandable that the trustees or their counsel could have been mistaken about the differing and distinct identities of the trustees as individual landowners, their son as landowner, and their family trust as landowners. As such, the trial court properly granted summary judgment in favor of the neighbors. *Bryant v. Hendrix*, 375 Ark. 200, 289 S.W.3d 402 (2008).

#### Motion for Restitution.

Where a tort judgment in favor of the plaintiffs was reversed, but where, during pendency of the appeal, the judgment was not superseded and the plaintiffs collected \$7,681.41 by garnishments, on remand the trial judge was right in treating defendant's motion for restitution as a motion for judgment and granting relief, and there was no reason for the trial judge to delay the award until a retrial merely to permit a possible set-off against any judgment that might be recovered by the plaintiffs. *Lowe v. Morrison*, 270 Ark. 668, 606 S.W.2d 569 (1980).

#### New Grounds.

There is no reason why pleadings in a divorce action cannot be amended to allege grounds for divorce that have arisen since the original action was commenced. *Price v. Price*, 29 Ark. App. 212, 780 S.W.2d 342 (1989).

#### Prejudice and Undue Delay.

The rule does not require a finding of prejudice or undue delay when a party has merely filed an unnecessary motion seeking to amend. *Schmidt v. McIlroy Bank & Trust*, 306 Ark. 28, 811 S.W.2d 281 (1991).

Where sufficient evidence existed to show that defendant had notice of the suit when it was filed, it became incumbent upon the defendant to show how it might be prejudiced in maintaining a defense. *Southwestern Bell Tel. Co. v. Blastech, Inc.*, 313 Ark. 202, 852 S.W.2d 813 (1993).

Although the striking of an amendment to a

complaint resulted in a loss of the claim that a conversion vote to convert from an association to a public water authority did not pass by the requisite majority, the trial court did not abuse its discretion since allowing the new allegations so close to trial would have resulted in prejudice. *Williams v. Brushy Island Pub. Water Auth.*, 368 Ark. 219, 243 S.W.3d 903 (2006).

In a company's action against a debtor to recover the balance due on a credit card account, the trial court erred in striking the company's amended complaint pursuant to subsection (a) of this rule where no new cause of action was pled; no delay was needed to allow the debtor to become acquainted with the substance of the amendment. *Cavalry SPV, LLC v. Anderson*, 99 Ark. App. 309, 260 S.W.3d 331 (2007).

Father's due process rights were not violated when a trial court allowed the Arkansas Department of Health and Human Services to amend a termination of parental rights petition on the day of the hearing to reflect that the child had been in its custody for 12 months or longer where the father was not prejudiced; the amendment was proper under subsection (a) of this rule. *Smith v. Ark. HHS*, 100 Ark. App. 74, 264 S.W.3d 559 (2007).

In a nursing home negligence action, although appellants failed to attach an arbitration agreement to their initial answer, a circuit court erred by striking appellants' amended answer in which the agreement was attached because appellants had attached the agreement to their motion to compel, which was filed two months before the amended answer, and there was no prejudice to appellee. *Advocat, Inc. v. Heide*, 2010 Ark. App. 826, — S.W.3d —, 2010 Ark. App. LEXIS 859 (Dec. 8, 2010).

Appellants failed to show that the circuit court erred in allowing appellees to amend their complaint, because appellants had not shown that they were prejudiced in any way by the amendment seeking partition; appellants did not assert that their trial preparation was changed in any way because of the amendment or that the amendment somehow delayed the resolution of the dispute. *Peterson v. Davis*, 2012 Ark. App. 166, — S.W.3d —, 2012 Ark. App. LEXIS 264 (Feb. 22, 2012).

### **Res Judicata.**

On remand from the appellate court, the trial court did not abuse its discretion in not allowing appellants to amend their pleadings based on its conclusion that *res judicata* applied to the appellate court's earlier decision. *O'Dell v. Rickett*, 92 Ark. App. 364, 214 S.W.3d 301 (2005).

### **Ruling of Court.**

Although the chancellor did not specifically rule on defendant's motion to amend his

pleading to include a statute of limitations defense, given the extensive discussion of this defense at the hearing, it was clear from his actions, if not his words, that the chancellor considered the pleadings to be amended. *King v. State, Office of Child Support Enforcement*, 58 Ark. App. 298, 952 S.W.2d 180 (1997).

### **Substitution of Parties.**

In action for real estate commission where parties five days before trial filed petition asking that they be substituted as parties plaintiff in the suit stating that they were real estate brokers licensed to do business in Arkansas, that they were the real parties in interest, that their business was not a corporation but a partnership and that it is not a licensed real estate broker in Arkansas and further alleged that no proof would be altered by the substitution and that no delay would result and defendants filed no response to the petition but did make a verbal objection, trial court's action in permitting the substitution of plaintiffs was not an abuse of discretion since there was no doubt from the record that the parties were doing business under the name of United Farm Agency and that one of them took the real estate listing of defendants, that the listing was in writing and did not identify the business as a corporation and defendants failed to show that the substitution of the parties would prejudice them in any way in maintaining their defenses upon the merits and neither the pleading nor the testimony was challenged in any manner by defendants. *Storey v. Johnson*, 270 Ark. 392, 605 S.W.2d 480 (Ct. App. 1980).

John Doe pleadings pursuant to § 16-56-125 are for actions against a tortfeasor whose identity is unknown. Before a real party can be substituted for a "Doe" defendant in the original complaint, however, such pleadings must meet the requirements of subsection (c) of this rule. *Harvill v. Community Methodist Hosp. Ass'n*, 302 Ark. 39, 786 S.W.2d 577 (1990).

This rule permitted the amendment of a pleading to relate back to the date of the original pleading and its purpose was not to permit the relation back of an entirely separate lawsuit; thus, where the amended complaint substituted out all of the plaintiffs and put in their place entirely new plaintiffs, it was not an amendment, but rather a new suit. *St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County*, 348 Ark. 197, 73 S.W.3d 584 (2002).

Where an original wrongful death complaint was a nullity because it was brought by the decedent's heirs rather than the personal representative, as required by the wrongful-death statute, § 16-62-102, a subsequent amended complaint filed by the administratrix which attempted to bring the estate in as a party was a new suit filed after the statute



of limitations period and, therefore, could not relate back under this rule and was barred by statute of limitations. *Rhuland v. Fahr*, 356 Ark. 382, 155 S.W.3d 2 (2004).

In a wrongful death action, the amended complaint related back to the date of the original pleading because the estate administrator's mistake was as to the identity of the proper party where at the time the administrator filed her original complaint, she properly named a nursing center and a hospital and, alternatively, named John Doe insurers as defendants, and after the decision in *Downing v. Nursing Ctr.*, 2010 Ark. 175, — S.W.3d —, 2010 Ark. LEXIS 213 (Apr. 15, 2010).

### Supplemental Pleadings.

Where plaintiff added to his complaint that he had been denied relief at his grievance hearing before the civil service commission, the addition was regarded as a supplementary complaint governed by subsection (d) of this rule rather than an amendment under subsection (a) of this rule, because the hearing had been held after plaintiff had filed the original complaint. *City of Ft. Smith v. Driggers*, 305 Ark. 409, 808 S.W.2d 748 (1991).

Because the amended complaint seeking damages for future earnings was stricken by the court and the appellant has not appealed that action, the trial court correctly found that the appellant lacked standing under his original complaint to pursue his claim for damages. *Vickers v. Freyer*, 41 Ark. App. 122, 850 S.W.2d 10 (1993).

Because trusts never filed a second-amended complaint in their legal malpractice action against attorneys and a law firm, the trusts could not argue that the trial court erred by not allowing the them to amend their complaint to add the trustees as plaintiffs in their individual capacities pursuant to this rule. *Giles v. Harrington, Miller, Neihouse & Krug*, 362 Ark. 338, 208 S.W.3d 197 (2005).

### Timeliness.

The trial court did not abuse its discretion in refusing to allow insured plaintiffs, to amend their complaint, where the insured attempted to make the amendment after the date beyond which the parties and the trial court had agreed that no pleadings would be filed. *Kay v. Economy Fire & Cas. Co.*, 284 Ark. 11, 678 S.W.2d 365 (1984).

In an action to recover on an open account, the defendant was not entitled to amend his pleadings to allege a set-off on the day of trial where the plaintiff was not prepared to meet that issue, even though the defendant in his answers to interrogatories had referred to the set-off. *Odaware v. Robertson Aerial-AG, Inc.*, 13 Ark. App. 285, 683 S.W.2d 624 (1985).

Pleading, not filed until the day before the

trial on the merits was to began, was untimely and would result in prejudice to opposing party. *Kinkead v. Union Nat'l Bank*, 51 Ark. App. 4, 907 S.W.2d 154 (1995).

Defendant's time for response should have been calculated from the date of service of the amended complaint, since that date allowed the longer time to respond, and entry of a default judgment prior to the expiration of the response time was improper. *Edward J. DeBartolo Corp. v. Cartwright*, 323 Ark. 573, 916 S.W.2d 114 (1996).

Trial court did not err in permitting appellees' adverse possession counterclaim, filed the morning of trial, pursuant to subsection (a) of this rule, where appellants failed to make a showing of prejudice, refused to request a continuance, and indicated that they wished to proceed with trial. *Trice v. Trice*, 91 Ark. App. 309, 210 S.W.3d 147 (2005).

Trial court erred in denying appellants' motion to strike a medical center's amended answer in an action for medical negligence because the amended answer, in which the center stated for the first time that it was entitled to charitable immunity, was prejudicial to appellants; by the time the center filed its amended answer, any attempt to add the center's insurer as a party-defendant would have been untimely. *Neal v. Sparks Reg'l Med. Ctr.*, 375 Ark. 46, 289 S.W.3d 8 (2008).

While a circuit court erred in fragmenting a jury verdict, and awarding the borrowers attorney fees outside the time limits of Ark. R. Civ. P. 54(e)(2), and post-judgment interest in excess of that authorized by Ark. Const. Art. 19, § 13, their amended complaint was properly dismissed as untimely under subsection (a) of this rule. *Mfrs. & Traders Trust Co. v. Nickelson*, 2011 Ark. App. 557, — S.W.3d —, 2011 Ark. App. LEXIS 589 (Sept. 21, 2011).

**Cited:** *White v. Cliff Peck Chevrolet Co.*, 266 Ark. 942, 587 S.W.2d 606 (Ct. App. 1979); *Davis v. Davis*, 270 Ark. 180, 603 S.W.2d 900 (1980); *Missouri Pac. R.R. v. Arkansas Sheriff's Boys' Ranch*, 280 Ark. 53, 655 S.W.2d 389 (1983); *Farm Bureau Mut. Ins. Co. v. Southall*, 281 Ark. 141, 661 S.W.2d 383 (1983); *Dunlap v. McCarty*, 284 Ark. 5, 678 S.W.2d 361 (1984); *Ashman v. Pickets*, 12 Ark. App. 233, 674 S.W.2d 4 (1984); *Citizens Bank v. Chitty*, 285 Ark. 55, 684 S.W.2d 814 (1985); *Western Auto Supply Co. v. Bank of Imboden*, 17 Ark. App. 4, 701 S.W.2d 394 (1986); *Big A Whse. Distribs., Inc. v. Rye Auto Supply, Inc.*, 19 Ark. App. 286, 719 S.W.2d 716 (1986); *National Lumber Co. v. Advance Dev. Corp.*, 293 Ark. 1, 732 S.W.2d 840 (1987); *Rachel v. Rachel*, 294 Ark. 110, 741 S.W.2d 240 (1987); *Wallner v. Johnson*, 21 Ark. App. 124, 730 S.W.2d 253 (1987); *Peterson v. Worthen Bank & Trust Co.*, 296 Ark. 201, 753 S.W.2d 278 (1988); *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988); *Speer v. Speer*, 298 Ark.

294, 766 S.W.2d 927 (1989); *Dupree v. Twin City Bank*, 300 Ark. 188, 777 S.W.2d 856 (1989); *Brown v. Imboden*, 28 Ark. App. 127, 771 S.W.2d 312 (1989); *Mitchell v. Mitchell*, 28 Ark. App. 295, 773 S.W.2d 853 (1989); *Burge v. Pack*, 301 Ark. 534, 785 S.W.2d 207 (1990); *Hendershot v. Hendershot*, 30 Ark. App. 184, 785 S.W.2d 34 (1990); *Ward v. Russell*, 32 Ark. App. 86, 796 S.W.2d 588 (1990); *Godwin v. Churchman*, 305 Ark. 520, 810 S.W.2d 34 (1991); *J.W. Reynolds Lumber Co. v. Smackover State Bank*, 310 Ark. 342, 836 S.W.2d 853 (1992); *Insurance from CNA v. Keene Corp.*, 310 Ark. 605, 839 S.W.2d 199 (1992); *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992); *overruled Bailey v. McCuen*, 318 Ark. 277, 884 S.W.2d 938 (1994); *Forrest City Mach. Works, Inc. v. Mosbacher*, 312 Ark. 578, 851 S.W.2d 443 (1993); *Williams v. Hudson*, 320 Ark. 635, 898 S.W.2d 465 (1995); *Schmidt v. Pearson, Evans, & Chad-*

*wick*, 326 Ark. 499, 931 S.W.2d 774 (1996); *Adams v. HLC Hotels, Inc.*, 328 Ark. 108, 941 S.W.2d 424 (1997); *State Auto Property & Cas. Ins. Co. v. Swaim*, 338 Ark. 49, 991 S.W.2d 555 (1999); *Tribco Mfg. Co. v. People's Bank of Imboden*, 67 Ark. App. 268, 998 S.W.2d 756 (1999); *McKay v. McKay*, 340 Ark. 171, 8 S.W.3d 525 (2000); *Ultracuts Ltd. v. Wal-Mart Stores, Inc.*, 70 Ark. App. 169, 16 S.W.3d 265 (2000); *McEntire v. Watkins*, 73 Ark. App. 449, 43 S.W.3d 770 (2001); *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 120 S.W.3d 525 (2003); *Estate of Byrd v. Tiner*, 81 Ark. App. 366, 101 S.W.3d 887 (2003); *George v. Ark. Dep't of Human Servs.*, 88 Ark. App. 135, 195 S.W.3d 399 (2004); *McDonald Mobile Homes, Inc. v. BankAmerica Hous. Servs.*, 93 Ark. App. 256, 218 S.W.3d 376 (2005); *Foscue v. McDaniel*, 2009 Ark. 223, 308 S.W.3d 122 (2009).

### Rule 16. Pre-trial procedure; formulated issues.

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

- (1) The simplification of issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of act and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) The advisability of a preliminary reference of issues to a master;
- (6) The possibility of settlement or, pursuant to Ark. Code Ann. § 16-7-202, the use of extrajudicial procedures, including mediation, to resolve the dispute;
- (7) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings and the agreements made by the parties as to any of the matters considered and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order, when entered, controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions. (Amended November 18, 1996, effective March 1, 1997.)

**Reporter's Notes to Rule 16:** 1. Rule 16 is essentially the same as FRCP 16. The only change from the Federal Rule is found in Section (5). Under Rule 53, a master is not permitted in jury actions; hence, the minor wording change. This rule is substantially the same as superseded *Ark. Stat. Ann.* 27-2401 (Repl. 1962), which was patterned after FRCP 16.

2. Omitted from Rule 16 is Section (d) of *Ark. Stat. Ann.* 27-2401 (Repl. 1962). Motions

or applications for the production of documents are matters which should be considered under Rule 34. Also, any unresolved questions concerning documents may be considered by the court and the parties under Rule 16 (3). Overall, this rule should have little effect on prior Arkansas law.

**Addition to Reporter's Notes, 1997 Amendment:** Former paragraph (6) has been redesignated as paragraph (7) and a new paragraph (6) added to mention the possibil-



ity of settlement and the use of extrajudicial procedures, such as mediation. The amended rule, based on a similar provision in the Alabama Rules of Civil Procedure, recognizes that pretrial conferences can be profitably used to discuss settlement. Since it eases congested court dockets and results in savings to litigants and the judicial system, set-

tlement should be facilitated at as early a stage in the litigation as possible. However, settlement conferences are not mandatory and would be a waste of time in many cases. In addition to settlement, paragraph (6) refers to exploring the use of alternative means of dispute resolution, such as mediation, in accordance with Ark. Code Ann. § 16-7-202.

## RESEARCH REFERENCES

**Ark. L. Rev. Note, To Seal or Not to Seal? That is Still the Question: Arkansas Best Corp. v. General Electric Capital Corp., 49 Ark. L. Rev. 325.**

**Recent Developments — 1997 Amendments to the Arkansas Rules of Civil Procedure and the Rules of Appellate Procedure — Civil, 50 Ark. L. Rev. 149.**

## CASE NOTES

### ANALYSIS

Purpose.  
Expert witness.  
Inapplicable order.  
Pretrial order controlling.

#### **Purpose.**

The primary purpose of the scheduling order is to keep litigation moving forward and to advise parties about the deadlines that they are expected to meet; failure to meet the deadlines undermines the goals of the scheduling order and prejudices the other side, which is also subject to discovery deadlines. *Rush v. Fieldcrest Cannon, Inc.*, 326 Ark. 849, 934 S.W.2d 512 (1996).

#### **Expert Witness.**

Case dismissed with prejudice where plaintiff refused to narrow her list of expert witnesses in violation of an order pursuant to subsection (4) of this rule. *Rush v. Fieldcrest Cannon, Inc.*, 326 Ark. 849, 934 S.W.2d 512 (1996).

#### **Inapplicable Order.**

An order which denied two motions for summary judgment, granted a motion to dismiss, and also dealt with a continuance motion and a motion in limine was not a motion under this rule. *Dodson v. Charter Behavioral Health Sys.*, 335 Ark. 96, 983 S.W.2d 98 (1998).

#### **Pretrial Order Controlling.**

Under this rule the pretrial order, when entered, controls the subsequent course of the action and, therefore, where an election of remedy issue was not contained in the trial court's pretrial order, the defendant could not raise the election of remedy issue at the trial even though the defendant had raised the issue as an affirmative defense in its answer. *Chappell Chevrolet, Inc. v. Strickland*, 4 Ark. App. 108, 628 S.W.2d 25 (1982).

**Cited:** *Shamblin v. Albright*, 278 Ark. 565, 647 S.W.2d 470 (1983); *Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985), cert. denied 475 U.S. 1036, 106 S. Ct. 1245, 89 L. Ed 2d 354 (1986).

## ARTICLE IV. PARTIES

### **Rule 17. Parties plaintiff and defendant.**

(a) *Real Party in Interest.* Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian (conservator), bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or the State or any officer thereof or any person authorized by statute to do so may sue in his own name without joining with him the party for whose benefit the action is being brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such

ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) *Infants or Incompetent Persons.* Whenever an infant or incompetent person has a guardian, the guardian must sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed guardian, he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent. No judgment shall be rendered against an infant or incompetent until after a defense by a guardian or guardian ad litem, who shall be appointed by the court upon application of any interested party and who shall promptly respond to the claim against the infant or incompetent as provided by these Rules. (Amended January 22, 2004.)

**Reporter's Notes to Rule 17:** 1. Rule 17 is a slightly modified version of FRCP 17. Basically this rule deletes various provisions of Sections (a) and (b) of FRCP 17 which have reference to actions brought by the United States or under a federal statute and to diversity of citizenship actions.

2. Section (a) is essentially the same as superseded *Ark. Stat. Ann.* 27-801 and 27-804 (Repl. 1962). It has generally been held that the real party in interest is the person who can discharge the claim upon which the action is brought and not necessarily the person who is ultimately entitled to the benefit of recovery. *House v. Long*, 244 Ark. 718, 426 S.W.2d 814 (1968). The federal courts have generally held that the effect of such rule is to require the action to be brought by the person who is entitled to enforce the right or claim. *Wright & Miller, Federal Practice And Procedure*, Sec. 1543. The list of persons in 17(a) is not meant to be conclusive and exhaustive and any person possessing the right to enforce a particular claim is deemed the real party in interest even though he is not specifically identified in the rule. Section (a) of this rule does not appreciably alter Arkansas law on real parties in interest.

3. While the Federal Rule is not clear on whether objection to a party as not being the real party in interest must be made by Rule 12(b) motion or by answer, *Ohmer Corp. v. Duncan Meter Corp.*, 8 F.R.D. 582 (D.C. Ill., 1948) and *Clark v. Chase National Bank*, 45 F. Supp. 820 (D.C. NY, 1942), Rule 12(b) does permit such objection without any question, although the objection can be raised under Rule 8(c).

4. Section (b) of the Federal Rule is omitted in its entirety from Rule 17 as it is not applicable to actions in state court.

5. Section (b) of this rule is basically the same as FRCP 17(c). Omitted from the Fed-

eral Rule are all those persons designated as representatives of an infant or incompetent except a guardian. The parenthetical reference to a conservator is made necessary by *Ark. Stat. Ann.*, Title 57, Ch. 7 (Supp. 1977). Rule 17 makes it mandatory that a guardian sue or defend as opposed to the permissive feature of FRCP 17.

6. Section (c) is not found in the Federal Rule. It is thought to be worthwhile as giving a measure of protection to prisoners who might not otherwise be protected. This section tracks superseded *Ark. Stat. Ann.* 27-833 (Repl. 1962). See also Rule 7.

**Addition to Reporter's Notes, 2004**

**Amendment:** Subdivision (c), which has no counterpart in Fed. R. Civ. P. 17, has been deleted. Borrowed from a superseded statute that was part of the Civil Code of 1868, the subdivision stated that "[n]o judgment shall be rendered against a prisoner in the penitentiary until after a defense made for him by his attorney, or, if there is none, by a person appointed by the court to defend for him." Because of the elimination of subdivision (c), prisoners no longer receive special treatment with respect to default judgments. See *Zardin v. Terry*, 275 Ark. 452, 631 S.W.2d 285 (1982). However, the safeguards in Rule 4(d)(4) and Rule 12(a)(1) afford incarcerated persons notice, the opportunity to be heard, and the opportunity to obtain counsel. Rule 12(a)(1), as amended in 2004, provides that incarcerated persons have 60 days after service of process in which to file an answer, compared to the 20-day period for residents of the state. This differential reflects the role of prison employees in delivering the summons and complaint, as well as the likelihood that an incarcerated person will need more time than other defendants to arrange for legal representation.



## CASE NOTES

## ANALYSIS

Applicability.  
Appointment of council.  
Estate proceedings.  
Minors.  
Real party in interest.  
Reasonable time.  
Timely objection.  
Waiver.  
Ward.

**Applicability.**

Although plaintiff lacked standing to sue when she filed the original complaint because she had not yet been appointed the administrator of decedent's estate and she was not the sole heir, upon being appointed administrator six days later, she was deemed to be a new party when she filed the amended complaint; further, the filing of an amended complaint by a new party constituted the commencement of a new suit, initiated prior to the expiration of the statute of limitations period and, thus, there was no need for the suit to "relate back" to the original complaint filed under this rule. *Hackelton v. Malloy*, 364 Ark. 469, 221 S.W.3d 353 (2006).

**Appointment of Council.**

Trial court properly granted summary judgment for Supreme Court Committee on Professional Conduct against disbarred appellant attorney despite denying attorney's motion for appointed counsel pursuant to subsection (c) of this rule; the attorney was not prejudiced in any way in presenting his case by not having appointed counsel and he failed in his attempt to show the appellate court why disbarment was not appropriate. *Todd v. Ligon*, 356 Ark. 187, 148 S.W.3d 229 (2004).

Finding against appellants in an action concerning property transfers was proper pursuant to subsection (c) of this rule because no motion requesting removal of an appointed attorney was included in the record or in a motion or judgment in an abstract. *Middleton v. Lockhart*, 364 Ark. 32, 216 S.W.3d 98 (2005).

**Estate Proceedings.**

There is no requirement of notice of estate proceedings to parties who had no direct interest in decedents' estates, and those parties did not have standing to enter into the estate proceeding or to raise the issue whether decedents' son, who had been convicted of manslaughter in their death, could inherit from their estate. *Kimrey v. Booth*, 285 Ark. 18, 685 S.W.2d 139 (1985).

A personal representative who was timely substituted as the plaintiff in an estate's suit for an injunction had a property interest,

giving her standing to sue as the real party in interest. *White v. Welsh*, 327 Ark. 465, 939 S.W.2d 299 (1997).

As a guardian's substitution for the promisee as the proper party to an action on a promissory note related back to the initial filing of the suit, the promisor's claim that the suit was time-barred was properly rejected. *Thurman v. Baker*, 76 Ark. App. 403, 65 S.W.3d 478 (2002).

Where an original wrongful death complaint was a nullity because it was brought by the decedent's heirs rather than the personal representative, as required by the wrongful-death statute, § 16-62-102, a subsequent amended complaint filed by the administrator which attempted to bring the estate in as a party was a new suit filed after the statute of limitations period and, therefore, could not relate back under Ark. R. Civ. P. 15 and was barred by statute of limitations. *Rhuland v. Fahr*, 356 Ark. 382, 155 S.W.3d 2 (2004).

Where a wrongful death complaint was a nullity because it was not brought by all of the heirs at law, Ark. R. Civ. P. 15 and this rule did not apply to allow the addition of the half-brother as a party plaintiff after the limitations period had run. *Andrews v. Air Evac EMS, Inc.*, 86 Ark. App. 161, 170 S.W.3d 303 (2004).

Term "heirs at law", as used in § 16-62-102(b), means "beneficiaries", as used in § 16-62-102(d), and a motion to dismiss a wrongful death action was properly granted because two sisters were not named as parties; the doctrine of relation back under Ark. R. Civ. P. 15 did not help because the original complaint was a nullity. *Brewer v. Poole*, 362 Ark. 1, 207 S.W.3d 458 (2005).

Regarding a father's motion to intervene in a mother's wrongful death and survivor action for the sole purpose of seeking to stay the proceedings pending a determination from the probate court as to who would be named administrator of decedent son's estate, this rule had no application because the action was not filed in accordance with § 16-62-102(b) or § 16-62-101 and the original complaint thus was a nullity. When the original complaint was a nullity, this rule was inapplicable because the original complaint never existed and, therefore, there was no pleading to amend. *Farrow v. Sammis*, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 90429 (E.D. Ark. Dec. 7, 2007).

**Minors.**

Where the only impediment to suit by a minor was one of capacity, and where the interests of the minor were sufficiently protected, the court could enter judgment in favor of the minor child. *Cowden v. Ramsay*,

154 Bankr. 531 (Bankr. E.D. Ark. 1993).

### **Real Party in Interest.**

Where an individual plaintiff trustee brought an action against the defendant purchasers for breach of a real estate sales contract, the trial court did not err when it allowed the addition of a bank as a new party plaintiff after the original plaintiff had rested his case, since the bank held the title to the real estate as a cotrustee and was, therefore, the real party in interest. *McMaster v. McIlroy Bank*, 9 Ark. App. 124, 654 S.W.2d 591 (1983).

The chancellor had no authority to grant damages to the plaintiff as trustee for her son and grandson, for damage done to a mulberry tree where at the time the tree was damaged she did not own the property on which the tree was located, having previously transferred the property to her son and grandson, because in Arkansas an express trust can never be implied or arise by operation of law and can be proved only by some instrument in writing signed by the party enabled by law to declare the trust. *Welch v. Cooper*, 11 Ark. App. 263, 670 S.W.2d 454 (1984).

Only a real party in interest may bring a cause of action; that party is generally considered that person who can discharge the claim on which suit is brought, and not necessarily the person ultimately entitled to the benefit of recovery. *Bar S Bar W. Store v. Martin*, 295 Ark. 176, 747 S.W.2d 113 (1988).

The decedent's three children, who were his only immediate heirs and the persons who were entitled to inherit his estate, were the real parties in interest in negligence suit against insurance company and its agent. *Gladden v. Bucy*, 299 Ark. 523, 772 S.W.2d 612 (1989).

The real party in interest is generally considered to be the person or corporation who can discharge the claim upon which the allegation is based, and is not necessarily the person ultimately entitled to the benefit of any recovery; the assignee of a properly assigned account is the entity who can discharge the claim, and the real party in interest. *Smith v. National Cashflow Sys.*, 309 Ark. 101, 827 S.W.2d 146 (1992).

When an insurance company has only partially reimbursed an insured for his loss, the insured is the real party in interest; however, when the insured has been paid in full, the insurer is the real party in interest. *Argenia, Inc. v. Blasingame*, 51 Ark. App. 70, 910 S.W.2d 225 (1995).

Where bank ratified the actions of the seller in declaring the purchase contract to be forfeited and further ratified the act of the seller in beginning an unlawful detainer suit, the case fell directly within the purview of this rule, and thus the trial court did not err in finding that the bank's ratification cured any

alleged defect in the parties. *Harvill v. Bevans*, 52 Ark. App. 57, 914 S.W.2d 784 (1996).

A change in procedural law now allows a substitution of the real party in interest upon a transfer of interest. *Lott v. Circuit Court*, 328 Ark. 596, 945 S.W.2d 922 (1997).

Where the insured has a deductible interest, the insured is the real party in interest and the action must be brought in his name for his own benefit, but an insured stands as a trustee to the insurer as to any amount recovered. *TB of Blytheville, Inc. v. Little Rock Sign & Emblem, Inc.*, 328 Ark. 688, 946 S.W.2d 930 (1997).

In an action pertaining to an easement, a developer was the real party in interest where (1) it was actually a party to the easement agreement, although the easement ran in favor of a city, (2) pursuant to contract, the developer provided the compensation for the easement and relied on the easement in installing sewer lines, and (3) the existence of the easement benefitted the developer as much as it did the city. *Forrest Constr., Inc. v. Milam*, 70 Ark. App. 466, 20 S.W.3d 440 (2000), *aff'd in part and rev'd in part* 345 Ark. 1, 43 S.W.3d 140 (2001).

Dismissal of a wrongful-death action against a doctor and a hospital was proper because the savings statute under § 16-62-102(b) did not apply since the case was improperly refiled by a mother and father as heirs at law when a personal representative had been appointed; the personal representative should have been substituted as the real party in interest prior to dismissal. *Recinos v. Zelnk*, 369 Ark. 7, 250 S.W.3d 221 (2007).

Even though a writ of execution named an original creditor instead of an assignee, a trial court did not err in finding that the assignee's status as the real party in interest related back to the issuance of the writ because the assignee's efforts arose out of the same conduct, transaction, or occurrence that existed when the original writ of execution was issued. *Looney v. Raby*, 100 Ark. App. 326, 268 S.W.3d 345 (2007).

Subsequent ratification of the shareholder's lender-liability suit did not cure the standing deficiency in the Bankruptcy Code; a trustee, and only a trustee, had standing to prosecute causes of action that were property of the Chapter 7 bankruptcy estate, and the determination of the real party in interest was not difficult for the shareholders, nor was there an understandable or excusable mistake by the shareholders in this regard. *Bibbs v. Cmty. Bank of Benton*, 375 Ark. 150, 289 S.W.3d 393 (2008).

Because parties' divorce-decree-settlement agreement was in essence a contract between an ex-husband and an ex-wife, to which the parties' adult children were third-party bene-



ficiaries, the ex-wife was the proper party under subsection (a) of this rule to bring a contempt action to enforce a provision in the decree despite such enforcement being of benefit to the children. *Chambers v. Ratcliff*, 2009 Ark. App. 377, 309 S.W.3d 224 (2009).

Former wife had standing to bring suit against a former brother-in-law to have a constructive trust placed on certain property because the wife was the real party in interest; a divorce decree granted the wife possession of the marital home, and the brother of the husband and brother-in-law testified that he held no claim to the property and considered it the wife's property. *Higgins v. Higgins*, 2010 Ark. App. 71, — S.W.3d —, 2010 Ark. App. LEXIS 64 (Jan. 20, 2010).

#### **Reasonable Time.**

What constitutes a reasonable time under this rule is a matter of judicial discretion and will depend upon the facts of each case. *Insurance from CNA v. Keene Corp.*, 310 Ark. 605, 839 S.W.2d 199 (1992).

#### **Timely Objection.**

Grantor of deed was a third party beneficiary of the option to repurchase agreement and he was a proper party to bring suit on that agreement; if third party should have been a party because the option was in his name, this point was waived by the grantee's failure to raise the issue before the trial started. *Monaghan v. Davis*, 16 Ark. App. 258, 700 S.W.2d 375 (1985).

Where the issue of standing is pleaded, but the issue is not brought to the trial court's attention and the trial court does not rule on the issue, the failure to do so constitutes a waiver of the issue and will not be considered

on appeal. *Peoples Bank & Trust Co. v. Wallace*, 290 Ark. 589, 721 S.W.2d 659 (1986).

#### **Waiver.**

Since this rule is designed for the protection of the defendant, it may be waived by him either by his action or inaction. *Gladden v. Bucy*, 299 Ark. 523, 772 S.W.2d 612 (1989).

#### **Ward.**

Because the acts of attorneys raised questions under Ark. R. Prof'l Conduct 1.7, 1.14, and 1.16, the matter was referred to the Supreme Court Committee on Professional Conduct to determine whether any disciplinary action was warranted; following their disqualification and the appointment of a guardian, the attorneys persisted in filing legal documents on behalf of a ward. *Kuelbs v. Hill*, 2011 Ark. App. 628, — S.W.3d —, 2011 Ark. App. LEXIS 674 (Oct. 26, 2011).

**Cited:** *Washington v. State*, 276 Ark. 140, 633 S.W.2d 24 (1982); *Bankston v. McKenzie*, 287 Ark. 350, 698 S.W.2d 799 (1985); *Franklin Collier Farms v. Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986); *Carroll County v. Eureka Springs Sch. Dist. # 21*, 292 Ark. 151, 729 S.W.2d 1 (1987); *Bruce v. Dillahunt*, 293 Ark. 479, 739 S.W.2d 522 (1987); *Arnold & Arnold v. Williams*, 315 Ark. 632, 870 S.W.2d 365, cert. denied 513 U.S. 990, 115 S. Ct. 489, 130 L. Ed. 2d 400 (1994); *Bray v. State*, 322 Ark. 178, 908 S.W.2d 88 (1995); *Morrison v. Jennings*, 328 Ark. 278, 943 S.W.2d 559 (1997); *Murrell v. Springdale Mem. Hosp.*, 330 Ark. 121, 952 S.W.2d 153 (1997); *Forrest Constr., Inc. v. Milam*, 345 Ark. 1, 43 S.W.3d 140 (2001); *Estate of Byrd v. Tiner*, 81 Ark. App. 366, 101 S.W.3d 887 (2003).

### **Rule 18. Joinder of claims and remedies.**

(a) *Joinder of Claims.* A party asserting a claim for relief as an original claim, counterclaim, cross-claim, or third-party claim may join, either as independent or alternate claims, as many claims, legal or equitable, as the party may have against an opposing party, provided that nothing herein shall affect the obligation of a party under Rule 13(a).

#### **(b) Severance and Transfer.**

(1) Any claim against a party may be severed and proceeded with separately.

(2) If the court determines that the action, or a particular claim, should in the interest of justice or judicial economy be heard in another division, the court may transfer it to that division.

(c) *Joinder of Remedies; Fraudulent Conveyances.* Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him,

without first having obtained judgment establishing the claim for money. (Amended May 24, 2001, effective July 1, 2001.)

**Reporter's Notes to Rule 18:** 1. Rule 18 is a modified version of FRCP 18. Its effect is to substantially change Arkansas procedural rules. Under superseded *Ark. Stat. Ann.* 27-1301 (Repl. 1962), joinder of claims was limited to those classes of actions specifically enumerated; however, under Rule 18, joinder of all claims is permitted, regardless of whether they are equitable or legal in nature.

2. Section (b) permits the trial court to grant a severance of joined claims or to order a transfer of a particular claim between law and chancery courts so as to do justice and facilitate the disposition of an action. This provision confers broad discretion upon the trial court in granting or denying a severance or transfer.

3. As under the Federal Rule, the joinder of claims under this rule is permissive and not mandatory. *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (C.C.A. 9th, 1969); *McConnell v. Travelers Indem. Co.*, 346 F.219 (C.C.A. 5th, 1965). Also, where the joinder of claims will result in prejudice or inconvenience to the court or the parties, the court may order separate trials under Rule 42(b).

4. Section 18(c) is identical to FRCP 18(b). The specific remedy mentioned in FRCP 18(b) is illustrative only and does not limit the application of the rule to that particular remedy. *Wright & Miller, Federal Practice And Procedure*, Section 1591.

**Addition to Reporter's Notes, 2001 Amendment:** Subdivisions (a) and (b) have been amended in light of Constitutional Amendment 80, which established the circuit courts as the "trial courts of original jurisdiction" in the state and abolished the separate chancery and probate courts.

New language in subdivision (a) authorizes joinder of claims whether "legal or equitable," as does the corresponding federal rule. Amendment 80's merger of law and equity removed any barriers to the joinder of legal and equitable claims in a single action. *See*

*Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959) ("the liberal joinder provisions of the Federal Rules ... allow legal and equitable causes to be brought and resolved in one civil action").

Previously, subdivision (b) stated that a trial court could "make appropriate orders affecting severance of claims and may transfer claims between courts of law and equity on appropriate jurisdictional grounds." This provision has been deleted because of Amendment 80 and replaced with two paragraphs.

Under new paragraph (1), which tracks the language of Rule 21, any claim "may be severed and proceeded with separately." New paragraph (2) permits the transfer of a particular claim, or the entire action, from one division of the circuit court to another "in the interest of justice or judicial economy." Administrative Order No. 14, adopted by the Supreme Court pursuant to Amendment 80, requires that the circuit judges of each judicial circuit establish five divisions in each county of the circuit: criminal, civil, juvenile, probate, and domestic relations. Creation of these divisions has no jurisdictional significance. *See* 2001 Reporter's Note accompanying Rule 2.

In the system contemplated by Amendment 80 and Administrative Order No. 14, severance should be employed sparingly and only when multiple claims in a single action are wholly unrelated. If the claims arise from the same transaction or occurrence, a series of transactions or occurrences, or a common nucleus of operative fact, they should not be severed and then transferred to another division of the circuit court for disposition. Severance and transfer in this situation would be at odds with the purpose of Amendment 80, which was designed to eliminate the jurisdictional lines that had forced cases to be divided artificially and litigated separately in different courts. *See, e.g., Hilburn v. First State Bank*, 259 Ark. 569, 535 S.W.2d 810 (1976).

## RESEARCH REFERENCES

**Ark. L. Notes.** Brill, Law and Equity in Arkansas: Will Liles v. Liles Lead Us Out of the Morass?, 1987 Ark. L. Notes 1.

**Ark. L. Rev.** Brill, The Election of Remedies Doctrine in Arkansas, 37 Ark. L. Rev. 385.

**U. Ark. Little Rock L.J.** Spears, Comment: The 1979 Civil Procedure Rules, 2 U. Ark. Little Rock L.J. 89.

Heller, Survey of Civil Procedure, 3 U. Ark. Little Rock L.J. 172.



## CASE NOTES

## ANALYSIS

Joinder allowed.  
Joinder not mandatory.  
Severance.

**Joinder Allowed.**

Contract and tort causes of action may be joined when both seek the same relief and the evidence to support recovery on one theory partially supports the other. *Lemon v. Laws*, 313 Ark. 11, 852 S.W.2d 127 (1993).

If a party has two or more remedies that are concurrent and consistent, he may pursue all of them. *Lemon v. Laws*, 313 Ark. 11, 852 S.W.2d 127 (1993).

A client's claims against his attorney, alleging negligence and breach of contract for inadequate representation, could be joined, since both causes of action sought the same relief and the evidence to support recovery on one theory partially supported the other. *Lemon v. Laws*, 313 Ark. 11, 852 S.W.2d 127 (1993).

**Joinder Not Mandatory.**

Where successor lessors filed action in chancery court to terminate lease and collect damages from assignor of lease and then filed suit in circuit court to recover damages for failure to comply with and perform the covenants in the lease, the circuit court erred in dismissing the suit before it since the plaintiff

lessors were not mandatorily required to join the suits in chancery court under this rule because it states that the party may join its claims against the opposing party, and since it was not a compulsory counterclaim under Rule 13 because it sought damages from the assignee as a result of the failure to perform its required duties under the lease. *Baltz v. Security Bank*, 272 Ark. 302, 613 S.W.2d 833 (1981).

**Severance.**

Under this rule, the trial court may sever causes at its discretion, but may not dismiss them. *Carpetland of N.W. Ark., Inc. v. Howard*, 304 Ark. 420, 803 S.W.2d 512 (1991).

**Cited:** *Dalrymple v. Simmons First Nat'l Bank*, 296 Ark. 534, 758 S.W.2d 5 (1988); *Dwiggins v. Propst Helicopters, Inc.*, 310 Ark. 62, 832 S.W.2d 840 (1992); *Westark Specialties, Inc. v. Stouffer Family Ltd. Partnership*, 310 Ark. 225, 836 S.W.2d 354 (1992); *Prairie Implement Co. v. Circuit Court*, 311 Ark. 200, 844 S.W.2d 299 (1992); *Hedlund v. Hendrix*, 39 Ark. App. 58, 837 S.W.2d 488 (1992); *In re Implementation of Amendment 80: Amendments to Rules of Civ. Procedure & Inferior Court Rules*, — Ark. —, — S.W.3d —, 2001 Ark. LEXIS 707 (May 24, 2001); *McDonald Mobile Homes, Inc. v. BankAmerica Hous. Servs.*, 93 Ark. App. 256, 218 S.W.3d 376 (2005).

**Rule 19. Joinder of persons needed for just adjudication.**

(a) *Persons to Be Joined If Feasible.* A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or, (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter, impair or impede his ability to protect that interest, or, (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been joined, the court shall order that he be made a party. If he should join as a plaintiff, but refuses to do so, he may be made a defendant; or, in a proper case, an involuntary plaintiff.

(b) *Determination by Court Whenever Joinder Not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a

judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Exception of Class Actions.* This rule is subject to the provisions of Rule 23.

**Reporter's Notes to Rule 19:** 1. Rule 19 deals with compulsory joinder of parties. With the exception of the omission of the last sentence of FRCP 19(a), this rule is the same as its federal counterpart. It is believed that the omitted sentence dealing with venue is unnecessary under state practice. Section 19(a) requires the person joined to be subject to service of process; therefore, the fact that such person could otherwise object to venue is of no consequence where existing defendants are properly before the court. This is the effect of *Ark. Stat. Ann.* 27-615 (Repl. 1962) which remains unaffected by these rules.

2. Section 19(a) concerns itself with the question of who is a "necessary" party while 19(b) deals with whether a necessary party is an indispensable party. *Wright v. First National Bank*, 483 F.2d 73 (C.C.A. 10th, 1973); *Charon v. Meaux*, 60 F.R.D. 107 (D.C. N.Y., 1973). The policy behind FRCP 19 is to avoid dismissal of actions where possible and when it is possible to join an absent party, dismissal is not proper as such party will be ordered to enter the action as a defendant or plaintiff.

3. Superseded *Ark. Stat. Ann.* 27-808

(Repl. 1962) provided that parties who were united in interest must be joined as plaintiffs or defendants. Superseded *Ark. Stat. Ann.* 27-814 (Repl. 1962) provided that where a controversy could not be resolved without prejudice to others or by preserving their rights, then the other parties had to be brought in as parties. This rule, following FRCP 19, abolishes the rigid distinctions between necessary and indispensable parties and instead places the emphasis upon the practical effects a judgment might have upon an absent party.

4. Section (c) of FRCP 19 is omitted from this rule. If there are questions as to defects in parties plaintiff, it is the Committee's view that this is more appropriately an issue which should be raised by a defendant under Rule 12(b).

5. The exception of class actions in 19(c) is for obvious reasons. Rule 23 suggests that absent class members can never be considered indispensable and it is doubtful that they can be considered necessary parties. *Watson v. Branch County Bank*, 380 F. Supp. 945 (D.C. Mich., 1974).

## RESEARCH REFERENCES

**Ark. L. Notes.** Matthews, Procedural Considerations in Bringing Suit Against a General Partnership in Arkansas, 1989 Ark. L. Notes 57.

## CASE NOTES

### ANALYSIS

In general.  
Action against corporation.  
Application.  
Attorney's fees.  
Dismissal.  
Indispensible parties.  
Municipal corporations.  
Necessary parties.

### In General.

Because joinder is proper only as to a person subject to service of process, then service of process must be made for joinder to be proper. *Taylor v. Zanone Props.*, 342 Ark. 465, 30 S.W.3d 74 (2000).

Committee to establish a municipal fire department which circulated a petition to place an ordinance on the city's general elec-

tion ballot, but which was not joined by a local voter and, further, did not purport to represent local voters, lacked standing to intervene or the right to be joined in a case concerning the ballot title and initiative petition, or rights which, pursuant to Ark. Const., Amend. VII, were reserved to the local voters. *Comm. to Establish Sherwood Fire Dep't v. Hillman*, 353 Ark. 501, 109 S.W.3d 641 (2003).

### Action Against Corporation.

It is axiomatic that a shareholder is not a proper party, much less a necessary or indispensable party, in a suit to foreclose a corporate mortgage; the corporation is the proper party to be sued, not its shareholders or their trustee; accordingly, the trial court did not abuse its discretion in refusing to grant a continuance on the basis that the trustee of minority shareholders was an indispensable



party. *Arkansas Iron & Metal Co. v. First Nat'l Bank*, 16 Ark. App. 245, 701 S.W.2d 380 (1985).

#### **Application.**

Writ of certiorari was proper, because the court erred in denying the husband's motion to quash several subpoenas concerning his medical records, when the husband was not a party to the underlying custody dispute, the husband did nothing to bring his medical condition into issue, and the husband's mental health was examined through other admissible evidence; neither party by intervention or by joinder applied. *McKenzie v. Pierce*, 2012 Ark. 190, — S.W.3d —, 2012 Ark. LEXIS 212 (May 3, 2012).

#### **Attorney's Fees.**

In a quiet title case where a dismissal was entered for failing to join indispensable parties, a trial court erred by awarding attorney's fees in favor of a neighbor based on an allegation of a complete absence of a justiciable issue. However, since an occupant would not have been an indispensable party and no evidence was presented to establish the merit of the claim against the occupant, a trial court was free to reconsider fees for the occupant on remand. *Croney v. Lane*, 99 Ark. App. 346, 260 S.W.3d 316 (2007).

#### **Dismissal.**

In a quiet title action, a dismissal for failing to join indispensable parties under this rule was erroneous because there was nothing showing that the other people who lived on the road could not have been joined. Even if they could not have been, a dismissal was not warranted since the purchasers would have had no other remedy. *Croney v. Lane*, 99 Ark. App. 346, 260 S.W.3d 316 (2007).

#### **Indispensible Parties.**

In a mother-in-law's conversion case against her former daughter-in-law, the son—who misappropriated all of his mother's funds and placed some in his former wife's account—was not an indispensable party under subsection (b) of this rule because he was completely available if the daughter-in-law wanted him joined in the litigation and, in fact, testified at trial. *Volgelgesang v. Vogelgesang*, 2010 Ark. App. 178, — S.W.3d —, 2010 Ark. App. LEXIS 210 (Feb. 24, 2010).

In an action alleging that the tobacco company breached the terms of the Master Settlement Agreement, the tobacco company did not amend its notice of appeal to include an appeal from the denial of its motion to amend or alter the judgment. Thus, its motion to amend or alter the judgment, which included its request to join indispensable parties, could not be addressed on appeal. *Vibo Corp. v. State ex rel. McDaniel*, 2011 Ark. 124, — S.W.3d —, 2011 Ark. LEXIS 122 (Mar. 31, 2011).

In an action alleging that the tobacco company breached the terms of the Master Settlement Agreement, because the tobacco company raised the issue of the circuit court's lack of authority over the Settling States other than Arkansas, which equated to lack of personal jurisdiction, and because this rule granted authority to the courts to bring in indispensable parties on their own motion, the order regarding payment to the other Settling States was reversed; the other Settling States appeared to be indispensable parties for allocation of the escrowed funds and the matter was remanded to the circuit court to weigh joinder of the other Settling States as indispensable parties under this rule so that complete relief could be afforded. *Vibo Corp. v. State ex rel. McDaniel*, 2011 Ark. 124, — S.W.3d —, 2011 Ark. LEXIS 122 (Mar. 31, 2011).

#### **Municipal Corporations.**

Where plaintiffs filed a complaint which sought to prevent annexation of territory by a city, and failed to serve notice on the city's agents, as required by § 14-40-601, the trial court should have directed that the city be made a party by service of summons on the city's agents, pursuant to subsection (a) of this rule, rather than dismissing the complaint. *Britton v. City of Conway*, 36 Ark. App. 232, 821 S.W.2d 65 (1991).

#### **Necessary Parties.**

There is nothing in this rule which compels the joinder of the division of social services (abolished — see § 25-10-101 et seq.) in all adoption proceedings, since the relief sought in an adoption proceeding is the adoption itself and by terms of § 9-9-201 et seq. such relief may be granted whether the division is a party or not; thus the department is not a necessary party under subdivision (a)(1) of this rule, and as to subdivision (a)(2) of this rule, social services does not have such an interest in the proceeding that it must be joined under this section since § 9-9-201 et seq. does not mandate that social services be joined in an adoption proceeding. *Cox v. Stayton*, 273 Ark. 298, 619 S.W.2d 617 (1981).

Beneficiaries of will were necessary parties to action against estate. *Moore v. Moore*, 21 Ark. App. 165, 731 S.W.2d 215 (1987).

In the declaratory judgment action, complete relief could not be afforded without making the lifetime beneficiary and the remainder beneficiaries parties to the action; consequently, chancellor erred in exercising jurisdiction because the guardian and the remaindermen could later raise identical issues, and thus, there would be no termination of the uncertainty or controversy. *Yamauchi v. Sovran Bank/Central S.*, 309 Ark. 532, 832 S.W.2d 241 (1992).

In action against dentist for unlawful prac-

tice of medicine and against hospital for aiding and abetting dentist, Dental Board should have been joined as a necessary party, since it is the regulatory agency vested with the authority to decide what constitutes the practice of dentistry. *Arkansas State Medical Bd. v. Bolding*, 324 Ark. 238, 920 S.W.2d 825 (1996).

In order to identify and determine what was marital property, the trial court had authority to require that the landlords of a store operated by the husband be made parties to a divorce action and that they be enjoined from selling the inventory of the store in order to recover rent due from the husband. *Arnold v. Spears*, 343 Ark. 517, 36 S.W.3d 346 (2001).

In the store's action to recover on a charge account, contrary to the store's argument, the customer's daughter who purportedly made the charges was not an indispensable party; the daughter's conduct was not relevant to the determination of the customer's obligations under the charge card agreement and the customer's declaratory action for a determination of whether she owed any amount of the alleged indebtedness on charges for which she did not sign charge slips was improperly dismissed under ARCP 12(b)(7). *Wilmans v. Sears, Roebuck & Co.*, 355 Ark. 668, 144 S.W.3d 245 (2004).

Circuit court erred in dismissing taxpayers' case for failure to join all interested parties where all licensed check-cashers in Arkansas would be members of the class and parties to the illegal exaction suit; Ark. Const., Art. 16, § 13 made each taxpayer a party to the lawsuit as a matter of law. *McGhee v. Ark. State Bd. of Collection Agencies*, 360 Ark. 363, 201 S.W.3d 375 (2005).

Although the secretary of state and the committee were indispensable parties under § 7-7-401 and this rule for pre-election chal-

lenges, they were not required parties in the present post-election challenge by a candidate for a district office, such as the state senate. *Willis v. Crumbly*, 368 Ark. 5, 242 S.W.3d 600 (2006).

In a case alleging an illegal exaction relating to a settlement agreement, an argument relating to joinder was not heard on appeal since it was moot; it was properly determined that there was no improper expenditure of money. Therefore, it did not matter whether a certain party was necessary or not. *Stromwall v. Van Hoose*, 371 Ark. 267, 265 S.W.3d 93 (2007).

Company was not a necessary party to the foreclosure action, because the lender on the deed of trust was the beneficiary and it received the payments on the debt, and the company held no authority to act as an agent and held no property interest in the mortgaged land. *Mortgage Elec. Registration Sys. v. Southwest Homes of Ark.*, 2009 Ark. 152, 301 S.W.3d 1 (2009).

**Cited:** *Wasp Oil, Inc. v. Arkansas Oil & Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983); *Loyd v. Keathley*, 284 Ark. 391, 682 S.W.2d 739 (1985); *Jernigan v. Cash*, 298 Ark. 347, 767 S.W.2d 517 (1989); *State ex rel. Robinson v. Craighead County Bd. of Election Comm'rs*, 300 Ark. 405, 779 S.W.2d 169 (1989); *Wiederkehr Wine Cellars, Inc. v. City Nat'l Bank*, 300 Ark. 537, 780 S.W.2d 551 (1989); *Halliburton Co. v. E.H. Owen Family Trust*, 28 Ark. App. 314, 773 S.W.2d 453 (1989); *Stair v. Phillips*, 315 Ark. 429, 867 S.W.2d 453 (1993); *Maloy v. Stuttgart Mem. Hosp.*, 316 Ark. 447, 872 S.W.2d 401 (1994); *Neal v. Wilson*, 321 Ark. 70, 900 S.W.2d 177 (1995); *Morgan v. Turner*, 2010 Ark. 245, — S.W.3d —, 2010 Ark. LEXIS 282 (May 20, 2010).

## Rule 20. Permissive joinder of parties.

(a) *Permissive Joinder.* All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) *Separate Trials.* The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of



a party against whom he asserts no claim and who asserts no claim against him and may order separate trials or make other orders to prevent delay or prejudice.

**Reporter's Notes to Rule 20:** 1. Rule 20 basically tracks prior Arkansas law. Section 20(a) is identical to superseded *Ark. Stat. Ann.* 27-806 (Repl. 1962) which was taken from FRCP 20. Omitted from this rule is the reference in the Federal Rule to admiralty

actions; otherwise, the two sections are identical.

2. Section 20(b) is identical to superseded *Ark. Stat. Ann.* 27-807 (Repl. 1962) and FRCP 20(b). Overall, Rule 20 works no changes in Arkansas practice and procedure.

## RESEARCH REFERENCES

**Ark. L. Rev. Note,** Davidson v. Lonoke Production Credit Association: A Federal Court Explores Mutuality of Collateral Estoppel in Arkansas, 37 *Ark. L. Rev.* 486.

**U. Ark. Little Rock L.J.** Spears, Comment: The 1979 Civil Procedure Rules, 2 *U. Ark. Little Rock L.J.* 89.

## CASE NOTES

### ANALYSIS

Joinder proper.  
Separate trials.

### Joinder Proper.

In a contract action to recover the value of work performed, permissive joinder of a contractor and subcontractor was proper where they both were involved in series of construction projects with defendant and there were common questions of law and of fact. *Dooley v. Cecil Edwards Constr. Co.*, 13 *Ark. App.* 170, 681 S.W.2d 399 (1984).

### Separate Trials.

Severance should have been granted in case alleging several civil conspiracies involving several defendants. *Pennington v. Harvest Foods, Inc.*, 326 *Ark.* 704, 934 S.W.2d 485 (1996).

**Cited:** *Wasp Oil, Inc. v. Arkansas Oil & Gas, Inc.*, 280 *Ark.* 420, 658 S.W.2d 397 (1983); *State, Second Injury Fund v. Mid-State Constr. Co.*, 16 *Ark. App.* 169, 698 S.W.2d 804 (1985); *Wiederkehr Wine Cellars, Inc. v. City Nat'l Bank*, 300 *Ark.* 537, 780 S.W.2d 551 (1989).

## Rule 21. Misjoinder and non-joinder of parties.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action and upon such terms as are just. Any claim against a party may be severed and proceeded with separately.

**Reporter's Notes to Rule 21:** 1. Rule 21 is identical to FRCP 21. There was no comparable provision under prior Arkansas law and a defect in parties was generally raised by demurrer where the defect appeared on the face of the complaint and by answer where the defect was not so evident. Under prior law, a defect in parties was ground for dismissal of the cause whereas under this rule, the cause is not dismissed, but rather the defect is simply cured by adding or striking parties

upon motion of a party or by the court on its own motion.

2. Rule 21 should have no appreciable effect on Arkansas law. A defect in parties was non-fatal under prior Arkansas law in that it could be waived. *Province v. Dean*, 223 *Ark.* 508, 266 S.W.2d 812 (1954). A defect in parties remains non-fatal under this rule. This rule does, however, confer upon the trial court additional discretion to cure a misjoinder or non-joinder on its own motion.

## CASE NOTES

### Parties Added by Judge.

In order to identify and determine what was marital property, the trial court had authority to require that the landlords of a

store operated by the husband be made parties to a divorce action and that they be enjoined from selling the inventory of the store in order to recover rent due from the

husband. *Arnold v. Spears*, 343 Ark. 517, 36 S.W.3d 346 (2001).

## Rule 22. Interpleader.

(a) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical, but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim, third-party complaint or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(b) A plaintiff who disclaims any interest in the money or property that is the subject of the interpleader action shall, upon depositing the money or property in the registry of the court, be discharged from all liability. The court may make an award of reasonable litigation expenses, including attorneys' fees, to such a plaintiff. (Amended November 8, 1993, effective January 1, 1994; amended May 24, 2001, effective July 1, 2001.)

**Reporter's Notes to Rule 22:** 1. Rule 22 is identical to FRCP 22 and does alter prior Arkansas law. Superseded *Ark. Stat. Ann.* 27-816 (Repl. 1962), et seq. set forth prior interpleader procedure and it is this procedure, rather than the substance of prior law which is changed by this rule.

2. Previously, upon depositing money or property into the registry of the court, a plaintiff was released from all further liability and was awarded his costs and a reasonable attorney's fee. Under this rule, as under FRCP 22, the allowance of costs and fees rests in the sound discretion of the trial court. *Gulf Oil Corporation v. Oliver*, 412 F.2d 938 (C.C.A. 5th, 1969).

3. Prior Arkansas law did not expressly require a deposit of the disputed funds or property into the registry of the court, but it was clear that the plaintiff could not be discharged from further liability or awarded costs and fees until he had deposited the money or property. Under this and the Federal Rule, a deposit is not a jurisdictional prerequisite, but may be required by the court in its discretion so as to safeguard the property and insure the satisfaction of a judgment. *Emmco Ins. Co. v. Frankford Trust Co.*, 352 F. Supp. 130 (D.C. Pa., 1972). Compare, however, *Miller & Miller Auctioneers, Inc. v. Murphy Industries, Inc.*, 472 F.2d 893 (C.C.A. 10th, 1973).

4. Prior Arkansas law required interpleader actions to be brought in chancery court. The decisions under FRCP 22 make it clear that an interpleader is equitable in

nature. *United Benefit Life Ins. Co. v. Leech*, 326 F. Supp. 598 (D.C. Pa., 1971); *Home Ins. Co. v. Moore*, 499 F.2d 1202 (C.C.A. 8th, 1974). Under this rule, however, interpleader actions are not limited to courts of equity.

**Addition to Reporter's Notes, 1993 Amendment:** Rule 22 is amended by adding new subdivision (b), which provides that a disinterested stakeholder — i.e., a plaintiff who disclaims any interest in the money or property — is to be discharged from liability upon depositing the money or property in the registry of the court. Further, such a disinterested stakeholder may be awarded attorneys' fees and other litigation expenses, in the discretion of the court. Subdivision (b) is based on a statute that was superseded when Rule 22 was adopted; however, the revised rule departs from the statute by making a fee award discretionary rather than mandatory. See *Ark. Stat. Ann.* § 27-816 (Repl. 1962). Absent express authorization, a fee award is impermissible in an interpleader action, even though the stakeholder is disinterested and brings about resolution of the conflicting claims by initiating the action. See, e.g., *Saunders v. Kleier*, 296 Ark. 25, 751 S.W.2d 343 (1988).

**Addition to Reporter's Notes, 2001 Amendment:** The word "trial," which modified "court" in the second sentence of subdivision (b), has been deleted. Constitutional Amendment 80 established the circuit courts as the "trial courts of original jurisdiction" in the state and abolished the separate chancery and probate courts.



## RESEARCH REFERENCES

**Ark. L. Notes.** Watkins, Procedural Rules You Won't Find in the Rules of Civil Procedure, 1992 Ark. L. Notes 53.

**Ark. L. Rev.** Recent Developments — Amendments to the Arkansas Rules of Civil Procedure, 47 Ark. L. Rev. 299.

## CASE NOTES

## ANALYSIS

Attorney's fees.  
Timeliness.

**Attorney's Fees.**

While former statute governing interpleader actions provided for the recovery of attorney's fees, that statute was specifically superseded by this rule, which does not provide or even mention recovery of legal expenses. *Saunders v. Kleier*, 296 Ark. 25, 751 S.W.2d 343 (1988).

There is no authority under this rule to award attorney's fees. *Birdsong Cabinet Shop, Inc. v. Bland*, 307 Ark. 149, 817 S.W.2d 886 (1991).

**Timeliness.**

The timeliness of intervention is within the discretion of the trial court; permitting intervention will not be considered error due to untimeliness unless there has been an abuse

of discretion. *Arkansas Best Corp. v. General Elec. Capital Corp.*, 317 Ark. 238, 878 S.W.2d 708 (1994).

When there are unusual and compelling circumstances, the court will permit intervention even after a final judgment has been entered. *Arkansas Best Corp. v. General Elec. Capital Corp.*, 317 Ark. 238, 878 S.W.2d 708 (1994).

**Cited:** *Martin v. Citizens Bank*, 283 Ark. 145, 671 S.W.2d 754 (1984); *Cessna Fin. Corp. v. Skelton*, 287 Ark. 378, 700 S.W.2d 44 (1985); *Jones v. Jones*, 27 Ark. App. 297, 770 S.W.2d 174 (1989); *Stair v. Phillips*, 315 Ark. 429, 867 S.W.2d 453 (1993); *Gravett v. McGowan*, 318 Ark. 546, 886 S.W.2d 606 (1994); *In re Implementation of Amendment 80: Amendments to Rules of Civ. Procedure & Inferior Court Rules*, — Ark. —, — S.W.3d —, 2001 Ark. LEXIS 707 (May 24, 2001).

**Rule 23. Class actions.**

(a) *Prerequisites to Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties and their counsel will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. At an early practicable time after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. For purposes of this subdivision, "practicable" means reasonably capable of being accomplished. An order under this section may be altered or amended at any time before the court enters final judgment. An order certifying a class action must define the class and the class claims, issues, or defenses.

(c) *Notice.* (1) In any class action in which monetary relief is sought, including actions for damages and restitution, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

(2) The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance and participate in person or through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members.

(3) In any class action in which no monetary relief is sought, the court may require any notice it deems appropriate in the circumstances.

(4) The cost of any notice shall be borne by the representative parties; provided, however, that the court may shift all or part of the cost to the opposing party or parties if the case is settled or the class representative substantially prevails on the merits.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of the members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dividing the class into subclasses, treating each subclass as a class, and construing and applying the provisions of this rule accordingly; and (6) dealing with similar procedural matters. The orders may be combined with an order under Rule 16 and may be altered or amended from time to time as may be desirable.

(e) *Dismissal or Compromise.* (1) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class. The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise. The court may approve any such resolution that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) The court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval. An objection may be



withdrawn only with the court's approval. (Amended December 10, 1990, effective February 1, 1991; amended May 25, 2006.)

**Publisher's Notes.** A proposed amendment to Rule 23 was published by the supreme court of Arkansas for comment on March 2, 2006. The proposed amendment would revise all parts of this rule to echo recent amendments to Federal Rule of Civil Procedure 23, while others incorporate the holding of recent Arkansas decisions and current Arkansas practice. With a few exceptions, the changes are technical and do not change Arkansas law.

**Reporter's Notes (as modified by the Court) to Rule 23:** 1. Class actions in Arkansas have been governed by *Ark. Stat. Ann.* 2-809 (Repl. 1962) which provide minimum procedural rules. This rule does not change prior law.

2. Rule 23 confers broad discretion upon the trial court to dictate such terms as are necessary to protect the rights of absent class members. This discretion is also conferred upon the federal courts by FRCP 23.

3. In Arkansas, many of the class action cases have involved actions brought by and against members of unincorporated associations such as labor unions. *Thomas v. Dean*, 245 Ark. 446, 432 S.W.2d 771 (1968); *International Brotherhood v. Blasingame*, 226 Ark. 614, 293 S.W.2d 444 (1956). See also *Massey v. Rogers*, 232 Ark. 110, 334 S.W.2d 664 (1960). Such actions shall henceforth be brought pursuant to Rule 23.2.

4. Under prior Arkansas law, class actions could be maintained in either law or equity. *Thomas v. Dean*, *supra*. This rule does not affect jurisdiction and thus such actions may still be maintained in either court.

**Addition to Reporter's Notes, 1990**

**Amendment:** Subdivision (a) has been completely rewritten to set out the requirements for numerosity, commonality, typicality, and adequate representation. As revised, subdivision (a) is identical to the corresponding federal rule. Former subdivision (c) has been modified slightly and redesignated as subdivision (e). Under the revised version, which is based on the corresponding federal rule, notice of a proposed dismissal or compromise is mandatory rather than discretionary. New subdivision (c) requires that the best practicable notice of the pendency of class actions seeking monetary relief, whether legal or equitable, be given to all class members. Among other things, the notice must advise class members of their right to participate in or be excluded from the litigation. When monetary relief is sought, class members must, as a matter of due process, be given such notice and afforded the opportunity to "opt out" of the class action. See *Phillips Petroleum v.*

*Shutts*, 472 U.S. 797 (1985). It is not clear from *Shutts* whether due process requires such notice when the class action involves only injunctive or declaratory relief. *Id.* at 811, n. 3. Subdivision (c) does not impose such a requirement in such circumstances, but the trial court may, pursuant to subdivision (d), order that notice be given. The last sentence of subdivision (c) makes clear that the class representatives must initially bear the cost of the notice, though such cost may ultimately be shifted to the opposing parties. This practice is followed in the federal courts. See *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974). Subdivision (d) has been revised to take into account the foregoing changes and to spell out in further detail the trial court's discretion in the management of a class action. It is virtually identical to the corresponding federal rule.

**Addition to Reporter's Notes, 2006**

**Amendment:** All parts of the Rule have been revised. Many of these changes echo recent amendments to Federal Rule of Civil Procedure 23, while others incorporate the holding of recent Arkansas decisions and current Arkansas practice. With a few exceptions, the changes are technical and do not change Arkansas law.

Another prerequisite - the adequacy of class counsel - has been added to subdivision (a). This addition conforms the Rule to Arkansas law. *E.g., Mega Life & Health Insurance Co. v. Jacola*, 330 Ark. 261, 275, 975 S.W.2d 898, 904 (1997). Relevant factors for the circuit court's evaluation of class counsel include: counsel's work identifying and investigating potential claims, counsel's experience in handling class actions, complex litigation, and claims of the type asserted; counsel's knowledge of the applicable law; and the resources counsel will commit to representing the class. See generally, Federal Rule of Civil Procedure 23(g). Unless a showing is made to the contrary, however, Arkansas law presumes that the class representative's counsel "will vigorously and competently pursue the litigation." *USA Check Cashers of Little Rock, Inc. v. Island*, 349 Ark. 71, 80, 76 S.W.3d 243, 247 (2002).

Subdivision (b) on the timing of the circuit court's certification decision has been amended. The former rule required a certification decision as soon as practicable after the lawsuit commenced. That requirement, however, neither captured the prevailing practice nor recognized the good reasons for delaying the certification decision, such as the need for limited discovery on the Rule 23(a) prerequisites. The revised Rule requires a decision on

certification at an early practicable time, which is the current standard in the federal Rule. That standard gives the circuit court and the parties some flexibility, while leaving intact the settled Arkansas law that the court may not inquire into the merits at the certification stage. *E.g., Speights v. Stewart Title Guaranty Co., Inc.*, — Ark. —, — S.W.3d —, — 2004 WL 1354279 (30 September 2004) (Supplemental Opinion Denying Rehearing).

The amendment deletes the phrase “may be conditional” from the part of subdivision (b) authorizing the circuit court to alter or amend a certification order. The deleted phrase is superfluous; the Arkansas cases on point have emphasized the circuit court’s power to reconsider, affirm, alter, modify, or withdraw certification. *E.g., Fraley v. Williams Ford Tractor and Equipment Co.*, 339 Ark. 322, 347, 5 S.W.3d 423, 438-39 (1999). All of these actions spring from the power to alter or amend a certification order. This change brings the Arkansas Rule back into conformity with the federal Rule.

The amendment also replaces the phrase “before the decision on the merits” in subdivision (b) with the phrase “at any time before the court enters final judgment.” This change follows an amendment to the federal Rule; it better reflects the duration of the circuit court’s authority to modify its certification decision; and it should give the circuit court greater flexibility to deal with developments late in the litigation but before final judgment.

A new sentence has been added to the end of subdivision (b). As the cases make plain, the certification order must define the class in sufficiently definite terms so that the court and the parties may identify the class members. *E.g., Ferguson v. Kroger*, 343 Ark. 627, 631-32, 37 S.W.3d 590, 593 (2001). Identifying the claims, issues, and defenses will likewise help in identifying class members and expedite the resolution of the litigation. The amendment tracks existing Arkansas law and the federal Rule. This amendment does not alter the precedent holding that the circuit court is not required to perform a rigorous analysis of the case at the certification stage. *E.g., THE/FRE, Inc. v. Martin*, 349 Ark. 507, 514, 78 S.W.3d 723, 727 (2002). But the circuit court must “undertake enough of an analysis to enable [the appellate court] to conduct a meaningful review.” *See Lenders Title Co. v. Chandler*, 353 Ark. 339, 349, 107 S.W.3d 157, 162 (2003).

Subdivision (c) on notice has been rewritten and divided into subparts. The changes specify the contents of the notice in clearer terms, make a plain-statement requirement for the notice explicit, and bring the Arkansas Rule in line with the comparable federal Rule. A provision explicitly authorizing the circuit court to require notice in class actions where no monetary relief is sought has also been added. All these revisions are technical and do not change Arkansas law.

A new sentence (5) has been added to subdivision (d) to recognize the circuit court’s authority to create subclasses. The Arkansas cases have assumed this authority, and implicitly approved it, for almost twenty years. *E.g., Int’l Union of Ethical, Radio and Machine Workers v. Hudson*, 295 Ark. 107, 117, 747 S.W.2d 81, 86-87 (1988); *State Farm Fire & Casualty Co. v. Ledbetter*, 355 Ark. 28, 35-36, 1295 S.W.3d 815, 820-21 (2003). The federal Rule authorizes subclasses, which are often useful. This change conforms the Rule to current Arkansas practice. Former sentence (5) has been renumbered as (6).

Subdivision (e) about dismissal and compromise has been rewritten. With some exceptions, the revised Rule restates Arkansas law in the clearer terms of Federal Rule of Civil Procedure 23(e) and incorporates current Arkansas practice. For example, proposed settlements are evaluated now for fairness, reasonableness, and adequacy. *Ballard v. Martin*, 349 Ark. 564, 79 S.W.3d 838 (2002). Subdivision (1) also requires the circuit court to hold a fairness hearing before approving any proposed settlement. This is a new requirement, though fairness hearings are routine in most class actions. Subdivision (2) requires the parties seeking approval of any settlement to file a statement identifying side agreements. This new requirement will promote fairness in settlements and mirrors the federal Rule. Subdivision (3) gives the circuit court discretion to open a second opt-out window if the circumstances justify it. The federal Rule contains this option, and it merely recognizes the circuit court’s power to fashion all appropriate relief as part of approving any proposed settlement. Finally, subdivision (4) requires court approval before an objection may be withdrawn. Objections often can, and should be, resolved by the parties. This new requirement, also drawn from the federal Rule, will help the circuit court insure the fairness of those resolutions in light of the overall proposed settlement of the litigation.

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CASE NOTES

ANALYSIS

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Constitutionality.

In action by taxpayers challenging municipal ordinance levying privilege tax on waterworks commission, trial court erred in refusing to require taxpayers to comply with this rule; the rule does not conflict with Ark. Const., Art. 16, § 13 governing illegal exactions but serves as the rule of procedure in a class action case of such nature. However, the error was harmless since there was a final adjudication of a fully developed adversary case. City of Little Rock v. Cash, 277 Ark. 494, 644 S.W.2d 229 (1982), cert. denied, 462 U.S. 1111, 103 S. Ct. 2464, 17 L. Ed. 2d 1341 (1983). But see Hamilton v. Villines, 323 Ark. 492, 915 S.W.2d 271 (1996).

The illegal-exaction clause provides for a constitutionally established class of interested persons, although the formation of the class is still subject to well established common law principles and is neither limited nor expanded by the provisions of this rule. Carson v. Weiss, 333 Ark. 561, 972 S.W.2d 933 (1998), appeal dismissed sub nom. 351 Ark. 318, 92 S.W.3d 30 (2002).

Adequate Representation.

Intervenors met all the necessary elements with respect to the adequacy of representation requirement, where it was not contended that (1) counsel was inadequate, inexperienced or unable to conduct the litigation; (2) there was no evidence in the record of any

conflicting interest between the Intervenor and the other members of the class; and (3) the Intervenor displayed the necessary interest in the action to ensure vigorous prosecution and were familiar with the litigation. *First Nat'l Bank v. Mercantile Bank*, 304 Ark. 196, 801 S.W.2d 38 (1990).

When it otherwise appears that the representative plaintiff will fairly and adequately protect the interests of the class, allegations of attorney misconduct are more appropriately addressed to the state disciplinary committee rather than denying the plaintiff's class status. *Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 823 S.W.2d 878 (1992), appeal dismissed sub nom. 316 Ark. 742, 875 S.W.2d 79 (1994).

The representative must simply display some minimal level of interest in the action, familiarity with the practices challenged, and ability to assist in decision making as to the conduct of the litigation. *Cheqnet Sys. v. Montgomery*, 322 Ark. 742, 911 S.W.2d 956 (1995).

Where a title company allegedly engaged in the unauthorized practice of law and violated the Arkansas Deceptive Trade Practices Act, § 4-88-101 et seq., a class action was appropriate because the representatives were adequate; they were qualified to conduct the litigation since they had been required to pay a document preparation fee, they displayed some interest in the litigation, despite a failure to appear, and there was no evidence of a conflict of interest. *American Abstract & Title Co. v. Rice*, 358 Ark. 1, 186 S.W.3d 705 (2004).

Class representative was adequate as he conducted his own research as to the legitimacy of the allegations before he decided to become a class member and representative, he displayed the minimal level of interest in the class action, he was familiar with the challenged practice of charging a documentary fee as part of a car sale, and he was able to assist in litigation decisions with class counsel. *Asbury Auto. Group, Inc. v. Palasack*, 366 Ark. 601, 237 S.W.3d 462 (2006).

Three elements are required under the adequacy criteria under subdivision (a)(4) of this rule: (1) the representative counsel must be qualified, experienced, and generally able to conduct the litigation; (2) that there be no evidence of collusion or conflicting interest between the representative and the class; and (3) the representative must display some minimal level of interest in the action, familiarity with the practices challenged, and ability to assist in decision making as to the conduct of the litigation. *Beverly Enterprises-Arkansas, Inc. v. Thomas*, 370 Ark. 310, 259 S.W.3d 445 (2007).

Under subdivision (a)(4) of this rule, the cash advance companies failed to show that the class representative could not adequately

represent her class as her mental illness rendered her incapable, she was not familiar with the basic facts, and did not understand her responsibilities and duties; the representative understood the nature and extent of her responsibilities and duties as a class representative, and the alleged injury suffered was the same for the representative and all class members. *Advance Am. Servicing of Ark., Inc. v. McGinnis*, 2009 Ark. 151, 300 S.W.3d 487 (2009).

#### **Amendments to Complaints.**

Subsection (e) of this rule does not require court approval for amendments to complaints, but only for dismissals or compromises. *SEECO, Inc. v. Hales*, 341 Ark. 673, 22 S.W.3d 157 (2000).

#### **Appeal.**

The order of a trial court certifying a case as a class action under this rule was a final or appealable order as defined in ARAP 2 following the Supreme Court's amendment of ARAP 2 to permit an appeal from an order certifying a case as a class action. *Ford Motor Credit Co. v. Nesheim*, 285 Ark. 253, 686 S.W.2d 777 (1985).

Where the trial court did not enter specific findings of fact and conclusions of law reflecting the analysis required for certification of a class action, the grant of class certification was reversed and the matter was remanded to the trial court for further proceedings. *BPS Inc. v. Richardson*, 341 Ark. 834, 20 S.W.3d 403 (2000).

Appeal from a refusal to grant certification of a class in an illegal exaction case was not a proper basis for an interlocutory appeal under RAP-Civ 2(a)(9) because the taxpayers were already a class pursuant to Ark. Const., Art. 16, § 13. *T&T Chem. v. Priest*, 351 Ark. 537, 95 S.W.3d 750 (2003).

#### **Appellate Review.**

The Supreme Court reviews class certification under an abuse of discretion standard. *Cheqnet Sys. v. Montgomery*, 322 Ark. 742, 911 S.W.2d 956 (1995).

To determine the fairness of a class settlement, the Supreme Court of Arkansas adopted the factors set forth in *Grunin v. Int'l House of Pancakes*, 513 F.2d 114 (8th Cir. 1975) which are: (1) the strength of the case for the plaintiffs on the merits, balanced against the amount offered in the settlement, (2) the defendant's overall financial condition and ability to pay, (3) the complexity, length, and expense of further litigation, and (4) the amount of opposition to the settlement. *Ballard v. Martin*, 349 Ark. 564, 79 S.W.3d 833 (2002), cert. denied 537 U.S. 1105, 123 S. Ct. 871, 154 L. Ed 2d 774 (2003).

In an individuals class-action complaint against three title insurance companies regarding the unauthorized practice of law, re-



lated to title searches and opinions already performed by licensed attorneys, the trial court committed reversible error when it concluded that it did not have subject-matter jurisdiction to hear the issues raised in the complaint; the Arkansas Supreme Court Committee on the Unauthorized Practice of Law (CUPL) did not have exclusive jurisdiction over such matters and the CUPL had no power to enforce whatever decision it might have reached regarding any given investigation. *Speights v. Stewart Title Guar. Co.*, 358 Ark. 59, 186 S.W.3d 715 (2004).

#### **Attorney's Fees.**

Although "monetary relief" in the form of attorney's fees was being sought in a class illegal exaction complaint, the chancellor erred in requiring individual notices to the taxpayers in accordance with subsection (c) of this rule because attorney's fees are not available in an illegal exaction case where no refund is sought. *Hamilton v. Villines*, 323 Ark. 492, 915 S.W.2d 271 (1996).

Taxpayer class members did not have standing to appeal the circuit court's decision awarding attorney's fees where they merely objected to the fees but did not intervene at the trial-court level; however, the court served notice that they would entertain in a subsequent case the issue of whether prior caselaw should be overruled in order to permit such an appeal. *Butt v. Evans Law Firm, P.A.*, 351 Ark. 566, 98 S.W.3d 1 (2003).

#### **Class Action Disallowed.**

Where plaintiffs sought to assert that a mortgage assumption fee made a loan usurious, and, under the particular facts of the case, plaintiff's fee was higher than usual but the application had initially been turned down due to insufficient income, refusal of the chancellor to entertain the suit as a class action was proper since, although the members of the class are numerous and the principle of law common to the members, the plaintiffs did not show that a class action would, under subsection (b) of this rule, be superior to individual remedies for a fair and efficient adjudication of the controversy, since, if the defendant did prove that plaintiff's fee was reasonable, plaintiff would not be in an equitable position to profit from a finding that defendant overcharged other borrowers. *Drew v. First Fed. Sav. & Loan Ass'n*, 271 Ark. 667, 610 S.W.2d 876 (1981).

Where seven former city policemen sought to recover up to a maximum of 30 days accumulated sick leave pay, and also sought to maintain the suit as a class action for the benefit of other former policemen who came within the same amended city ordinance, a class action suit was not proper under subsection (a) of this rule since the total number of other former policemen was determined to be

ten; thus the class was not too numerous and it was not impracticable to bring all 17 plaintiffs to court at the same time. *City of N. Little Rock v. Vogelgesang*, 273 Ark. 390, 619 S.W.2d 652 (1981).

In a medical malpractice action, the issue of informed consent is foundational to the individual claims and cannot be tried on a class basis. *Arthur v. Zearley*, 320 Ark. 273, 895 S.W.2d 928 (1995).

There must be full compliance with § 26-18-507(e)(2)(A) before sovereign immunity is waived; therefore, where only one taxpayer has claimed a refund, no taxpayer class action can be certified. *State, Dep't of Fin. & Admin. v. Staton*, 325 Ark. 341, 942 S.W.2d 804 (1996).

In action by taxpayers for refunds from the state, chancellor lacked authority to certify as members of class taxpayers who had not filed refund claims, because sovereign immunity was waived only for plaintiffs who had followed the procedure outlined in § 26-18-507 and applied for refunds. *ACW, Inc. v. Weiss*, 329 Ark. 302, 947 S.W.2d 770 (1997).

While Ark. Code Ann. § 23-2-301 gave to Arkansas Public Service Commission the power to hear a class action in an administrative proceeding, the Commission was not required to follow the Rules of Civil Procedure and address a class certification issue before determining the merits of a case, and did not err in denying class certification because individual claims of purported class members lacked merit. *Brandon v. Ark. Western Gas Co.*, 76 Ark. App. 201, 61 S.W.3d 193 (2001).

#### **Class Action Maintainable.**

Subsection (b) of this rule requires that a class action be superior to other available methods for the fair and efficient adjudication of the controversy. *Lemarco, Inc. v. Wood*, 305 Ark. 1, 804 S.W.2d 724 (1991).

The requirements of numerosity, commonality, predominance, superiority, typicality, and adequacy were met, and class certification was proper. *Mega Life & Health Ins. Co. v. Jacola*, 330 Ark. 261, 954 S.W.2d 898 (1997).

Applying the criteria of typicality, predominance, and superiority of this rule, the trial court determined that a class action was appropriate. *BNL Equity Corp. v. Pearson*, 340 Ark. 351, 10 S.W.3d 838 (2000), cert. denied 531 U.S. 823, 121 S. Ct. 66, 148 L. Ed. 2d 32 (2000).

Where each class member in the lawsuit would be asserting the same claim of usury against the lender, the lender's individual defenses or claims against particular class members or subsets of class members did not defeat the initial usury inquiry, therefore, the class representative's claims were typical of the class's claims; moreover, because of the pervasiveness of the issue of the lender's fees in the transactions of all potential class mem-

bers, a class action was the superior method for adjudicating the class members' claims. *The Money Place v. Barnes*, 349 Ark. 518, 78 S.W.3d 730 (2002).

Circuit court did not err in granting the customers' class certification under this rule where there was a common usury claim against the stores that ran amongst all class members, and the need to resolve the usury question outweighed the possibility of individual defenses, and the class action was fair to both sides in the case. *Johnson's Sales Co. v. Harris*, 370 Ark. 387, 260 S.W.3d 273 (2007).

#### **Class Certification.**

Subsection (a) of this rule differs from that of the federal rule, but it embodies implicitly the requirement that class certification is dependent on the representative parties protecting the interests of the class fairly and adequately. *First Nat'l Bank v. Mercantile Bank*, 304 Ark. 196, 801 S.W.2d 38 (1990).

The trial judge has broad discretion in matters of class certification. A finding of adequate representation may be jeopardized if a representative's interests are in conflict with other class members, but six members who disagree with what is a potentially legitimate claim, common to thousands of people, does not justify decertification. *Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 823 S.W.2d 878 (1992), appeal dismissed sub nom. 316 Ark. 742, 875 S.W.2d 79 (1994).

Where the insurer failed to request specific findings in regard to the elements of subsection (b) of this rule either prior to or after the entry of the order of certification, it waived the issue on appeal. *Mega Life & Health Ins. Co. v. Jacola*, 330 Ark. 261, 954 S.W.2d 898 (1997).

Trial court properly certified a class consisting of every person who had engaged in deferred presentment transactions with the check cashing companies anywhere in Arkansas, properly concluding that the class representatives' experience with the companies and the transactions involved were typical of all of the companies' customers, that questions of law or fact common to the class members predominated over individual issues and that a class action was superior to other available methods of adjudication. *F&G Fin. Servs. v. Barnes*, 349 Ark. 420, 82 S.W.3d 162 (2002).

Where class members alleged that the service fees charged in connection with check-cashing transactions were loans, and that such service fees were usurious in violation of the Arkansas Constitution, the trial court properly found that the requirements of adequacy of representation, typicality, predominance, and superiority under this rule were met where class members were adequate persons to serve as class representatives, their counsel could adequately represent the class,

they demonstrated that they had at least a minimal level of interest in the cause of action, and the common issue was whether the check-cashing transactions were considered loans and whether the fees charged in connection with those transactions were usurious in nature. *THE/FRE, Inc. v. Martin*, 349 Ark. 507, 78 S.W.3d 723 (2002).

In class action against lender for violating usury laws, where lender neither requested specific findings of fact for the issues under this rule, nor did it file a motion pursuant to ARCP 52(b) after the entry of the court's judgment to make additional findings on the issues, the lender's argument that the trial court "failed to undertake the required rigorous analysis" in considering the class-certification request was waived on appeal; further, the appellate court did not require that the trial court conduct a "rigorous analysis" under this rule. *The Money Place v. Barnes*, 349 Ark. 518, 78 S.W.3d 730 (2002).

The trial court is not required to undertake a "rigorous analysis" of requirements of predominance and superiority under subsection (b) of this rule in considering a class certification request. *Tay-Tay, Inc. v. Young*, 349 Ark. 675, 80 S.W.3d 365 (2002).

Under the terms of Ark. Const., Art. 16, § 13, the parties to an illegal exaction suit include all citizens of the county, city, or town affected by the illegal exaction, and because all citizens are parties to the constitutionally created class, the right to opt out, as developed under this rule, is not applicable in an illegal exaction suit; further, communication with the affected citizens have to be unfettered to determine whether any alleged illegal exaction may have been voluntarily paid, and therefore, not subject to suit under Ark. Const., Art. 16, § 13. *Worth v. City of Rogers*, 351 Ark. 183, 89 S.W.3d 875 (2002).

Appeal by city from a class-certification order in an illegal-exaction case was not a proper basis for an interlocutory appeal under RAP-Civ 2(a)(9); the taxpayers were already a class under Ark. Const., Art. 16, § 13. *City of W. Helena v. Sullivan*, 353 Ark. 420, 108 S.W.3d 615 (2003).

Trial court did not err in granting teacher's motion for class certification in a breach of contract action against the school district because there were adequate methods for determining the identity of class members, the class definition was specific enough to prevent it from becoming too unwieldy, and there were common issues as what comprised a school day under the teacher contracts and the teachers' uncompensated non-instructional duties; further, the class definition did not require the trial court to delve into the ultimate issue in determining which teachers were class members. *Van Buren Sch. Dist. v. Jones*, 365 Ark. 610, 232 S.W.3d 444 (2006).



In a suit by former and current residents of an apartment complex for damages resulting from their exposure to dangerous levels of carbon monoxide, the circuit court did not err in certifying the class as to claims of breach of contract and fraud because the claims regarding improper design and construction were common to all class members. The circuit court properly denied, however, class certification as to the residents' claims of negligence, wrongful death, and strict liability because proximate cause was a foundational element of their tort claims and the residents could not establish the collective liability of the apartments' owners, builder, and architect without addressing the individualized issues of proximate cause, which involved the extent of each resident's exposure to carbon monoxide and the particular ill effects suffered by each individual resident as a result of such exposure. *Simpson Hous. Solutions, LLC v. Hernandez*, 2009 Ark. 480, 347 S.W.3d 1 (2009).

Denial of the class member's motion to strike in an action against cellular providers was inappropriate, in part because expert testimony focused on one provider's damages and how other costs might increase if the early termination fees were invalidated; thus, the expert's opinion was concerned with the underlying merits of the case and it was improper to consider the underlying merits at the class-certification stage of proceedings. Moreover, the expert opinion contained conclusions that invaded the role of the circuit court. *Rosenow v. Alltel Corp.*, 2010 Ark. 26, 358 S.W.3d 879 (2010).

Denial of the class member's motion for class certification in an action against cellular providers was inappropriate because the reasoning by the circuit court went well beyond the procedural issues of whether there were any common issues and whether those common issues predominated under subdivision (a)(2) of this rule. The circuit court's focus in analyzing the requirements of this rule was possible damages sustained by one of the providers and not the claims alleged by the class member on behalf of the class. *Rosenow v. Alltel Corp.*, 2010 Ark. 26, 358 S.W.3d 879 (2010).

Certification of a class pursuant to this rule was proper because, although identification of a class member may have required determining if the person was legally responsible for the charges for services or goods received from a health care provider, that did not require delving into the individual merits of each claim, legal responsibility for the charges was but one factor to consider, and the provider's records contained much of the information needed to analyze this issue; further, the individual issues here, applying the various factors to determine the prices ac-

cepted by the provider to satisfy the patient accounts of nonclass members, did not defeat the common question. Since the only alternative method to adjudicate the claims of the class would have been through numerous separate trials, with the potential for different and inconsistent results, the superiority requirement was satisfied. *Baptist Health v. Hutson*, 2011 Ark. 210, — S.W.3d —, 2011 Ark. LEXIS 197 (May 12, 2011).

#### **Discretion of Court.**

While a chancellor does have discretion in determining whether to certify a suit as a class action, that discretion is not unlimited. The latitude of a chancellor's discretion increases proportionately as the situation presents to the trial judge a question that cannot equally well be presented to the Supreme Court by the printed record. Where the question on appeal turns heavily on the credibility of witnesses, for example, the Supreme Court will defer to the superior position of the chancellor in that regard. *Ford Motor Credit Co. v. Nesheim*, 287 Ark. 78, 696 S.W.2d 732 (1985), overruled *International Union of Electrical, etc. v. Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988), questioned *Arkansas Louisiana Gas Co. v. Morris*, 294 Ark. 496, 744 S.W.2d 709 (1988).

Court abused its discretion in certifying a class action in customers' suit against a telephone company challenging interest charges because the definition of a class member depended on the determination of the ultimate question, i.e., whether the interest charges were usurious; definition provided no objective criteria for ascertaining class membership and the court had to delve into the merits in order to determine who was an appropriate class member. *Southwestern Bell Tel. Co. v. Pipkin Enters.*, 359 Ark. 402, 198 S.W.3d 115 (2004).

#### **Due Process.**

In a class action suit, those persons who have allegedly been denied due process are those absent class members who will receive directory rather than mandatory notice of the action; their right to due process is a personal right, and it may not be asserted by their adversary. In the event the class loses at the trial on the merits, an absent class member can then contend that the judgment on the merits is not entitled to res adjudication effect because of the directory, rather than the mandatory, notice. *Ford Motor Credit Co. v. Rogers*, 285 Ark. 64, 685 S.W.2d 145 (1985).

A 28-day notice met the requirements of the rule and due process. *Seeco, Inc. v. Hales*, 334 Ark. 307, 973 S.W.2d 818 (1998).

#### **Federal Rules.**

The amended version of this rule tracks the language of the federal rule, but even under the prior version of this rule the spirit of the

federal rule was to be found even if all the words were not, so that the federal and state rules all set out the same basic requirements for a class action. *Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 823 S.W.2d 878 (1992), appeal dismissed sub nom. 316 Ark. 742, 875 S.W.2d 79 (1994); *Farm Bureau Mut. Ins. Co. v. Farm Bureau Policy Holders & Members*, 323 Ark. 706, 918 S.W.2d 129 (1996).

### Findings of Fact.

A trial court is required to conduct an analysis of the factors required for certification of a class action under the provisions of this rule and to enter written findings of fact and conclusions of law when requested by a party to the litigation as provided by Rule 52. *BPS Inc. v. Richardson*, 341 Ark. 834, 20 S.W.3d 403 (2000).

### Identification of Class.

In an action alleging that the defendant store misled the public with its double-coupon advertisements, the certification of a class action was properly denied because of the all but insurmountable difficulties in identifying the class. *Ferguson v. Kroger Co.*, 343 Ark. 627, 37 S.W.3d 590 (2001).

A class must be susceptible to definition and cannot be amorphous or imprecise. *Ferguson v. Kroger Co.*, 343 Ark. 627, 37 S.W.3d 590 (2001).

In a class action filed against a title company, the class was properly identified by examining documents where the title company participated in closings during a relevant time period; it was administratively feasible to identify the class, even though it was not convenient for the title company due to poor bookkeeping practices. *Lenders Title Co. v. Chandler*, 358 Ark. 66, 186 S.W.3d 695 (2004).

Trial court erred in certifying a class pursuant to this rule because the parties seeking certification had advanced two different class definitions, the trial court had included both of these definitions in its order, and there was no way of ascertaining which definition was the intended class definition. *Teris, L.L.C. v. Golliher*, 371 Ark. 369, 266 S.W.3d 730 (2007).

Health-information management company's argument that a trial court erred in granting a motion for class certification under this rule because the class definition presented no feasible means for ascertaining the members of the class failed because: (1) class members could have been identified by objective criteria, including the company's own billing records; (2) any issue that could have arose regarding a notary fee was a damages issue and did not render the class definition defective; and (3) the fact that the company failed to maintain and store sufficient records

was not the fault of the patient or the class. *ChartOne, Inc. v. Raglon*, 373 Ark. 275, 283 S.W.3d 576 (2008).

Class definition was sufficiently precise because the class was identifiable from objective criteria, specifically, ownership of the specified vehicles so specifically equipped, and no investigation into the merits of each individual's claim was needed to identify the class members. The class definition clearly stated that the class included any owner or subsequent owner of certain vehicles containing a specified parking-brake system, with the terms owners and subsequent owners being taken from a corporation's own warranty publications. *GMC v. Bryant*, 374 Ark. 38, 285 S.W.3d 634 (2008), cert. denied — U.S. —, — S. Ct. —, 173 L. Ed. 2d 107 (2009).

Order certifying a class and defining the class as all adults residing or occupying business premises who were physically evacuated because of the fire and explosion at issue in the lawsuit was a sufficient definition because the definition of the class provided objective criteria for ascertaining class membership without requiring an investigation into the merits of each individual's claim. *Teris, LLC v. Chandler*, 375 Ark. 70, 289 S.W.3d 63 (2008).

### Jurisdiction.

Arkansas circuit court had subject matter jurisdiction pursuant to subsection (e) of this rule regarding an intervention to contest a settlement of an Arkansas class action on behalf of about 250,000 persons nationwide who held cancer insurance policies, despite the lack of controversy between plaintiffs and defendants upon settlement. *Hunter v. Runyan*, 2011 Ark. 43, — S.W.3d —, 2011 Ark. LEXIS 38 (Feb. 9, 2011).

### Merits of Case.

In an action challenging the defendant's practice of cashing checks for a fee, the trial court erred when it reached the merits on a motion for class certification and determined that the cash advances were loans, that the fees charged were interest, and that the transactions were usurious on their face, void ab initio, and unenforceable. *Advance Am. v. Garrett*, 344 Ark. 75, 40 S.W.3d 239 (2001).

Trial court did not err in finding that a class action was the superior method for adjudicating the claims at issue; the trial court found that the predominant issue was whether the fees assessed in exchange for deferring presentation of checks were usurious, and an attempt to raise defenses at this stage, including the issue of whether the individuals were to remain in the lawsuit on a theory of piercing the corporate veil, was an attempt to delve into the merits of the case, which the court refused to address. *Nat'l Cash, Inc. v. Loveless*, 361 Ark. 112, 205 S.W.3d 127 (2005).

Circuit court erred when it determined that



a claim of an illegal tying arrangement based on an alleged forced purchase by a franchisee could not have fallen under state statutes; federal jurisdiction was not exclusive in these matters under the Sherman Act, 15 U.S.C.S. § 1 et seq.; moreover, a finding that a state claim could not have prevailed or that defenses existed was improper at the class certification stage because the only permissible inquiry was whether the elements of this rule had been satisfied. *Carquest of Hot Springs, Inc. v. General Parts, Inc.*, 367 Ark. 218, 238 S.W.3d 916 (2006).

### Monetary Relief.

Reference to a sanction which may or may not become necessary does not amount to a request for "monetary relief" by a class as contemplated in subsection (c) of this rule. *Hamilton v. Villines*, 323 Ark. 492, 915 S.W.2d 271 (1996).

Bifurcated process of certifying a class to resolve preliminary, common issues and then decertifying the class to resolve individual issues, such as damages, is consistent with the rule. *Beverly Enterprises-Arkansas, Inc. v. Thomas*, 370 Ark. 310, 259 S.W.3d 445 (2007).

### Notice.

An order prescribing notice to absent class members of the class action is fundamental to the further conduct of the case, and is reviewable on interlocutory appeal. *Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 823 S.W.2d 878 (1992), appeal dismissed sub nom. 316 Ark. 742, 875 S.W.2d 79 (1994).

Defendants in a class action have standing to challenge the notice to absent class members since they are not asserting the due process rights of the class, but rights of their own. Without a determination of the issue, the defendants may be subject to multiple lawsuits from absent class members who claim they never received adequate notice. *Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 823 S.W.2d 878 (1992), appeal dismissed sub nom. 316 Ark. 742, 875 S.W.2d 79 (1994).

This rule gives the court continuing jurisdiction to require additional terms and conditions in order to ensure that the class members are being fairly and adequately represented, and to correct any deficiencies as to notice to absent class members during the pendency of the litigation. *Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 823 S.W.2d 878 (1992), appeal dismissed sub nom. 316 Ark. 742, 875 S.W.2d 79 (1994).

The purpose of requiring notice to class members who may have a monetary recovery in prospect is to allow them to decide whether to participate as members of the class; in a case in which the prospective class member has no individual claim to relief, there is no purpose in the notice requirement that would

not obtain anytime a city or county is sued. *Hamilton v. Villines*, 323 Ark. 492, 915 S.W.2d 271 (1996).

Notices of class certification, the settlement, and the date of the fairness hearing to class members were adequate in that the class members were given approximately three months notice of the opt-out deadline, individual notices were properly sent, and proper newspaper publication was made such that the minimum standards of due process were met. *Ballard v. Martin*, 349 Ark. 564, 79 S.W.3d 833 (2002), cert. denied 537 U.S. 1105, 123 S. Ct. 871, 154 L. Ed 2d 774 (2003).

Developer's motion for summary judgment on liability issues prior to class notice waived the mandate that notice be given under subsection (c) of this rule; it would make little sense for a defendant such as the developer to move for summary judgment on liability issues before notice, lose on that motion, and then argue that the court's judgment violated notice requirements. *Nat'l Enters., Inc. v. Kessler*, 363 Ark. 167, 213 S.W.3d 597 (2005).

In a dispute brought by condominium owners against corporations who were successors-in-interest to the original developers, the trial court did not err in ruling on the owner's cross-motion for summary judgment on the issue of liability before the class members were noticed as the corporations waived the issue of notice, and § 18-14-601 was quite clear that the obligations of the original developers remained in place. *Nat'l Enters. v. Kessler*, 363 Ark. 167, 213 S.W.3d 597 (2005).

Defendant condominium developers' motion for summary judgment on liability issues prior to class notice waived the mandate that notice be given under subsection (c) of this rule. *Office of Child Support Enforcement v. Pyron*, 363 Ark. 521, 215 S.W.3d 637 (2005).

Though liability issues could be resolved before notice to the class members due to defendant developers' waiver, notice was then appropriate to class members under the direction of the circuit court, and the court remanded the case for that purpose. *Office of Child Support Enforcement v. Pyron*, 363 Ark. 521, 215 S.W.3d 637 (2005).

### Numerosity.

A trial court should not delve into the merits of affirmative defenses, such as release and consent, in determining whether the numerosity requirement of subsection (a) of this rule has been satisfied at the class-certification stage. *Fraley v. Williams Ford Tractor & Equip. Co.*, 339 Ark. 322, 5 S.W.3d 423 (1999).

Numerosity requirement was established in a class action suit against a title company under the Arkansas Deceptive Trade Practices Act, § 4-88-101 et seq., because the title company closed more than 50,000 loan transactions in the relevant period of time, the title company routinely charged a document fee,

the issues raised in one case were present in most of the closings where the title company participated, and the act complained of by the representative was typical of the title company's actions in other closings. *Lenders Title Co. v. Chandler*, 358 Ark. 66, 186 S.W.3d 695 (2004).

Where the circuit court's defined the class as all persons in Arkansas that paid a documentary fee to appellants since December 31, 1997, this definition was sufficient because it provided an objective set of criteria that could be used to identify the class members. *Asbury Auto. Group, Inc. v. Palasack*, 366 Ark. 601, 237 S.W.3d 462 (2006).

#### **Pre-Certification Communications with Potential Class Members.**

Pre-certification communications with potential class members which attempt to substantially reduce member participation in the class action, or which otherwise indicate a likelihood of coercion or a serious potential for harm to the interests of the class action, should be restricted or prohibited when brought to the attention of the trial court. *Fralely v. Williams Ford Tractor & Equip. Co.*, 339 Ark. 322, 5 S.W.3d 423 (1999).

Pre-certification communications by the defendant with potential class members were improper and presented a likelihood of serious abuses and, therefore, the trial court's consideration of such communications, including the releases that resulted therefrom, was an abuse of discretion where representatives of the defendant attempted to contact all potential class members prior to class certification, attempted to discourage participation in the lawsuit, and also discussed the merits of the case. *Fralely v. Williams Ford Tractor & Equip. Co.*, 339 Ark. 322, 5 S.W.3d 423 (1999).

#### **Predominant Common Questions.**

Where the validity of a 99-year lease of a gate house to a developer, objected to by property owners in the developments, was the main issue, questions of law or fact common to the members of the class predominated over questions affecting only individual members. *Cooper Communities, Inc. v. Sarver*, 288 Ark. 6, 701 S.W.2d 364 (1986).

In class action challenging propriety of insurers' requirement that insureds pay membership fee to the Farm Bureau Federation, the trial court did not abuse its discretion in ruling on the commonality of interests; the common question was whether the applicable statutes preclude the companies from requiring their insureds to pay such fee. *Farm Bureau Mut. Ins. Co. v. Farm Bureau Policy Holders & Members*, 323 Ark. 706, 918 S.W.2d 129 (1996).

Individual issues raised by a claim of fraudulent concealment and the defenses of statute of limitations, release, and consent did not

override the common questions relating to the allegation of a centralized scheme perpetrated by the defendant. *Fralely v. Williams Ford Tractor & Equip. Co.*, 339 Ark. 322, 5 S.W.3d 423 (1999).

Where a common question of misrepresentation under subdivision (a)(1) of this rule was the linchpin of every class member's case and needed to be resolved as the first step, resolution of the issue predominated over potential individual issues relating to investor knowledge or affirmative defenses. *BNL Equity Corp. v. Pearson*, 340 Ark. 351, 10 S.W.3d 838 (2000), cert. denied 531 U.S. 823, 121 S. Ct. 66, 148 L. Ed. 2d 32 (2000).

Employees' breach of contract action against employer regarding an incentive bonus plan lacked the commonality required for certification as a class action, under subdivision (a)(2) of this rule, since inquiry of each class member as to his or her understanding of the contract terms was required. *Williamson v. Sanofi Winthrop Pharms., Inc.*, 347 Ark. 89, 60 S.W.3d 428 (2001).

Where a title company allegedly engaged in the unauthorized practice of law and violated the Arkansas Deceptive Trade Practices Act, § 4-88-101 et seq., a class action was appropriate because the common wrong alleged applied to every member of the class, and the individual claims did not predominate because the common issues were capable of resolution first. *American Abstract & Title Co. v. Rice*, 358 Ark. 1, 186 S.W.3d 705 (2004).

Predominance requirement was established in a class action suit against a title company under the Arkansas Deceptive Trade Practices Act, § 4-88-101 et seq., because several common issues predominated over individual claims; the common threshold questions concerning whether the company was permitted to charge document fees during closings could have been decided before the consideration of any individual issues. *Lenders Title Co. v. Chandler*, 358 Ark. 66, 186 S.W.3d 695 (2004).

Circuit court did not abuse its discretion in concluding that the predominance element was satisfied where common issues of law and fact predominated over the individual issues in the case; the predominating questions concerned the charge of the documentary fee and the basis for charging that fee. *Asbury Auto. Group, Inc. v. Palasack*, 366 Ark. 601, 237 S.W.3d 462 (2006).

Starting point in examining the predominance issue is whether a common wrong has been alleged against the defendant. If a case involves preliminary, common issues of liability and wrongdoing that affect all class members, the predominance requirement of the rule is satisfied even if the trial court must subsequently determine individual damage issues in bifurcated proceedings. *Beverly En-*



terprises-Arkansas, Inc. v. Thomas, 370 Ark. 310, 259 S.W.3d 445 (2007).

In a case in which a corporation that had been sued for damages and injunctive relief arising out of vapors, gasses, odors, and other forms of hazardous, noxious, toxic and or harmful substances and contamination emitted from an industrial wastewater treatment system operated by the corporation, the trial court erred in granting limited class certification because numerous and complex individual issues predominated over the common issues. *Georgia-Pacific Corp. v. Carter*, 371 Ark. 295, 265 S.W.3d 107 (2007).

Element of predominance, under subsection (b) of this rule, was satisfied in a case that alleged that a health-information management company's actions constituted a statewide deceptive practice because the issue of whether the prices charged by the company exceeded those allowed under § 16-46-106 was the single most common issue that predominated over all others because the company's billing practices, whether they were for the copying of records or for shipping or postage, were the central issue of the litigation, and the patient alleged that the company engaged in a deceptive scheme to overcharge its customers in violation of statutory and common law. *ChartOne, Inc. v. Raglon*, 373 Ark. 275, 283 S.W.3d 576 (2008).

Fact that various states' laws could be required in determining certain issues, such as damages, restitution, or other individual issues, did not mean certification was improper because whether or not a class of vehicles contained a defectively designed parking-brake system and whether or not a corporation concealed that defect were predominating questions. A circuit court was not required to engage in a choice of law analysis prior to certifying a class. *GMC v. Bryant*, 374 Ark. 38, 285 S.W.3d 634 (2008), cert. denied — U.S. —, — S. Ct. —, 173 L. Ed. 2d 107 (2009).

Pursuant to this rule, the circuit court abused its discretion in certifying a class action where there was no one set of operative facts applicable to all class members that may or may not have constituted the unauthorized practice of law or a violation of the Arkansas Deceptive Trade Practices Act by the railroad; the question of whether the railroad advised claimants of their legal rights would vary from person to person, and there was no one set of operative facts that established the railroad's liability to any given class member. *Union Pac. R.R. v. Vickers*, 2009 Ark. 259, 308 S.W.3d 573 (2009).

Circuit court did not abuse its discretion as to the class' unjust-enrichment claim against the preparer under this rule, as it provided specific findings of fact and conclusions of law; if the issue was resolved in favor of the class, every member would have suffered a common

injury of paying a fee the preparer was not permitted to charge. *Flow Doc, Inc. v. Horton*, 2009 Ark. 411, 334 S.W.3d 865 (2009).

Circuit court did not abuse its discretion in finding that the requirement of predominance was met because the common issue that predominated was whether a limited liability company, individuals, and trusts breached a fiduciary duty by failing to disclose all relevant information with respect to a proposed merger; that over-arching issue could be resolved before the circuit court reached any of the individualized questions the company, individuals, and trusts raised. *Ark. Media, LLC v. Bobitt*, 2010 Ark. 76, 360 S.W.3d 129 (2010).

In an action by insureds against insurers, alleging that the insurers sold health insurance policies by systematically misrepresenting the scope and nature of the policies, the trial court properly certified the matter a class action under this rule where common issues of law and fact predominated over individual issues in the case. The crucial issue common to all members of the class was whether the insurers engaged in a general scheme to defraud and misrepresent to potential customers that an offered bundle was equal to or better than major medical coverage and whether the insurers falsely implied that a membership and life insurance policy were included free with the purchase of a healthcare policy. *United Am. Ins. Co. v. Smith*, 2010 Ark. 468, — S.W.3d —, 2010 Ark. LEXIS 571 (Dec. 2, 2010).

#### **Prerequisites Generally.**

This rule requires that the questions presented be of interest to many persons, or numerous parties, and that it be impractical to bring them all before the court within a reasonable time. *Lemarco, Inc. v. Wood*, 305 Ark. 1, 804 S.W.2d 724 (1991).

Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff; thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims. *Cheqnet Sys. v. Montgomery*, 322 Ark. 742, 911 S.W.2d 956 (1995).

The numerosity requirement was met where the proposed class possibly consisted of

3,000 persons; while the exact number of the proposed class was not proved, the exact size of the proposed class and the identity of the class members need not be established for the court to certify a class, and the numerosity requirement may be supported by common sense. *Cheqnet Sys. v. Montgomery*, 322 Ark. 742, 911 S.W.2d 956 (1995).

Individual questions relating to a class member's reliance for an estoppel claim or reliance for a misrepresentation claim will not defeat class certification. *SEECO, Inc. v. Hales*, 330 Ark. 402, 954 S.W.2d 234 (1997).

Despite her lack of understanding of some legal terms involved in the case, where class representative clearly showed a minimal level of interest in the action in that she contacted her attorneys to pursue a claim against the lender, stayed in regular contact with her attorneys regarding the progress of the case, and understood the cycle of payment of "fees" or "interest" at percentages beyond the usury rate, the class representative met the minimal bar set by the third requirement derived from subdivision (a)(4) of this rule. *The Money Place v. Barnes*, 349 Ark. 518, 78 S.W.3d 730 (2002).

#### **Prerequisites Not Satisfied.**

Where plaintiff, who filed a class action suit on behalf of himself and all other taxpayers similarly situated, was the only taxpayer who had applied for a refund and been denied, only he had complied with § 26-18-507(e)(2)(A), and thus the proposed class of taxpayers, who had not complied with that section, could not be certified as a class. *State, Dep't of Fin. & Admin. v. Tedder*, 326 Ark. 495, 932 S.W.2d 755 (1996).

Class certification was properly denied in an action against numerous manufacturers, suppliers, and distributors of fenfluramine, dexfenfluramine, and phentermine for negligence, product liability, failure to warn, and breach of express and implied warranties, because numerous and complex individual issues predominated over the common issues. *Baker v. Wyeth-Ayerst Lab. Div.*, 338 Ark. 242, 992 S.W.2d 797 (1999).

In a suit against an insurer regarding denial of coverage pursuant to the homeowner's insurance policy exclusion for damage caused by settling or earth movement, because there were no objective criteria for ascertaining class membership and because the trial court could not delve into the merits of the underlying claim when deciding whether the requirements for class certification were met, the trial court abused its discretion in certifying the matter as a class action. *State Farm Fire & Cas. Co. v. Ledbetter*, 355 Ark. 28, 129 S.W.3d 815 (2003).

Trial court did not abuse its discretion in refusing to certify a class of municipal bondholders in an action for breach of fiduciary

duty, gross negligence, and breach of contract brought against a bank that served as trustee in connection with the issuance and sale of municipal bonds where it would have been necessary to establish that the bank's conduct was the proximate cause for the low price received by each bondholder upon the sale of their bonds and, thus, individual issues predominated over the issues common to the class. *Mittry v. Bancorpsouth Bank*, 360 Ark. 249, 200 S.W.3d 869 (2005).

Where two parents who had been identified as class representatives did not know much about the fire that was the underlying basis for the complaint and did not understand the responsibilities of a class representative, the motion to deny class certification under subdivision (a)(4) of this rule was proper. *Valley v. Nat'l Zinc Processors, Inc.*, 364 Ark. 184, 217 S.W.3d 832 (2005).

#### **Prerequisites Satisfied.**

A group comprising 184 individuals satisfied the requirement that the question be of interest to many persons and that it be impractical to bring them all before the court within a reasonable time, the mere signing of the affidavit did not make each affiant a party to the case. *Cooper Communities, Inc. v. Sarver*, 288 Ark. 6, 701 S.W.2d 364 (1986).

There is no requirement that the trial court find that the facts as to each individual of a class action must in every respect be identical with that of all other members of the class; it is enough to show that a common question of law or fact predominates over other questions affecting only individual members. *Arkansas La. Gas Co. v. Morris*, 294 Ark. 496, 744 S.W.2d 709 (1988).

Where it was found that (1) the trial court did not abuse its discretion in certifying the class action, (2) the number of persons seeking relief was not too small, (3) there were predominant common questions of law or fact, and (4) a tort action should be allowed to proceed as a class action, there was a sufficient showing of compliance with the requirements of this rule. *International Union of Elec., Radio & Mach. Workers v. Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988).

Trial court did not abuse its discretion in determining that the requirements of subsection (a) of this rule had been met. *Lemarco, Inc. v. Wood*, 305 Ark. 1, 804 S.W.2d 724 (1991).

The prerequisites of this rule were met where there were numerous potential class members with predominate common questions even though the law of 39 states relative to novation would have to be explored. *Security Benefit Life Ins. Co. v. Graham*, 306 Ark. 39, 810 S.W.2d 943 (1991).

Although the plaintiffs' allegations as to their injuries and damages were different from those they described for other members



of the class, their claims were sufficiently typical in the sense that they arose from the alleged wrong to the class which included the wrong allegedly done to them. *Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 813 S.W.2d 240 (1991).

The prerequisites to a class action were satisfied. *Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 813 S.W.2d 240 (1991).

The requirement of common questions of law or fact was met in action where common questions of fact concerned whether defendant charged \$25 per dishonored check and where common questions of law concerned the legality of defendant's charging \$25 per dishonored check and the applicability of the federal Fair Debt Collection Practices Act and where these questions applied to the entire class of those individuals who were overcharged. *Chequet Sys. v. Montgomery*, 322 Ark. 742, 911 S.W.2d 956 (1995).

Plaintiff shareholder satisfied typicality requirement despite the fact that she had not yet suffered any damages because, even though some class members may collect more than others, the claims are still typical where they arise from the same wrong. *Direct Gen. Ins. Co. v. Lane*, 328 Ark. 476, 944 S.W.2d 528 (1997).

The Supreme Court will not look to the merits of class claims or to appellants' defenses in determining the procedural issue of whether the elements of this rule have been satisfied. *BNL Equity Corp. v. Pearson*, 340 Ark. 351, 10 S.W.3d 838 (2000), cert. denied 531 U.S. 823, 121 S. Ct. 66, 148 L. Ed. 2d 32 (2000).

There was no abuse of discretion in certifying the class under this rule, because each of the claims arose from the same wrong allegedly committed by the trusts, the common issues regarding usury, fraud and choice of law could be addressed before individual issues were resolved, a single class action instead of over 600 individual lawsuits to try the common issues of usury and fraud was the most efficient way to resolve the litigation, and the notes and mortgages of the class were in writing and contained substantially the same language and each lender had the same or similar contacts with Arkansas. *FirstPlus Home Loan Owner 1997-1 v. Bryant*, 372 Ark. 466, 277 S.W.3d 576 (2008).

Element of typicality under subdivision (a)(3) of this rule was satisfied in an action that alleged that a health-information management company's actions constituted a statewide deceptive practice because a patient and the class alleged the same unlawful conduct by the company and a resolution of the central issues of whether the company overcharged its customers would have resolved all class members' claims, and the claims of the class members all arose out of

the company's practices of charging for the copying of medical records. *ChartOne, Inc. v. Raglon*, 373 Ark. 275, 283 S.W.3d 576 (2008).

In a class action lawsuit with a class comprised of all adults residing or occupying business premises who were physically evacuated because of the fire and explosion at issue in the lawsuit, the typicality prong for a class action suit was satisfied because the claims were based on the same legal theory and the same illegal conduct, the predominance element was satisfied because there were common questions regarding liability and those questions predominated over individual issues, and the superiority prong was satisfied when the trial court found that a class action was the superior method because common questions predominated and a class action would be the most realistic means for disposing of the large number of claims arising out of the same event. *Teris, LLC v. Chandler*, 375 Ark. 70, 289 S.W.3d 63 (2008).

### Representative Parties.

To adequately follow the proceedings, the class representative must simply display some minimal level of interest in the action, familiarity with the practices challenged, and ability to assist in decision making as to the conduct of the litigation. *Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 823 S.W.2d 878 (1992), appeal dismissed sub nom. 316 Ark. 742, 875 S.W.2d 79 (1994).

Proposed class representatives were adequate where counsel was qualified, experienced, and generally able to conduct the legislation and where there was no evidence of collusion or conflicting interest between the representatives and the class; representatives also demonstrated in their affidavits and depositions that they possessed the requisite interest in the action to serve as representatives and showed a familiarity with the practices challenged in the complaint. *USA Check Cashers of Little Rock, Inc. v. Island*, 349 Ark. 71, 76 S.W.3d 243 (2002).

Where the insurer sold the husband Medicare supplemental insurance, although the husband was already receiving Medicaid benefits, and the husband and his wife sued the insurer, the chancery court did not abuse its discretion by certifying the suit as a class action since: (1) the class definition was not imprecise; (2) the husband and wife were proper class representatives; (3) common issues predominated over individual issues; and (4) certification was the superior method of disposing of the claims in an effort to avoid numerous small lawsuits. *Arkansas Blue Cross & Blue Shield v. Hicks*, 349 Ark. 269, 78 S.W.3d 58 (2002).

An individual qualified as an adequate class representative as required by subdivision (a)(4) of this rule because the individual: (1) displayed a level of interest in the action

by attempting to put an end to the check-cashing practices of certain companies; (2) talked to the attorneys for the class on a regular basis; and (3) was informed of the status of the case by the attorneys. *Ballard v. Martin*, 349 Ark. 564, 79 S.W.3d 833 (2002), cert. denied 537 U.S. 1105, 123 S. Ct. 871, 154 L. Ed. 2d 774 (2003).

#### **Request for Findings.**

A trial court is required to conduct an analysis of the factors required for certification of a class action under the provisions of this rule and to enter written findings of fact and conclusions of law when requested by a party to the litigation, as provided by ARCP 52. *BPS Inc. v. Richardson*, 341 Ark. 834, 20 S.W.3d 403 (2000).

Trial court's order certifying a suit as a class action was reversed on appeal where the trial court was required but failed to make specific findings and conclusions, even though a request for such findings was timely made; more was required of the trial court than a cursory mention of the six criteria for a class action or bare conclusions that those criteria had been satisfied. *Lenders Title Co. v. Chandler*, 353 Ark. 339, 107 S.W.3d 157 (2003).

In "self-pay" patients' action that alleged a hospital charged them significantly more than it charged patients with private insurance or patients insured under government health plans, such as Medicare, the trial court erred in certifying the case for class-action status because the trial court's order did not provide the parties or the appellate court with an analysis of the requirements of this rule or specific findings of fact or conclusions of law pursuant to Ark. R. Civ. P. 52. *Baptist Health v. Haynes*, 367 Ark. 382, 240 S.W.3d 576 (2006).

#### **Res Judicata.**

Res judicata can prevent a person from being certified as a class member in a class action. *Arkansas La. Gas Co. v. Taylor*, 314 Ark. 62, 858 S.W.2d 88 (1993).

#### **Standing.**

Unnamed class member lacked standing to appeal the settlement entered into by the named class members. *Haberman v. Lisle*, 318 Ark. 177, 884 S.W.2d 262 (1994), opinion withdrawn, substituted opinion 317 Ark. 600, 884 S.W.2d 262 (1994).

#### **Superiority.**

Evidence established superiority since there were common predominating questions of law and fact and since a class action would allow the defendant to present evidence of fair dealing with the plaintiff customers and could also present individual defenses to the claims of individual class members. *Fraley v. Williams Ford Tractor & Equip. Co.*, 339 Ark. 322, 5 S.W.3d 423 (1999).

Class action was not a superior method under subsection (b) of this rule, of resolving employee's breach of contract action against their employer, since each employee would have to individually state his or her understanding of the alleged contract. *Williamson v. Sanofi Winthrop Pharms., Inc.*, 347 Ark. 89, 60 S.W.3d 428 (2001).

Where a title company allegedly engaged in the unauthorized practice of law and violated the Arkansas Deceptive Trade Practices Act, § 4-88-101 et seq., a class action was appropriate because the superiority requirement was met since a class action was fair to both sides and an efficient way of handling the controversy, which involved more than 10,000 real estate transactions. *American Abstract & Title Co. v. Rice*, 358 Ark. 1, 186 S.W.3d 705 (2004).

Superiority requirement was established in a class action suit against a title company under the Arkansas Deceptive Trade Practices Act, § 4-88-101 et seq., because it was not feasible to recover the small document fee charged to parties in real estate transactions in individual litigation and an examination of individual cases were not required; the title company's argument that § 4-88-113 showed the economic feasibility of individual claims was rejected. *Lenders Title Co. v. Chandler*, 358 Ark. 66, 186 S.W.3d 695 (2004).

The number of claims and the low dollar amount involved in each claim indicated that a class action was superior because it would avoid a multitude of small individual claims and the initial determination of common, predominating issues in the form of a class-action lawsuit was the most efficient method of adjudicating these claims; once these questions were answered, any individual claims and advanced defenses could be tried separately, if necessary. *Asbury Auto. Group, Inc. v. Palasack*, 366 Ark. 601, 237 S.W.3d 462 (2006).

In a guardian's action against a nursing center for breach of contract and violation of the Arkansas Residents' Rights Act, the trial court properly granted class certification where a class action was the superior method under subsection (b) of this rule to resolve the issue of whether the center was chronically understaffed so as to violate the residents' statutory and contractual rights. *Beverly Enterprises-Arkansas, Inc. v. Thomas*, 370 Ark. 310, 259 S.W.3d 445 (2007).

Subsection (b) of this rule requires that a class action be superior to other available methods for the fair and efficient adjudication of the controversy. The superiority requirement is satisfied if class certification is the more "efficient" way of handling the case, and it is fair to both sides. *Beverly Enterprises-Arkansas, Inc. v. Thomas*, 370 Ark. 310, 259 S.W.3d 445 (2007).



Class action was the superior method, under subsection (b) of this rule, for handling a case that alleged that a health-information management company's actions constituted a statewide deceptive practice because: (1) the common, predominating issue was whether the company engaged in a scheme to overcharge customers for copying charges, as well as postage and shipping; (2) the common question could have been answered and, if necessary, subsequent trials could have been held on any individual issues; (3) the large number of potential class members, and the relatively small size of their claims, favored a finding of superiority; and (4) proceeding as a class action was fair to both sides because each side could have presented evidence regarding the predominating question of whether the company engaged in a deceptive scheme. *ChartOne, Inc. v. Raglon*, 373 Ark. 275, 283 S.W.3d 576 (2008).

Circuit court did not abuse its discretion in finding that a class action was superior to individual actions because the proposed class of around 4 million members made it at least likely that without a class action numerous meritorious claims could go unaddressed; the relief sought by class members was relatively small if sought on an individual basis, and thus, it was not economically feasible for members of the class to pursue a corporation on an individual basis; and a class action was a better resolution than having individual members seek relief from the National Highway Traffic Safety Administration. *GMC v. Bryant*, 374 Ark. 38, 285 S.W.3d 634 (2008), cert. denied — U.S. —, — S. Ct. —, 173 L. Ed. 2d 107 (2009).

### Typicality.

Circuit court did not abuse its discretion in concluding that the requirement of typicality was satisfied because class representatives' claims arose from the same course of conduct giving rise to the claims of the other class members, and those claims were based on the same legal theories; both the class representatives and the class alleged the same unlawful conduct, and each class member was asserting the same claims. *Ark. Media, LLC v. Bobitt*, 2010 Ark. 76, 360 S.W.3d 129 (2010).

**Cited:** *Morgan v. Robertson*, 271 Ark. 461, 609 S.W.2d 662 (1980); *Mendel v. Garner*, 283 Ark. 473, 678 S.W.2d 759 (1984); *Fausett & Co. v. Bogard*, 285 Ark. 124, 685 S.W.2d 153 (1985); *Mixon v. Anderson* (In re Ozark Restaurant Equip. Co.), 61 Bankr. 750 (W.D. Ark. 1986), aff'd 816 F.2d 1222 (8th Cir. 1987); *Smith v. City of Springdale*, 291 Ark. 63, 722 S.W.2d 569 (1987); *Arkansas State Bd. of Educ. v. Magnolia Sch. Dist. No. 14*, 298 Ark. 603, 769 S.W.2d 419 (1989); *City of Jacksonville v. Venhaus*, 302 Ark. 204, 788 S.W.2d 478 (1990); *Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 823 S.W.2d 878 (1992), appeal dismissed sub nom. 316 Ark. 742, 875 S.W.2d 79 (1994); *Arkansas County Farm Bureau v. McKinney*, 334 Ark. 582, 976 S.W.2d 945 (1998); *Frank v. Barker*, 341 Ark. 577, 20 S.W.3d 293 (2000); *Stromwall v. Van Hoose*, 371 Ark. 267, 265 S.W.3d 93 (2007); *Farmers Union Mut. Ins. Co. v. Robertson*, 2010 Ark. 241, — S.W.3d —, 2010 Ark. LEXIS 279 (May 20, 2010).

## Rule 23.1. Actions by shareholders.

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

**Reporter's Notes to Rule 23.1:** 1. Rule 23.1 is identical to FRCP 23.1.

2. Both this and FRCP 23.1 are silent concerning the "security for expenses" provision of many state business corporation acts, including that found in *Ark. Stat. Ann.* § 64-223(c)(d) (Repl. 1962). Since the decision in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 69 S. Ct. 1221 (1949), it has generally been considered that such acts were substantive in nature and should be followed in diversity actions in federal courts. Consequently, the adoption of this rule does not supersede or repeal the "security for expenses" provision found in the Arkansas Business Corporation Act. The same is also true with regard to the matter of attorney's fees,

which under *Ark. Stat. Ann.* § 64-223 (Repl. 1962), may be awarded to either plaintiff or defendant, depending upon which prevailed in the action. See Wright & Miller, *Federal Practice And Procedure*, Section 1841.

3. This rule follows prior Arkansas law as found in *Ark. Stat. Ann.* § 64-223(f) (Repl. 1962) which required court approval to dismiss or compromise a derivative action. This rule goes further, however, and requires that notice of a proposed dismissal or compromise be given to other shareholders or members in such manner as the court may direct. This is simply to afford an opportunity for other stockholders to voice objection to any proposed settlement or dismissal.

## RESEARCH REFERENCES

**Ark. L. Rev.** Matthews, The Shareholder Derivative Suit in Arkansas, 52 *Ark. L. Rev.* 353.

## CASE NOTES

### ANALYSIS

Allegation of efforts made.  
Compliance with requirements.  
—Burden of proof.  
Real party in interest.  
Standing.

### Allegation of Efforts Made.

With respect to the requirement that a plaintiff allege with particularity the efforts made to obtain the actions he desires from the directors and the reasons for his failure to obtain the action or for not making the effort, there are situations in which the demand requirement should be relaxed and if the demand is in all likelihood a futile gesture, it is not essential. *Morgan v. Robertson*, 271 Ark. 461, 609 S.W.2d 662 (1980).

### Compliance with Requirements.

The requirement of this rule that a plaintiff fairly and adequately represent the interests of the members justifies requiring compliance with the rule to a greater degree than a complaint which fails to supply any information regarding members — who they are, where they are, how they become members, or even whether there are members. If this information is not known to plaintiff, but is available to the defendants, even that ought to be alleged and pursued by discovery. *Morgan v. Robertson*, 271 Ark. 461, 609 S.W.2d 662 (1980).

The true measure of representation under this rule is not how many shareholders the plaintiff represents but rather how well the representative plaintiff advances the inter-

ests of similarly situated shareholders. *Brandon v. Brandon Constr. Co.*, 300 Ark. 44, 776 S.W.2d 349 (1989).

The trial court correctly concluded that the plaintiffs shareholders' claims essentially constituted a derivative action, which could be maintained pursuant to the rule, where the plaintiffs sought relief from corporate indebtedness that they had personally guaranteed. *Hames v. Cravens*, 332 Ark. 437, 966 S.W.2d 244 (1998).

### —Burden of Proof.

The burden of showing that the party bringing a derivative action does not fairly and adequately represent the interests of the shareholders is always on the defendant. *Brandon v. Brandon Constr. Co.*, 300 Ark. 44, 776 S.W.2d 349 (1989).

### Real Party in Interest.

In a derivative suit on behalf of a corporation either against third persons or against officers or directors of the corporation, the corporation is a necessary party. It is, in fact, inherent in the nature of the suit itself that it is the corporation whose rights are being redressed rather than those of the individual plaintiff, and the corporation is regarded as the real party in interest and is entitled to service of process as any other defendant. *Morgan v. Robertson*, 271 Ark. 461, 609 S.W.2d 662 (1980).

### Standing.

An officer, director and member of a non-profit corporation is not without standing to question the management and conduct of



other officers and directors who are alleged to be in violation of the bylaws and articles and against the purposes of the corporation. *Morgan v. Robertson*, 271 Ark. 461, 609 S.W.2d 662 (1980).

A corporation's injuries for loss of contract, the goodwill associated with the contract, and the gross receipts and profits generated therefrom, were injuries for which relief should be granted to the corporation and not a shareholder, and any action to recover the alleged loss was derivative in nature and subject to this rule. *Walker v. Hyde*, 303 Ark. 615, 798 S.W.2d 435 (1990).

A shareholder may bring a derivative action on behalf of a corporation to enforce a right of the corporation when the corporation has

failed to do so, but in order for a shareholder to bring an individual cause of action against a third party, that shareholder must be injured for a wrong directly or independently of the corporation; individual stockholders have no standing to sue in their individual capacities for injuries allegedly suffered primarily by the corporation and its shareholders, and direct suits are appropriate only where a shareholder asserts a direct injury to the shareholder distinct and separate from harm caused to the corporation. *Farm Bureau Ins. Co. of Ark., Inc. v. Running M Farms, Inc.*, 366 Ark. 480, 237 S.W.3d 32 (2006).

**Cited:** *Taylor v. Terry*, 279 Ark. 97, 649 S.W.2d 392 (1983).

## Rule 23.2. Actions relating to unincorporated associations.

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e). (Amended November 11, 1991, effective January 1, 1992.)

**Reporter's Notes to Rule 23.2:** 1. With the exception of minor wording changes, Rule 23.2 is identical to FRCP 23.2. These wording changes were necessary because of the revision of Rule 23 from FRCP 23.

2. Actions by and against members of unincorporated associations as a class have been long recognized in Arkansas. Since an association cannot sue or be sued in its own name, a class action has been the customary method of bringing suit. *Baskin v. United Mine Work-*

*ers of America*, 150 Ark. 398, 234 S.W. 464 (1921); *Smith v. Arkansas Motor Freight Lines*, 214 Ark. 553, 217 S.W.2d 249 (1949).

3. Rule 23.2 should have little effect on Arkansas law. The rule simply provides safeguards to insure that absent members of the association are fully protected. This rule does not affect the principle that individual members of an association are not liable for damages. *Massey v. Rogers*, 232 Ark. 110, 334 S.W.2d 664 (1960).

## CASE NOTES

### ANALYSIS

Adequate representation.  
Class certification.

### Adequate Representation.

Despite its erroneous finding that a taxpayer was an inadequate representative under Ark. Const., Art. 16, § 13, a circuit court did not err in dismissing an illegal-exaction claim as to taxpayers within 498 of the 499 municipalities participating in a defense program because those municipalities were not proper parties through this rule. Ark. Const., Art. 16, § 13 was self-executing and imposed no terms or conditions upon the right of a citizen to file suit to prevent an illegal exac-

tion. *Stromwall v. Van Hoose*, 371 Ark. 267, 265 S.W.3d 93 (2007).

### Class Certification.

There is no need for the certification of a class in an action brought under the rule. *Arkansas County Farm Bureau v. McKinney*, 334 Ark. 582, 976 S.W.2d 945 (1998).

In a case alleging an illegal exaction relating to a settlement agreement, an argument that there were no findings of fact made was meritless because a request under Ark. R. Civ. P. 52 was in error; no class certification was required to proceed under this rule. *Stromwall v. Van Hoose*, 371 Ark. 267, 265 S.W.3d 93 (2007).

**Cited:** *Fausett & Co. v. Bogard*, 285 Ark. 124, 685 S.W.2d 153 (1985); *Arkansas Inter-*

*collegiate Conference v. Parnham*, 309 Ark. 170, 828 S.W.2d 828 (1992).

## Rule 24. Intervention.

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) *Procedure.* A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. When the constitutionality of a statute of this state affecting the public interest is drawn into question in any action, the court may require that the Attorney General of this state be notified of such question.

**Reporter's Notes to Rule 24:** 1. Generally speaking, the question of whether to allow an intervention has rested in the discretion of the trial court. There are situations, however, under prior Arkansas law where an intervention has been allowed as a matter of right. *Ark. Stat. Ann.* § 31-157 (Repl. 1962) permits a person contesting the validity of an attachment or claiming an interest in attached property to intervene to assert his rights. That statute seems to suggest that an intervention is allowed as a matter of right once the proper interest is shown in the subject matter. *Laurence v. Ford Motor Credit Co.*, 247 Ark. 1125, 449 S.W.2d 695 (1970). Likewise, *Ark. Stat. Ann.* § 34-1809 (Repl. 1962), provides that upon proper showing, a party claiming an interest in property about to be sold at a partition sale can intervene in that action, with the implication that such right is unconditional. Also, *Ark. Stat. Ann.* § 81-1340(a) (Repl. 1962), seems to suggest that a workmen's compensation carrier has the unconditional right to intervene in an action brought by an injured employee against a third party. Thus, there are at least three situations where the right to intervene is

granted by statute as contemplated by Rule 24(a)(1).

2. The Arkansas Supreme Court has held that intervention is not a common law right, but is instead based upon the principle that a party should be permitted to do that voluntarily which, if known, a court would require to be done. *Board of Directors of St. Francis Levee Dist. v. Raney*, 190 Ark. 75, 76 S.W.2d 311 (1934). Accordingly, the court has followed the general rule that only necessary parties could intervene as a matter of right, while permitting the trial court to exercise its discretion in deciding whether others could intervene. *Pulaski County Bd. of Eq. v. American Republic Life Ins. Co.*, 223 Ark. 124, 342 S.W.2d 660 (1961). Section (a)(2) of this rule suggests, however, that an intervention as a matter of right may not be limited to those persons who have been traditionally considered as "necessary" parties.

3. Section (b) does not appear to change to any appreciable degree prior Arkansas law concerning permissive interventions. As noted herein, the question of permitting persons other than those mentioned in Section (a) to intervene rests in the sound discretion



of the trial court. Thus, Section (b), does not work any changes in prior law.

## RESEARCH REFERENCES

**ALR.** Right to Intervene in Court Review of Zoning Proceeding. 47 ALR 6th 439.

**Ark. L. Rev. Note,** Un-Appealing Class Action Settlements: Why No One Has Standing to Challenge Settlements after Haberman v. Lisle, 49 Ark. L. Rev. 375.

**U. Ark. Little Rock L.J.** Survey — Civil Procedure, 12 U. Ark. Little Rock L.J. 135.

**U. Ark. Little Rock L. Rev.** Annual Survey of Caselaw: Property Law, 27 U. Ark. Little Rock L. Rev. 739.

## CASE NOTES

### ANALYSIS

In general.

Appeal.

Application.

Independent cause of action.

Interested parties.

Intervention as a matter of right.

Intervention denied.

Intervention properly allowed.

Notice to intervenor of right.

Permissive intervention.

Pleading.

Probate proceedings.

Timeliness.

### In General.

There are two means by which to intervene in a lawsuit: as a matter of right and by permission. The former cannot be denied, but the latter is discretionary, and denial of permissive intervention will only be reversed if that discretion is abused. *Schacht v. Garner*, 281 Ark. 45, 661 S.W.2d 361 (1983).

One who does not intervene, whether or not by right, is not at risk of being bound by the litigation and is not subject to *res judicata*. The impairment that is faced by one who has been denied intervention and proceeds with his own litigation, is that of *stare decisis*. *UHS of Ark., Inc. v. City of Sherwood*, 296 Ark. 97, 752 S.W.2d 36 (1988).

Where plaintiff's counsel sought newspaper photographs of accident scene, the trial court abused its discretion by refusing to quash the subpoena because it abrogated the newspaper's property rights by requiring the newspaper to create and produce photographic prints for use in a lawsuit to which it was not a party, while prohibiting it from recovering reasonable compensation for the use of its intellectual property. *Ark. Democrat-Gazette, Inc. v. Brantley*, 359 Ark. 75, 194 S.W.3d 748 (2004).

In a probate proceeding, a decision to deny intervention by two healthcare providers in order to challenge the qualifications of an administratrix was reversed where the court failed to analyze the case under this rule.

*Helena Reg'l Med. Ctr. v. Wilson*, 362 Ark. 117, 207 S.W.3d 541 (2005).

### Appeal.

An order denying intervention as a matter of right is appealable; the movant need only claim a legitimate interest to warrant review. *Cupples Farms Partnership v. Forrest City Prod. Credit Ass'n*, 310 Ark. 597, 839 S.W.2d 187 (1992).

In order to overturn the chancellor's ruling denying their motion to intervene, appellants must demonstrate that the trial court abused its discretion by making a judgment call which was arbitrary or groundless. *Employers Nat'l Ins. Co. v. Grantors to Diaz Refinery PRP Comm. Site Trust*, 313 Ark. 645, 855 S.W.2d 936 (1993).

When a trial court granted a permissive intervention, the intervenors could not appeal the decision because they had a method of intervention and the judgment was not final. *Duffield v. Benton County Stone Co.*, 369 Ark. 314, 254 S.W.3d 726 (2006).

### Application.

Writ of certiorari was proper, because the court erred in denying the husband's motion to quash several subpoenas concerning his medical records, when the husband was not a party to the underlying custody dispute, the husband did nothing to bring his medical condition into issue, and the husband's mental health was examined through other admissible evidence; neither party by intervention or by joinder applied. *McKenzie v. Pierce*, 2012 Ark. 190, — S.W.3d —, 2012 Ark. LEXIS 212 (May 3, 2012).

### Independent Cause of Action.

Trial court erred in denying Arkansas Department of Human Services' motion for intervention, as its claims were clearly not derivative of the claims of the parents. *National Bank of Commerce v. Quirk*, 323 Ark. 769, 918 S.W.2d 138 (1996), amended, 325 Ark. 31, 922 S.W.2d 717 (1996), overruled in part on other grounds, *Ark. HHS v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006).

**Interested Parties.**

Subdivision (a)(2) of this rule has expanded the privilege to intervene as a matter of right and this privilege is no longer limited to those persons who have been traditionally considered as "necessary" parties. *Bank of Quitman v. Phillips*, 270 Ark. 53, 603 S.W.2d 450 (1980).

An applicant must establish not only a sufficient interest, but also that the disposition of the action may, as a practical matter, impair or impede an ability to protect one's interest and that the interest is not adequately represented by the existing parties. *UHS of Ark., Inc. v. City of Sherwood*, 296 Ark. 97, 752 S.W.2d 36 (1988).

Circuit court erred in holding that the foster parents had no right to adopt and therefore no right to intervene in an adoption proceeding involving their foster child under this rule. Section 9-27-325(1)(3)(B) contemplated that foster parents seeking to adopt a child might become parties to the dependency-neglect proceeding. *Schubert v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 113, — S.W.3d —, 2010 Ark. App. LEXIS 101 (Feb. 3, 2010).

**Intervention As a Matter of Right.**

Grandparents who had been granted visitation rights had sufficient interest in adoption proceedings to allow them to intervene for the limited purpose of offering evidence on the best interests of their grandchildren and were entitled to intervene as a matter of right under this rule. *Quarles v. French*, 272 Ark. 51, 611 S.W.2d 757 (1981).

Generally, if the one seeking intervention will be left with his right to pursue his own independent remedy against the parties, regardless of the outcome of the pending case, then he has no interest that needs protecting by intervention of right. *Billabong Prods., Inc. v. Orange City Bank*, 278 Ark. 206, 644 S.W.2d 594 (1983).

Allegations by corporation, which sought to intervene in action between corporate stockholders and bank, that *stare decisis* might prevent it from prosecuting its own claim against bank and that it was financially unable to bring the suit were insufficient reasons to allow intervention as a matter of right. *Billabong Prods., Inc. v. Orange City Bank*, 278 Ark. 206, 644 S.W.2d 594 (1983).

Corporation did not claim a sufficient interest relating to the transaction which was the subject of suit between corporate stockholders and a bank where the transaction which was the subject of that action was a guaranty contract whereby the stockholders guaranteed payment of a debt allegedly owed by corporation, while the transaction in corporation's motion to intervene was an alleged breach of contract to loan money or, in the alternative, an alleged promissory deceit;

moreover, corporation was not so situated that disposition of the action would impair its ability to protect its claim against the bank since, no matter how the suit between the stockholders and the bank was decided, corporation could still bring an action against the bank for breach of contract to loan money or for promissory deceit. Therefore, the trial court did not err in refusing to grant intervention under subdivision (a)(2) of this rule. *Billabong Prods., Inc. v. Orange City Bank*, 278 Ark. 206, 644 S.W.2d 594 (1983); *Midland Dev., Inc. v. Pine Truss, Inc.*, 24 Ark. App. 132, 750 S.W.2d 62 (1988).

Intervention as a matter of right cannot be denied. *Midland Dev., Inc. v. Pine Truss, Inc.*, 24 Ark. App. 132, 750 S.W.2d 62 (1988).

This rule does not give an absolute right to intervene unless the application complies with the procedural requirements. Three requirements that an applicant must meet in order to prevail as a matter of right are that: (1) he has a recognized interest in the subject matter of the primary litigation, (2) his interest might be impaired by the disposition of the suit, and (3) his interest is not adequately represented by existing parties. *Midland Dev., Inc. v. Pine Truss, Inc.*, 24 Ark. App. 132, 750 S.W.2d 62 (1988).

When § 11-9-410(a)(1) gives a carrier the right to intervene, the carrier may intervene as a matter of right under this rule. *Carton v. Missouri Pac. R.R.*, 315 Ark. 5, 865 S.W.2d 635 (1993).

A party's interest in enforcing arbitration rights has been held to be a significant factor in determining whether to allow intervention as of right pursuant to the federal rule, which is identical to this rule. *Matson, Inc. v. Lamb & Assocs. Packaging*, 328 Ark. 705, 947 S.W.2d 324 (1997).

Employer had an unconditional right to intervene in its injured employees' suit against a company the employees were working for as independent contractors, and it was error for the trial court to have denied the employer that right; additionally, the right to intervene to protect subrogation rights did not require the default judgment against the employer to have been set aside. *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004).

Easement holder was entitled to intervene as a matter of right in a title-confirmation case because the holder had a valid interest in the property and showed both entitlement and unusual and compelling circumstances for the holder's late attempt to intervene; the assessor's office erroneously deleted the holder from its tax rolls in 2001, which led to the holder not being officially notified of a 2004 tax sale or the 2007 title-confirmation



action. *Parkerson v. Brown*, 2010 Ark. App. 505, — S.W.3d —, 2010 Ark. App. LEXIS 534 (June 16, 2010).

### Intervention Denied.

Where Illinois official wanted to be a party to keep an eye on lawsuit involving rehabilitation of Arkansas insurance companies but he did not object to reorganization, and made no third party complaint, nor did he make any claim, trial judge properly denied intervention. *Schacht v. Garner*, 281 Ark. 45, 661 S.W.2d 361 (1983).

Where no motion to intervene was ever filed as required by this rule, the county could not object to the failure of the trial court to allow it to intervene in a probate action to determine the ownership of the contents of a safe deposit box. *Newton County v. Davison*, 289 Ark. 109, 709 S.W.2d 810 (1986).

There was ample evidence in the record to support the chancellor's finding that the appellants' motions for intervention were untimely. *Employers Nat'l Ins. Co. v. Grantors to Diaz Refinery PRP Comm. Site Trust*, 313 Ark. 645, 855 S.W.2d 936 (1993); *National Enters., Inc. v. Union Planters Nat'l Bank*, 322 Ark. 590, 910 S.W.2d 691 (1995).

Where no motion to intervene was filed in the trial court before that court lost jurisdiction of the case, and only filed in the appellate court four days after the record was lodged in the appeal, the proposed intervenors' motion was denied for lack of timeliness. *Arkansas Dep't of Health v. Westark Christian Action Council*, 319 Ark. 288, 890 S.W.2d 582 (1995).

Where a secured creditor of a company that owned and operated a federally licensed radio station successfully sought an ex parte order appointing it receiver for purposes of furthering its claim before the Federal Communications Commission that it was entitled to the radio license, petitioner, who also claimed he was entitled to the license, should have been allowed to intervene in the cause of action as a matter of right. *Pearson v. First Nat'l Bank*, 325 Ark. 127, 924 S.W.2d 460 (1996).

Law firms did not have a right to intervene in an action by the state against several tobacco manufacturers for the purpose of protecting their claimed interest in attorney's fees, pursuant to an alleged contract to represent the state in the matter, where: (1) the motion to intervene was not filed until approximately three weeks after a consent decree was entered, and the complaint in intervention was not filed until some six months later, (2) the state and the tobacco companies would be prejudiced by the delay caused by intervention, (3) there was no sound or compelling reason for the delay in seeking intervention, (4) the law firms had no recognized interest in the subject matter of the litigation between the state and the tobacco companies, and (5) the law firms' interest in obtaining

attorney's fees would not be impaired by the disposition of the litigation between the state and the tobacco companies. *Milberg, Weiss, Bershad, Hynes, & Lerach v. State*, 342 Ark. 303, 28 S.W.3d 842 (2000).

Law firms did not qualify for permissive intervention in an action by the state against several tobacco manufacturers for the purpose of protecting their claimed interest in attorney's fees, pursuant to an alleged contract to represent the state in the matter, where they cited no state statute that conferred upon them a conditional right to intervene and failed to show that their claim for attorney's fees and the underlying litigation had a common question of law or fact. *Milberg, Weiss, Bershad, Hynes, & Lerach v. State*, 342 Ark. 303, 28 S.W.3d 842 (2000).

Committee to establish a municipal fire department which circulated a petition to place an ordinance on the city's general election ballot but which was not joined by a local voter and, further, did not purport to represent local voters, lacked standing to intervene in a case concerning the ballot title and initiative petition, or rights which, pursuant to Ark. Const., Amend. VII, were reserved to the local voters. *Comm. to Establish Sherwood Fire Dep't v. Hillman*, 353 Ark. 501, 109 S.W.3d 641 (2003).

Denial of the motor company's representative's motions to intervene and to quash a writ of garnishment was proper where, given the fact that a tort suit would have complicated the issues already before the circuit court and the fact that the representative could have pursued his claim independently, the circuit court did not abuse its discretion in denying the motion to intervene. *Turner v. Farnam*, 82 Ark. App. 489, 120 S.W.3d 616 (2003).

Trial court properly denied hospital's motion to intervene because it found the hospital had not met one of the factors required by subdivision (a)(2) of this rule. *Med. Park Hosp. v. BancorpSouth*, 357 Ark. 316, 166 S.W.3d 19 (2004).

Where the mother's parental rights were terminated, the maternal grandparents lost any right they had to custody and visitation of the children. The trial court did not abuse its discretion by denying the grandparents' motion to intervene in the adoption proceedings under subsection (c) of this rule. *Burt v. Ark. HHS*, 99 Ark. App. 402, 261 S.W.3d 468 (2007).

In a class action suit against a telecommunications company, denial of an alleged class member's motion to intervene was proper as he failed to establish eligibility for intervention under subdivision (a)(2) of this rule; the settlement agreement, as well as the notice to proposed class members, made clear that proposed class members could request to be excluded from the settlement class, but the

member did not make any such request. Further, there was no merit to the member's argument that he did not receive a copy of the settlement agreement in sufficient time for him to consider his options and decide upon exclusion, and he failed to show that his interest was not adequately represented by the existing parties. *DeJulius v. Sumner*, 373 Ark. 156, 282 S.W.3d 753 (2008).

#### **Intervention Properly Allowed.**

Where four county householders brought an action challenging the validity of a county ordinance which imposed an annual fee on each household to meet the cost of providing emergency medical services to the county, the chancellor did not abuse his discretion in permitting a city within the county and the emergency medical service corporation to intervene in the suit since the intervenors had a vital interest to protect and had questions of law and fact in common with the primary litigation. *Vandiver v. Washington County*, 274 Ark. 561, 628 S.W.2d 1 (1982), questioned *Cox v. Commissioners of Maynard Fire Improv. Dist. No. 1*, 287 Ark. 173, 697 S.W.2d 104 (1985), criticized *North Little Rock v. Graham*, 278 Ark. 547, 647 S.W.2d 452 (1983).

The trial court in an eminent domain proceeding did not err in allowing contract purchasers of a portion of the property to intervene in the action, and the granting of the intervention did not amount to a suit against the state in violation of Ark. Const., Art. 5, § 20. *Arkansas State Hwy. Comm'n v. Wilkinson*, 12 Ark. App. 28, 670 S.W.2d 462 (1984).

Where bank had itself appointed receiver even though it had an interest in the matter (an appointment which was in apparent violation of § 16-17-207), basic fairness dictated that petitioner, also claiming an interest, be allowed to intervene and contest the appointment of bank as receiver. *Pearson v. First Nat'l Bank*, 325 Ark. 127, 924 S.W.2d 460 (1996).

In parents' divorce action, son seeking specific performance of a contract to convey property to him satisfied the three requirements that an applicant must meet in order to intervene as a matter of right: (1) that he has a recognized interest in the subject matter of the primary litigation; (2) that his interest might be impaired by the disposition of the suit; and (3) that his interest is not adequately represented by existing parties. *Bradford v. Bradford*, 52 Ark. App. 81, 915 S.W.2d 723 (1996).

#### **Notice to Intervenor of Right.**

Under the provisions of § 28-50-101 the insurance company which insures a deceased tort-feasor is the only party financially interested in the outcome of the case since, although the estate is the named defendant, it is not financially liable under the statute;

therefore, the peculiar nature of the statute, in effect, confers an unconditional right to intervene on the insurance carrier under subsection (a) of this rule, and the insurance carrier is entitled to notice of the proceeding. *Ideal Mut. Ins. Co. v. McMillian*, 275 Ark. 418, 631 S.W.2d 274 (1982).

Where passenger injured in airplane crash filed negligence suit against estate of the deceased pilot, the insurer of the airplane was entitled to notice of and had the right to intervene in the proceedings; the method of giving notice must be reasonably calculated to apprise the insurance company of the pendency of the action and attempted notice by a letter mailed to the wrong address was insufficient. *Ideal Mut. Ins. Co. v. McMillian*, 275 Ark. 418, 631 S.W.2d 274 (1982).

Although the insurance company was not given notice that the case had been set for trial, it knew the lawsuit was pending, and this was sufficient notice to satisfy the due process requirement. *RLI Ins. Co. v. Coe*, 306 Ark. 337, 813 S.W.2d 783 (1991), cert. dismissed 502 U.S. 1067, 112 S. Ct. 959, 117 L. Ed. 2d 126 (1992).

#### **Permissive Intervention.**

Permissive intervention is a matter resting within the sound discretion of the trial court and appellate court will reverse only for abuse of that discretion. *Billabong Prods., Inc. v. Orange City Bank*, 278 Ark. 206, 644 S.W.2d 594 (1983).

Where corporation sought to intervene in action by bank to enforce guaranty contract against stockholders and motion alleged breach of contract or promissory deceit by bank, the trial court did not abuse its discretion in not allowing permissive intervention since the pleadings failed to establish any common questions between the guaranty and the alleged breach of contract to loan money or promissory deceit. *Billabong Prods., Inc. v. Orange City Bank*, 278 Ark. 206, 644 S.W.2d 594 (1983).

#### **Pleading.**

Motion to intervene was deficient where it contained no pleading setting forth the claim or defense of the appellant. *Polnac-Hartman & Assocs. v. First Nat'l Bank*, 292 Ark. 501, 731 S.W.2d 202 (1987).

#### **Probate Proceedings.**

In accordance with Ark. R. Civ. P. 81, it is precisely because the probate code and the Arkansas Rules of Civil Procedure set forth different time limits on the court's authority to modify or vacate prior orders that § 28-1-115 applies in probate proceedings; therefore, an appeal under § 28-1-116 was timely since Ark. R. Civ. P. 52 was not implicated in an appeal from a denial of reconsideration arising from a denial of intervention in a probate case. *Helena Reg'l Med. Ctr. v. Wilson*, 362



Ark. 117, 207 S.W.3d 541 (2005).

Because appellant heir was made a party to the probate action when the circuit court granted his motion to intervene under this rule, the circuit court erred by determining that he was not entitled to notice of a hearing on a motion to remove the estate executrix. *Maxwell v. Estate of Maxwell*, 2012 Ark. App. 174, — S.W.3d —, 2012 Ark. App. LEXIS 276 (Feb. 22, 2012).

#### **Timeliness.**

This rule does not give an absolute right to intervene unless the application is timely and timeliness is a matter within the sound discretion of the trial court whether the intervention is allowed or denied; the trial court's action is subject to reversal only where discretion has been abused. *Bank of Quitman v. Phillips*, 270 Ark. 53, 603 S.W.2d 450 (1980).

Absent extraordinary and unusual circumstances, intervention after a final judgment by a party who did not participate in the litigation giving rise to the judgment sought to be vacated, should not be permitted and where the record showed that a bank, which failed to intervene before final judgment in a foreclosure action, was fully aware of this action from its inception and chose not to intervene before the decree although it had a right to do so, intervention in an action to vacate such judgment was properly denied. *Bank of Quitman v. Phillips*, 270 Ark. 53, 603 S.W.2d 450 (1980).

Entry of judgment is not the only criterion by which court can measure the timeliness of the attempted intervention; timeliness of intervention is a matter within the discretion of the trial court. *Polnac-Hartman & Assocs. v. First Nat'l Bank*, 292 Ark. 501, 731 S.W.2d 202 (1987).

Attempted intervention held untimely. *Polnac-Hartman & Assocs. v. First Nat'l Bank*, 292 Ark. 501, 731 S.W.2d 202 (1987).

A post-judgment intervention will be allowed only upon a strong showing of entitlement or a demonstration of unusual and compelling circumstances. *UHS of Ark., Inc. v. City of Sherwood*, 296 Ark. 97, 752 S.W.2d 36 (1988).

It would not be reasonable to charge an intervenor with untimeliness where the motion for intervention would clearly have been timely but for the expedited manner with which the judgment was entered. *UHS of Ark., Inc. v. City of Sherwood*, 296 Ark. 97, 752 S.W.2d 36 (1988).

Timeliness under subsection (a) of this rule is a matter lying within the discretion of the trial court and will not be subject to reversal absent abuse of that discretion. *Cupples Farms Partnership v. Forrest City Prod. Credit Ass'n*, 310 Ark. 597, 839 S.W.2d 187 (1992).

Factors to consider in a decision on timeli-

ness of a motion to intervene are: (1) how far the proceedings have progressed; (2) any prejudice to other parties caused by the delay; and (3) the reason for the delay. *Cupples Farms Partnership v. Forrest City Prod. Credit Ass'n*, 310 Ark. 597, 839 S.W.2d 187 (1992).

Not protecting a claimed interest in over four hundred thousand dollars for either seven or ten years was untimely. *Cupples Farms Partnership v. Forrest City Prod. Credit Ass'n*, 310 Ark. 597, 839 S.W.2d 187 (1992).

There are three factors to be considered in a decision on timeliness: (1) how far the proceedings have progressed; (2) any prejudice to other parties caused by the delay; and (3) the reason for the delay. *Employers Nat'l Ins. Co. v. Grantors to Diaz Refinery PRP Comm. Site Trust*, 313 Ark. 645, 855 S.W.2d 936 (1993).

A threshold question in determining whether intervention should be allowed is whether the application to intervene was made in a timely manner. *Employers Nat'l Ins. Co. v. Grantors to Diaz Refinery PRP Comm. Site Trust*, 313 Ark. 645, 855 S.W.2d 936 (1993).

A decision as to the timeliness of intervention is a matter within the sound discretion of the trial court and is subject to reversal only where that discretion has been abused. *Employers Nat'l Ins. Co. v. Grantors to Diaz Refinery PRP Comm. Site Trust*, 313 Ark. 645, 855 S.W.2d 936 (1993).

Timeliness of intervention under subsection (a) of this rule is a matter within the discretion of the trial court and will not be disturbed absent some abuse of discretion; timeliness is to be determined from all the circumstances. *Carton v. Missouri Pac. R.R.*, 315 Ark. 5, 865 S.W.2d 635 (1993).

The timeliness of intervention is within the discretion of the trial court; permitting intervention will not be considered error due to untimeliness unless there has been an abuse of discretion. *Arkansas Best Corp. v. General Elec. Capital Corp.*, 317 Ark. 238, 878 S.W.2d 708 (1994).

When there are unusual and compelling circumstances, the court will permit intervention even after a final judgment has been entered. *Arkansas Best Corp. v. General Elec. Capital Corp.*, 317 Ark. 238, 878 S.W.2d 708 (1994).

Timeliness is to be determined from all of the circumstances including: (1) how far the proceedings have progressed; (2) any prejudice to other parties caused by the delay; and (3) the reason for the delay. *Bradford v. Bradford*, 52 Ark. App. 81, 915 S.W.2d 723 (1996).

Intervention of two fathers in the custody proceedings involving their children and the divorce of the mother from a third father held timely where the fathers filed on the day the

temporary order finding probable cause for dependency-neglect was entered and only a month had passed since the original petition had been filed. *Lowell v. Lowell*, 55 Ark. App. 211, 934 S.W.2d 540 (1996).

A motion to intervene was untimely where it was not filed until four years after the entry of a preliminary injunction, notwithstanding that little or litigation ensued during that four year period, where the movant failed to explain why it did not seek to enter the action earlier and deliberately chose other avenues to pursue to protect its interests. *McLane Co. v. Davis*, 342 Ark. 655, 30 S.W.3d 743 (2000), substituted opinion 342 Ark. 655, 33 S.W.3d 473 (2000).

In an action arising from a motor vehicle accident, the motions of the plaintiff's employer and the workers' compensation carrier for the employer to intervene were timely, notwithstanding that the motion was not made until almost three months after they were notified of the action and only after they were notified that the parties has reached a settlement, where the motion was brought six days before the end of an extended period granted to the plaintiff for completing service upon the defendant. *Northwest Ark. Area Agency on Aging v. Golmon*, 70 Ark. App. 136, 15 S.W.3d 363 (2000).

Where dissatisfied class members delayed the filing of their motion to intervene until nearly 15 months after the litigation had begun or 2 months after a proposed settlement had been reached, the trial court did not abuse its discretion in finding that: (1) class members waited until the litigation had progressed too far before they filed their motion to intervene; (2) the granting of the class members' untimely motion would have caused the other parties to the litigation to suffer prejudice; and (3) the class members failed to

provide a valid reason for their delay in filing their motion to intervene. *Ballard v. Garrett*, 349 Ark. 371, 78 S.W.3d 73 (2002).

Probate judge did not abuse his discretion in finding that the doctor's and medical clinic's petition to intervene under this rule was untimely where the petition was filed almost four years after the order appointing the son as administrator was filed and the estate could be prejudiced if appellants were permitted to intervene; appellants delayed almost two years after being named as defendants in the wrongful-death action before they challenged the son's appointment. *Kelly v. Estate of Edwards*, 2009 Ark. 78, 312 S.W.3d 316 (2009).

Trial court did not err in dismissing a petition by a great-uncle for permissive intervention under subsection (b) of this rule in a dependency-neglect case involving his great-niece and great nephew subsequent to the termination of their parents' rights; the petition was not filed until 15 months after the children were removed from their home, and approximately seven months after parental rights were terminated. *Mann v. Ark. Dep't of Human Servs.*, 2012 Ark. App. 352, — S.W.3d —, 2012 Ark. App. LEXIS 463 (May 16, 2012).

**Cited:** *St. Clair v. Haun*, 601 S.W.2d 223 (1979); *Pulaski County Mun. Court v. Scott*, 272 Ark. 115, 612 S.W.2d 297 (1981), overruled in part *Johnson County Bd. of Election Comm'rs v. Holman*, 280 Ark. 128, 655 S.W.2d 408 (1983); *Wasp Oil, Inc. v. Arkansas Oil & Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983); *Bushong v. Garman Co.*, 311 Ark. 228, 843 S.W.2d 807 (1992); *Stair v. Phillips*, 315 Ark. 429, 867 S.W.2d 453 (1993); *Gravett v. McGowan*, 318 Ark. 546, 886 S.W.2d 606 (1994); *Davis v. Child Support Enforcement Unit*, 326 Ark. 677, 933 S.W.2d 798 (1996).

## Rule 25. Substitution of parties.

(a) *Death.* (1) If a party dies and the claim is not thereby extinguished, the Court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party, and such substitution may be ordered without notice or upon such notice as the Court may require. Unless the motion for substitution is made not later than ninety (90) days after the death is suggested upon the record by the service upon the parties of a statement of the fact of death, the action may be dismissed as to the deceased party.

(2) Upon the death of a plaintiff the proper party for substitution shall be his personal representative or, where the claim has passed to his heirs or to his devisees, the heirs or devisees may be substituted for the deceased party. Upon the death of a defendant in an action wherein the claim survives against his personal representative, the personal representative shall be the proper party for substitution. Except in an action for the recovery of real property only, or for the adjudication of an interest therein, the heirs,



devisees or personal representative may be the proper parties for substitution as the Court may determine. Where the deceased party is acting in the capacity as personal representative, his successor shall be the proper party for substitution.

(3) Upon the death of any party the Court before which such litigation is pending may, upon the motion of any party, appoint a special administrator who shall be substituted for the deceased party. The powers of such special administrator shall extend only to the prosecution and defense of the litigation wherein he is appointed. No special administrator shall be appointed where there is a general personal representative subject to the jurisdiction of the Court for the deceased party. Where such a general personal representative qualifies after the appointment of a special administrator, the general personal representative shall, upon the motion of any party, or the general personal representative, be substituted for such special administrator. Costs taxed against a special administrator shall not constitute a personal obligation.

(4) In the event of the death of one or more of the plaintiffs or one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) *Guardians.* If a plenary, limited or temporary guardian is appointed for a party, the court shall upon such terms as it considers just and upon motion of a party or the guardian allow the guardian to be substituted to the extent of his judiciary capacity, for the party for whom the guardian has been appointed.

(c) *Transfer of Interest.* In the case of any transfer of interest, the action may be continued by or against the original party, unless the Court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of this motion shall be made as provided in subdivision (a) of this rule.

(d) *Public Officers; Death or Separation from Office.* (1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of the substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the Court may require his name to be added.

(e) *Limitation of Rule.* The provisions of this rule shall in no way allow a claim to be maintained which is otherwise barred by limitations or non-claim, nor shall the provisions of this rule be determinative of whether or not a claim for or against a deceased party survives his death. (Amended July 9, 1984, effective September 1, 1984.)

**Reporter's Notes to Rule 25:** 1. Section (a)(1) is modified from FRCP 25(a) so as to allow, with or without notice, the substitution of parties in the event of the death of a party.

This change is predicated upon the assumption that the trial court can best determine whether the substitution is essentially a routine clerical matter or whether it should be

allowed only after a hearing. This section is further modified from the Federal Rule by changing the word "may" for "shall" in the last sentence so as to afford the trial court some discretion in deciding whether to dismiss an action.

2. Section (a)(2) represents an attempt to identify the proper parties for substitution on the death of a party and to condense superseded *Ark. Stat. Ann.* §§ 27-1003, 27-1012, 27-1013 and 27-1014 (Repl. 1962). The purpose of this rule is to permit the action to be prosecuted by or against those who are, following the death of a party, either the real party in interest or representative thereof.

3. Section (a)(3) empowers the trial court to appoint a special administrator for a deceased party in litigation pending before it. This basically tracks the provisions contained in

superseded *Ark. Stat. Ann.* §§ 27-1009 through 27-1011 (Repl. 1962).

4. Section (e) represents an attempt to limit the effect of this rule to the determination of who may be substituted and not to enlarge the time during which a claim may be prosecuted. Neither does it determine which claims survive the death of a party. Specifically, *Ark. Stat. Ann.* §§ 27-901 through 27-910 (Repl. 1962), remain unaffected by Rule 25.

**Addition to Reporter's Notes, 1984 Amendment:** Rule 25(b) is amended to make it compatible with the Limited Guardianship Act and Rule 4(d)(1) and (3). The purpose of providing for substitution of a guardian only "to the extent of his judiciary capacity" is to permit the individual to remain a party in cases in which issues in excess of the guardian's capacity are to be decided.

## CASE NOTES

### ANALYSIS

Applicability.

Construction with other laws.

Death of party.

Dismissal.

Notice.

Substitution at trial level.

Timeliness.

Transfer of interest.

### Applicability.

Where the guardian of the wife's estate failed to timely obtain letters of administration within forty days of the wife's death, the guardian lost its authority to prosecute an action to contest her husband's will on her behalf. No substitution of parties was at issue; therefore, this rule was inapplicable. *First Sec. Bank v. Estate of Leonard*, 369 Ark. 213, 253 S.W.3d 434 (2007).

### Construction with Other Laws.

Section 16-62-108 is not superseded by this rule since the statute creates a special proceeding with a different procedure distinct from an ordinary civil action to which the rules apply. *Nix v. St. Edward Mercy Med. Ctr.*, 342 Ark. 650, 30 S.W.3d 746 (2000).

### Death of Party.

Circuit court order appointing son as special administrator for his deceased mother and ordering substitution of parties was sufficient to revive mother's breach of contract and negligence action against the nursing home; the procedures in § 16-62-105(a) and (b) were superseded by the Rules of Civil Procedure in 1986 and no longer governed the procedure for obtaining an order of revivor. *Deaver v. Faucon Props.*, 367 Ark. 288, 239 S.W.3d 525 (2006).

### Dismissal.

The use of the word "may" in this rule implies that dismissal is not mandatory; however, it is discretionary with the trial court. *Wolford v. St. Paul Fire & Marine Ins. Co.*, 331 Ark. 426, 961 S.W.2d 743 (1998).

### Notice.

The trial court did not err by granting appellee's motion to be substituted for the original party as the party in interest nor did the court abuse its discretion by not requiring notice to appellants of the requested substitution, as substitution may be ordered without notice. *McDermott v. Great Plains Equip. Leasing Corp.*, 40 Ark. App. 8, 839 S.W.2d 547 (1992).

### Substitution at Trial Level.

Since this rule is directed towards substitution at the trial court level, a motion indicating the death of the appellee and asking that an appropriate order be entered to substitute the personal representative of the appellee's estate, if any, or, if none has been appointed, to appoint an undesignated person as a special administrator to be substituted for and as the appellee, pursuant to this rule, was properly denied. *Constitution State Ins. Co. v. Passmore*, 18 Ark. App. 247, 713 S.W.2d 255 (1986).

While this rule illustrates the proper substitution of parties, it does not determine which claims survive the death of a party; thus, the matter was remanded to the trial court to determine if it was a proper action for revival under § 16-62-105 and to determine if the wife's petition for an increase in Medicaid benefits was one that would survive her husband's death such that wife would be substi-



tuted as the executrix of the husband's estate. Ark. HHS v. Smith, 366 Ark. 584, 237 S.W.3d 79 (2006).

**Timeliness.**

Dismissal of medical malpractice action against doctor who died properly dismissed where the motion for substitution of parties was not timely filed; however, in accordance with ARCP 41(b), the dismissal should have been without prejudice. Wolford v. St. Paul Fire & Marine Ins. Co., 331 Ark. 426, 961 S.W.2d 743 (1998).

**Transfer of Interest.**

A change in procedural law now allows a substitution of the real party in interest upon a transfer of interest. Lott v. Circuit Court, 328 Ark. 596, 945 S.W.2d 922 (1997).

Even though a writ of execution named an original creditor instead of an assignee, a trial court did not err in finding that the assignee's status as the real party in interest related back to the issuance of the writ because the assignee's efforts arose out of the same conduct, transaction, or occurrence that existed when the original writ of execution was issued. Looney v. Raby, 100 Ark. App. 326, 268 S.W.3d 345 (2007).

**Cited:** ABC Div. v. Barnett, 285 Ark. 189, 685 S.W.2d 511 (1985); Efird v. Efird, 31 Ark. App. 190, 791 S.W.2d 713 (1990); Deaver v. Faucon Props., 94 Ark. App. 370, 231 S.W.3d 100 (2006); Foremost Ins. Co. v. Miller County Circuit Court, Third Div., 2010 Ark. 116, 361 S.W.3d 805 (2010).

## ARTICLE V. DEPOSITIONS AND DISCOVERY

### Rule 26. General provisions governing discovery.

(a) *Discovery Methods.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) *Scope of Discovery.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues in the pending actions, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, identity and location of any books, documents, or other tangible things and the identity and location of persons who have knowledge of any discoverable matter or who will or may be called as a witness at the trial of any cause. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Insurance agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial preparation; materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party

seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial preparation: experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which he is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Subject to subdivision (b)(4)(C) of this rule, a party may depose any person who has been identified as an expert expected to testify at trial.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at the trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Inadvertent Disclosure.*

(A) A party who discloses or produces material or information without intending to waive a claim of privilege or attorney work product shall be presumed not to have waived under these rules and the Arkansas Rules of Evidence if the party takes the following steps: (i) within fourteen calendar days of discovering the inadvertent disclosure, the producing party must notify the receiving party by specifically identifying the material or infor-



mation and asserting the privilege or doctrine protecting it; and (ii) if responses to written discovery are involved, then the producing party must amend them as part of this notice.

(B) Within fourteen calendar days of receiving notice of an inadvertent disclosure, a receiving party must return, sequester, or destroy the specified materials and all copies. After receiving this notice, the receiving party may not use or disclose the materials in any way.

(C) A receiving party may challenge a disclosing party's claim of privilege or protection and inadvertent disclosure. The reason for such a challenge may include, but is not limited to, the timeliness of the notice of inadvertent disclosure or whether all the surrounding circumstances show waiver.

(D) In deciding whether the privilege or protection has been waived, the circuit court shall consider all the material circumstances, including: (i) the reasonableness of the precautions taken to prevent inadvertent disclosure; (ii) the scope of the discovery; (iii) the extent of disclosure; and (iv) the interests of justice. Notwithstanding Model Rule of Professional Conduct 3.7, and without having to terminate representation in the matter, an attorney for the disclosing party may testify about the circumstances of disclosure and the procedures in place to protect against inadvertent disclosure.

(c) *Protective Orders.* Upon motion by a party or by the person from whom discovery is sought, stating that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) *Sequence and Timing of Discovery.* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) *Supplementation of Responses.* (1) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective

information has not otherwise been made known to the other parties during the discovery process or in writing. This duty includes, but is not limited to, supplying supplemental information about the identity and location of persons having knowledge of discoverable matters, the identity and location of each person expected to be called as a witness at trial, and the subject matter and substance of any expert witness's testimony.

(2) An additional duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) *Contents of Trial Court Orders for Production of Discovery When Defense to Production is a Privilege or the Opinion-work-product Protection.* When the defense to production of discovery is any privilege recognized by Arkansas law or the opinion-work-product protection, orders pursuant to Rule of Civil Procedure 37 compelling production of discovery or denying a motion to quash production of materials pursuant to Rule 45 shall be supported by factual findings and shall address the following factors:

- (1) the need to prevent irreparable injury;
- (2) the likelihood that the claim of privilege or protection would be sustained on appeal;
- (3) the likelihood that an immediate appeal would delay a scheduled trial date;
- (4) the diligence of the parties in seeking or resisting the discovery in the circuit court;
- (5) the circuit court's written statement of reasons supporting or opposing immediate review; and
- (6) any conflict with precedent or other controlling authority as to which there is substantial ground for difference of opinion.

The Supreme Court may, in its discretion, permit an interlocutory appeal from such orders pursuant to Ark. R. App. P.-Civ. 2(f). (Amended November 18, 1996, effective March 1, 1997; amended January 28, 1999; amended May 25, 2006; amended January 10, 2008; amended May 24, 2012, effective July 1, 2012.)

**Reporter's Notes to Rule 26:** 1. Rule 26 is a slightly modified version of FRCP 26. This rule works few significant changes in Arkansas law although Section (b)(2) is new to state practice.

2. The changes from FRCP 26 are designed to follow prior Arkansas law where it was deemed sounder or more appropriate than the Federal Rule. The first change is found in (b)(1) which permits a party to determine the identity and location of persons who will or may be called as witnesses at the trial. The Federal Rule does not specifically require that the names and addresses of potential witnesses be furnished although many local district court rules do make this a requirement. *Bell v. Swift & Co.*, 283 F. 2d 407 (C.C.A. 5th, 1960). This rule makes it clear that such information must be furnished.

3. The second change from the language of the Federal Rule is found in Section (c) which concerns which court may enter a protective order. Under FRCP 26, the court in the district where the deposition is taken may enter

a protective order. This is a power concurrent with that exercised by the court in which the action is pending. Under this rule, only the courts wherein actions are pending shall have the right to enter a protective order.

4. Overall, Rule 26 simply recites the basic philosophy of discovery and with the exception of Section (b)(2), as noted, works few changes in Arkansas practice and procedure.

**Addition to Reporter's Notes, 1997 Amendment:** The introductory clause of Rule 26(c) has been revised along the lines of the corresponding federal rule, as amended in 1993. A similar change has been made in Rule 37(a). As amended, subdivision (c) provides that a motion for a protective order must contain a statement that the movant has conferred, either in person or by telephone, with the other affected parties in a good faith effort to resolve the discovery dispute without the need for court intervention. If the movant is unable to get opposing parties even to discuss the matter, the efforts in attempting to arrange such a conference should be indi-



cated. Like the motion itself, the statement required by subdivision (c) is subject to Rule 11.

**Addition to Reporter's Notes, 1999**

**Amendment:** The first sentence of subdivision (b)(1) has been revised to correct an oversight that dates to the rule's adoption. As amended, this sentence provides for discovery not only as to persons who may have knowledge of discoverable matters or who may be called as witnesses at trial, but also as to "books, documents, or other tangible things." The new language is taken from Federal Rule 26(b)(1), on which the Arkansas rule was based.

Subdivision (e)(2) has been revised to track the corresponding federal rule, as amended in 1993. The duty to supplement, while imposed on a "party," applies whether the corrective information is learned by the client or by the attorney. Supplementation need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. Under the revised rule, the obligation to supplement applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, supplementation is required under subdivision (e)(1) with respect to changes in the opinions of experts, whether in response to interrogatories under subdivision (b)(4)(A) or in a deposition.

The obligation to supplement under subdivision (e)(2) arises whenever a party learns that its prior responses are "in some material respect" incomplete or incorrect. The "knowing concealment" standard found in the former version of the rule has been deleted. A formal amendment of a response is not necessary if the corrective or supplemental information has been made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition.

**Addition to Reporter's Notes, 2006**

**Amendment:** Subdivision (e) has been amended. The amendment strengthens a party's duty to supplement discovery responses with additional or corrected information received after the party's original response. Introductory language stating a general no-duty-to-supplement rule with exceptions has been eliminated. Former subdivisions (e)(1) and (e)(2) have been combined: there is one duty to amend, and amended responses containing supplemental information are one kind of amendment. Former subdivision (e)(3) has been renumbered as new (e)(2) and clarified. The circuit court or the parties may expand the Rule 26(e) duty to supplement. New subdivision (e) in Arkansas Rule of Civil Procedure 37 contains a companion change: if

a party fails to supplement discovery responses seasonably, and prejudice results, then the prejudiced party may move for any appropriate sanction from the circuit court.

**Addition to Reporter's Notes, 2008**

**Amendment:** Paragraph (4)(A) of subdivision (b) has been amended to conform the Rule to current practice. Parties routinely depose testifying experts, as they do other witnesses, without first getting a court order allowing the deposition. This amendment eliminates an unnecessary provision that no one was following.

Paragraph (5) has been added to subdivision (b). These provisions protect parties who inadvertently disclose material protected by any evidentiary privilege or doctrine of protection, such as the attorney work product doctrine. This provision draws on the work of the *Arkansas Bar Association's Task Force on the Attorney-Client Privilege*, *American Bar Association Resolution 120D* (adopted by House of Delegates in August 2006), and a 2006 amendment to Federal Rule of Civil Procedure 26. The Arkansas Bar Association specifically endorsed a similar change in the Arkansas Rule, although its proposal was limited to the attorney-client privilege and the work-product doctrine.

Lawyers do their best to avoid mistakes, but they sometimes happen. Discovery has always posed the risk of the inadvertent production of privileged or protected material. The advent of electronic discovery has only increased the risk of inadvertent disclosures. This amendment addresses this risk by creating a procedure to evaluate and address inadvertent disclosures, including disputed ones.

Arkansas law on this issue is scarce. In *Firestone Tire & Rubber Co. v. Little*, 276 Ark. 511, 639 S.W.2d 726 (1982), a letter between two lawyers for Firestone "made its way" to one of Firestone's customers, who produced the letter in another lawsuit. The Supreme Court held that Firestone waived the privilege by allowing the letter to get into the customer's hands. 276 Ark. at 519, 639 S.W.2d at 730. The Court, however, did not discuss how the customer obtained the letter or whether Firestone's disclosure was inadvertent. The Eighth Circuit has endorsed the multifactor approach contained in this Rule as amended. *Gray v. Bicknell*, 86 F.3d 1472, 1483-84 (8th Cir. 1996) (predicting in a diversity case that Missouri courts would adopt this approach, which is the majority view).

The new provision creates a presumption against waiver if the disclosing party acts promptly after discovering the inadvertent disclosure. Notice by the disclosing party must be specific about both the material inadvertently disclosed and the privilege or doctrine protecting it. After receiving this kind of notice, a party may neither use nor

disclose the specified material. Instead, the receiving party must either return, sequester, or destroy the material (including all copies). A party's failure to fulfill these obligations will expose that party to sanctions under Rule 37. The new provision also creates a procedure for the receiving party to challenge a notice of inadvertent disclosure and a procedure for the circuit court to resolve the dispute. This procedure, which requires the court to consider all the material circumstances, "strikes the appropriate balance" and is "best suited to achieving a fair result." *Gray*, 86 F.2d at 1484.

**Addition to Reporter's Notes, 2012 Amendment:** Subdivision (f) is added to cor-

respond with new Ark. R. App. P.—Civil 2(f). That rule of appellate procedure gives the Arkansas Supreme Court discretion to grant permission to take an interlocutory appeal of an order under Ark. R. Civ. P. 37 compelling production of materials or information or an order under Ark. R. Civ. P. 45 denying a motion to quash production of materials for which a privilege or opinion-work-product is claimed. To help ensure development of an adequate record for the Supreme Court's consideration of whether to allow an appeal, new Rule 26(f) requires the trial court to make factual findings and address the guideline factors (a) through (f).

## RESEARCH REFERENCES

**ALR.** Discoverability of Metadata. 29 ALR 6th 167.

**Ark. L. Notes.** Watkins, Recent Developments under the Arkansas Freedom of Information Act, 1987 Ark. L. Notes 59.

Watkins, Procedural Rules You Won't Find in the Rules of Civil Procedure, 1992 Ark. L. Notes 53.

Bailey, Supplementation and Amendment Reintroducing Surprise to Discovery, 1993 Ark. L. Notes 1.

Watkins, Using the Freedom of Information Act as a Discovery Device, 1994 Ark. L. Notes 59.

**Ark. L. Rev.** Recent Developments — 1997 Amendments to the Arkansas Rules of Civil Procedure and the Rules of Appellate Procedure — Civil, 50 Ark. L. Rev. 149.

Recent Developments, 2006 Amendments Arkansas Rules of Civil Procedure, 59 Ark. L. Rev. 803.

**U. Ark. Little Rock L.J.** Survey — Civil Procedure, 11 U. Ark. Little Rock L.J. 137.

## CASE NOTES

### ANALYSIS

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### Appellate Review.

The standard of appellate review, of decisions by the trial court to exclude or permit the testimony of any witness at trial, is whether the trial court has abused its discretion. *Collins v. Hinton*, 327 Ark. 159, 937 S.W.2d 164 (1997).

### Construction with Other Rules.

The failure of the plaintiffs to serve full and complete answers to interrogatories could not be excused under ARCP 37(d) where their objections to some of the interrogatories were

not made within 30 days, as required by ARCP 33(b), and they did not apply for a protective order under subsection (c) of this rule. *Calandro v. Parkerson*, 333 Ark. 603, 970 S.W.2d 796 (1998).

### Evidence.

A court does not abuse its discretion in admitting rebuttal evidence where a response to discovery was truthful when made and the need to change the response is the result of trial developments. *Phillips v. McAuley*, 297 Ark. 563, 764 S.W.2d 424 (1989).

### Expenses.

The trial court did not abuse its wide latitude of discretion in setting a "reasonable" amount for expenses. *65th Ctr., Inc. v. Copeland*, 308 Ark. 456, 825 S.W.2d 574 (1992).

### Expert Testimony.

Where answer to interrogatories supplied by a party identifying an expert witness was dated and mailed to counsel for the opposing party, according to the certificate of service, nearly two weeks before the trial began, the circuit court did not abuse its discretion in admitting the testimony of the expert. *Banks*



v. Jackson, 312 Ark. 232, 848 S.W.2d 408 (1993).

Even if subdivision (b)(4)(B) of this rule applied in a breach of contract action, a client's use of a contractor's witness as an expert was within an exception to the rule, which permitted discovery upon a showing of exceptional circumstances; the client's attorney informed the trial court that the client was unable to obtain another expert to testify about the repairs at issue. *Acker Constr., LLC v. Tran*, 2012 Ark. App. 214, — S.W.3d —, 2012 Ark. App. LEXIS 318 (Mar. 14, 2012).

### Methods.

Under subsection (a) of this rule, a party has an absolute right to take a deposition; if the deponent is asked questions that are inappropriate or unreasonable, he has a right to refuse to answer the question and request a protective order from the trial court, pursuant to subsection (c) of this rule, to prevent the deposer from asking further questions along that line. *Lupo v. Lineberger*, 313 Ark. 315, 855 S.W.2d 293 (1993), criticized *Conner v. Simes*, 355 Ark. 422, 139 S.W.3d 476 (2003).

Since issues of discovery are squarely under the trial court's jurisdiction, it necessarily follows that a writ of prohibition is not the solution to a discovery problem. *Lupo v. Lineberger*, 313 Ark. 315, 855 S.W.2d 293 (1993), criticized *Conner v. Simes*, 355 Ark. 422, 139 S.W.3d 476 (2003).

### Motor Vehicle Accident Cases.

In an action arising from a motor vehicle accident which occurred when a sheet of plexiglass allegedly blew off the defendant's camper and struck the plaintiff's vehicle, the defendant was entitled to discovery of the defendant's address for the past 15 years and whether he had any citations of the type that could have been issued under the circumstances of the case, i.e., weights and measures violations, overweight loads, and failure to secure a load; however, the defendant was not entitled to discovery of all traffic tickets received by the defendant or information establishing whether his vehicle insurance had ever been declined or canceled. *Barker v. Clark*, 69 Ark. App. 375, 13 S.W.3d 190 (2000), rev'd 343 Ark. 8, 33 S.W.3d 476 (2000).

### Privileged Matters.

While parties may not obtain discovery under subdivision (b)(1) of this rule regarding privileged matters, a privilege is only safeguarded if the proper procedures are followed in a timely fashion. *Dunkin v. Citizens Bank*, 291 Ark. 588, 727 S.W.2d 138 (1987).

A party claiming a privilege to refuse to answer interrogatories may obtain a protective order under subsection (c) of this rule, which would protect the party from discovery or from inquiry into certain matters. ARCP 37(d) states that the failure to serve answers

or objections to interrogatories "may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided in ARCP 26(c)." *Dunkin v. Citizens Bank*, 291 Ark. 588, 727 S.W.2d 138 (1987).

Subdivision (b)(3) of this rule does not create an exception to the Freedom of Information Act, § 25-19-101 et seq., based on attorney-client privilege. *Scott v. Smith*, 292 Ark. 174, 728 S.W.2d 515 (1987).

Where an accident reconstructionist was hired by an attorney representing a driver who was involved in a car accident, the accident reconstruction report and testimony of the accident reconstructionist's employee were confidential, privileged communications that could not be subpoenaed. *Holt v. McCastlain*, 357 Ark. 455, 182 S.W.3d 112 (2004).

### Public Census Information.

Court did not abuse its discretion in permitting introduction of testimony by witness regarding certain information based upon the 1970 census even though no advance notice of such expert witness was provided to defendant since no issue of relevancy was raised and the testimony amounted to no more than the extraction of public census information; even without the presence of this witness the court could have taken judicial notice of the information under Evid. Rules 201 and 1005. *Bradley v. Houston*, 12 Ark. App. 351, 676 S.W.2d 746 (1984).

### Remedies.

Where there was an obvious violation of subdivision (e)(1) of this rule to the prejudice of the appealing party, the two-hour continuance granted by the trial court was hardly sufficient to allow examination and investigation of new facts and figures contained in an expert witness' report; the trial court's response amounted to an abuse of discretion sufficient to cause reversal and remand of the case. *Arkansas State Hwy. Comm'n v. Frisby*, 329 Ark. 506, 951 S.W.2d 305 (1997).

Writ of certiorari was proper, because neither exception under Ark R. Civ. P. 60(k) applied and the husband had no remedy under subsection (c) of this rule, when the husband was neither a party, nor a person from whom discovery was sought. *McKenzie v. Pierce*, 2012 Ark. 190, — S.W.3d —, 2012 Ark. LEXIS 212 (May 3, 2012).

### Supplementation of Responses.

Subsection (e) of this rule was inapplicable where expert was court's witness and there was no surprise of defense counsel. *Bradley v. Houston*, 12 Ark. App. 351, 676 S.W.2d 746 (1984).

Trial court has considerable latitude to excuse failure to supplement when the response to an answer changes, and it requires at least

passive concealment before imposition of a sanction. *Dunlap ex rel. First State Bank v. Buchanan*, 293 Ark. 179, 735 S.W.2d 705 (1987).

Records should not have been excluded from evidence solely as a sanction under subsection (e) of this rule. *Dunlap ex rel. First State Bank v. Buchanan*, 293 Ark. 179, 735 S.W.2d 705 (1987).

Where appellant failed to supplement the response to interrogatories as required by subsection (e) of this rule, and the trial court sanctioned that party by disallowing exhibit, which may well have been error, because the jury returned a verdict in favor of that party, it could show no basis for prejudice. Without prejudice to the appellants, there is no basis for reversal. *Banks v. Jackson*, 312 Ark. 232, 848 S.W.2d 408 (1993).

Subsection (e) of this rule allowed for the supplementation of incomplete or incorrect responses to interrogatories, not for untruthful responses corrected if and when the responding party's deceit was discovered; thus, the trial court did not abuse its discretion in striking the offending party's answer to interrogatories propounded against it where it was caught in a lie and attempted to correct the same by its supplemented answer. *Coulson Oil Co. v. Tully*, 84 Ark. App. 241, 139 S.W.3d 158 (2003).

In a mother's medical malpractice action against a doctor, where the mother's expert failed to update the opinion testimony given by deposition after the expert changed that opinion based on previously unread information, the trial court's refusal to exclude the testimony of the mother's expert was affirmed on appeal because the doctor did not show that the ruling was an abuse of discretion. *Hill v. Billups*, 85 Ark. App. 166, 148 S.W.3d 288 (2004).

Finding in favor of the passenger in her personal-injury action against the driver was proper, in part pursuant to subdivision (e)(1) of this rule because the driver received a continuance of over a year in order to review the digital motion x-rays and the documents supplied before trial contained no surprises and illustrated the reliability and acceptance of the evidence that was already in the driver's possession. *Graftenreed v. Seabaugh*, 100 Ark. App. 364, 268 S.W.3d 905 (2007).

Defendant was entitled to a new trial after a jury awarded damages to plaintiff in an action to recover damages for injuries sustained in a car accident because a constructive fraud occurred when plaintiff did not fulfill the duty of supplementing discovery responses about plaintiff's medical treatment; subdivision (e)(1) of this rule imposed a legal duty on plaintiff to supplement the dis-

covery responses if any of them got stale. *Battles v. Morehead*, 103 Ark. App. 283, 288 S.W.3d 693 (2008).

Although property buyers failed to supplement their discovery responses as required by subsection (e) of this rule to disclose their expert witness, a property surveyor, the failure was not prejudicial because the witness's testimony was not about the central issue of the case, the validity of a land purchase agreement, and the trial court's ultimate judgment did not depend on the surveyor's testimony. *Price v. Willbanks*, 2009 Ark. App. 849, — S.W.3d —, 2009 Ark. App. LEXIS 1016 (2009).

### Witnesses.

Where a name did not appear on the witness list, the trial judge conducted an in-chambers hearing and properly determined that the purpose of the testimony was to rebut plaintiff's case-in-chief and that there had not been a knowing concealment of the name of the witness. *Marvel v. Parker*, 317 Ark. 232, 878 S.W.2d 364 (1994).

Witness properly excluded where defendant did not list witness on answers or supplemental answers to interrogatories; neither the fact that the witness was mentioned, not by name, but only by a reference to the wife of another witness, in a deposition conducted by defense counsel, nor the fact that defense counsel had announced the witness as a witness during voir dire, were sufficient notice for the plaintiff. *Collins v. Hinton*, 327 Ark. 159, 937 S.W.2d 164 (1997).

When a party complains about failure to update discovery, the matter lies within the discretion of the trial court. *Arkansas State Hwy. Comm'n v. Frisby*, 329 Ark. 506, 951 S.W.2d 305 (1997).

Trial court's refusal to allow wife, in her medical malpractice action brought after her husband died after surgery, to depose people whom it seriously doubted she could call as witnesses at trial, was error because that was not the standard by which such decisions should have been made, and on remand, the wife was to be allowed to depose the doctors who treated her husband's surgeon for his bipolar disorder. *Turner v. Northwest Ark. Neurosurgery Clinic, P.A.*, 84 Ark. App. 93, 133 S.W.3d 417 (2003).

**Cited:** *Bull v. Brantner*, 10 Ark. App. 229, 662 S.W.2d 476 (1984); *Evans v. White*, 284 Ark. 376, 682 S.W.2d 733 (1985); *Smith v. Roane*, 284 Ark. 568, 683 S.W.2d 935 (1985); *Morrison v. Morrison*, 286 Ark. 353, 692 S.W.2d 601 (1985); *Weatherford v. State*, 286 Ark. 376, 692 S.W.2d 605 (1985); *Prater ex rel. Estate of Prater v. St. Paul Ins. Co.*, 293 Ark. 547, 739 S.W.2d 676 (1987); *White v. Associates Com. Corp.*, 20 Ark. App. 140, 725 S.W.2d 7 (1987); *Nationwide Mut. Fire Ins. Co. v. Dunkin*, 850 F.2d 441 (8th Cir. 1988); *City of*



Fayetteville v. Edmark, 304 Ark. 179, 801 S.W.2d 275 (1990); Stephens v. Stephens, 306 Ark. 59, 810 S.W.2d 946 (1991); In re Badami, 309 Ark. 511, 831 S.W.2d 905 (1992); F.L. Davis Bldrs. Supply, Inc. v. Knapp, 42 Ark. App. 52, 853 S.W.2d 288 (1993); Arkansas Dep't of Human Servs. v. Hardy, 316 Ark. 119, 871 S.W.2d 352 (1994); Arkansas Best Corp. v. General Elec. Capital Corp., 317 Ark. 238, 878 S.W.2d 708 (1994); Wade v. Grace, 321 Ark. 482, 902 S.W.2d 785 (1995); Chlanda v. Kille-

brew, 329 Ark. 39, 945 S.W.2d 940 (1997); Dodson v. Allstate Ins. Co., 345 Ark. 430, 47 S.W.3d 866 (2001); Chiodini v. Lock, 2010 Ark. App. 340, — S.W.3d —, 2010 Ark. App. LEXIS 353 (Apr. 21, 2010); Lancaster v. Red Robin Int'l, Inc., 2011 Ark. App. 706, — S.W.3d —, 2011 Ark. App. LEXIS 758 (Nov. 16, 2011); Padilla v. Archer, 2011 Ark. App. 746, — S.W.3d —, 2011 Ark. App. LEXIS 807 (Dec. 7, 2011).

## Rule 26.1. Electronic Discovery.

(a) *Definitions.* In this rule:

(1) "Discovery" means the process of providing information in a civil proceeding in the courts of this state pursuant to the Arkansas Rules of Civil Procedure or these rules.

(2) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) "Electronically stored information" means information that is stored in an electronic medium and is retrievable in perceivable form.

(4) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(b) *Supplemental and optional rule.* This rule is intended to supplement the Arkansas Rules of Civil Procedure, and the Arkansas Rules of Civil Procedure shall govern if there is a conflict between this supplemental rule and the Rules of Civil Procedure. The rule is optional because either the parties must agree that it will apply, or the circuit court must order that it will apply on motion for good cause shown.

(c) *Conference, plan, and report.*

(1) In any proceeding in circuit court, the parties may agree to pursue electronic discovery pursuant to this rule or the court may so order on motion for good cause shown. Any such agreement or motion shall be made within 120 days after the date that the complaint was filed. The court, however, may extend or reopen this period for good cause. Within 30 days of an agreement or order to proceed under this rule, the parties shall confer. At this conference, the parties shall discuss and plan for the following issues:

- (A) any issues relating to preservation of discoverable information;
- (B) the form in which each type of the information will be produced;
- (C) the period within which the information will be produced;
- (D) the method for asserting or preserving claims of privilege or of protection of the information such as trial-preparation materials, including the manner in which such claims may be asserted after production;
- (E) the method for asserting or preserving confidentiality and proprietary status of information relating to a party or a person not a party to the proceeding;

(F) whether allocation among the parties of the expense of production is appropriate; and,

(G) any other issue relating to the discovery of electronically stored information.

(2) Following the planning conference, the parties shall:

(A) develop a proposed plan relating to discovery of the information; and  
(B) not later than 14 days after the conference under subdivision (c)(1), submit to the court a written report that summarizes the plan and states the position of each party as to any issue about which they are unable to agree.

(d) *Order governing discovery.*

(1) In a civil proceeding, the court may issue an order governing the discovery of electronically stored information pursuant to:

(A) a motion by a party seeking discovery of the information or by a party or person from which discovery of the information is sought;

(B) a stipulation of the parties and of any person not a party from which discovery of the information is sought, or

(C) the court's own motion, after reasonable notice to, and an opportunity to be heard from, the parties and any person not a party from which discovery of the information is sought.

(2) An order governing discovery of electronically stored information may address:

(A) whether discovery of information is reasonably likely to be sought in the proceedings;

(B) preservation of the information;

(C) the form in which each type of the information is to be produced;

(D) the time within which the information is to be produced;

(E) the permissible scope of discovery of the information;

(F) the method for asserting or preserving claims of privilege or of protection of the information as trial-preparation material after production;

(G) the method for asserting or preserving confidentiality and the proprietary status of information relating to a party or a person not a party to the proceeding;

(H) allocation of the expense of production; and

(I) any other issue relating to the discovery of the information.

(e) *Limitation on sanctions.* Absent exceptional circumstances, the court may not impose sanctions on a party under these rules for failure to provide electronically stored information lost as the result of the routine, good-faith operation of an electronic information system.

(f) *Request for production.*

(1) In a civil proceeding, a party may serve on any other party a request for production of electronically stored information and for permission to inspect, copy, test or sample the information.

(2) A party on which a request to produce electronically stored information has been served shall, in a timely manner, serve a response on the requesting party. The response must state, with respect to each item or category in the request:

(A) that inspection, copying, testing, or sampling of the information will be permitted as requested; or

(B) any objection to the request and the reasons for the objection.

(g) *Form of production.* Unless the parties otherwise agree or the court otherwise orders:

(1) the responding party shall produce the information in a form in which it is ordinarily maintained or in a form that is reasonably useful;

(2) if necessary, the responding party shall also produce any specialized software, material, or information not ordinarily available so that the requesting party can access and use the information in its ordinarily maintained form; and



(3) a party need not produce the same electronically stored information in more than one form.

(h) *Limitations on discovery.*

(1) A party may object to discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or expense. In its objection the party shall identify the reason for such undue burden or expense.

(2) On motion to compel discovery or for a protective order relating to the discovery of electronically stored information, a party objecting bears the burden of showing that the information is from a source that is not reasonably accessible because of undue burden or expense.

(3) The court may order discovery of electronically stored information that is from a source that is not reasonably accessible because of undue burden or expense if the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

(4) If the court orders discovery of electronically stored information under subdivision (h)(3) it may set conditions for discovery of the information, including allocation of the expense of discovery.

(5) The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that:

(A) it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive;

(B) the discovery sought is unreasonably cumulative or duplicative;

(C) the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or

(D) the likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

(i) *Claim of privilege or protection after production.* A claim of privilege or protection after production of electronic data under these supplemental rules shall be governed by Rule of Civil Procedure (26)(b)(5) unless the application of that rule is modified by agreement of the parties or by order of the court.

(j) *Subpoena for production.*

(1) A subpoena in a civil proceeding may require that electronically stored information be produced and that the party serving the subpoena or person acting on the party's request be permitted to inspect, copy, test, or sample the information.

(2) Subject to subsections (j)(3) and (j)(4), subdivisions (g), (h), and (i) apply to a person responding to a subpoena under subsection (j)(1) as if that person were a party.

(3) A party serving a subpoena requiring production of electronically stored information shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

(4) An order of the court requiring compliance with a subpoena issued under this rule must provide protection to a person that is neither a party

nor a party's officer from undue burden or expense resulting from compliance. (Added September 24, 2009, effective October 1, 2009.)

### **Rule 27. Depositions before action or pending appeal.**

(a) *Before Action.*

(1) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in the circuit court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (1) that the petitioner expects to be a party to an action cognizable in a court in this state but is presently unable to bring it or cause it to be brought; (2) the subject matter of the expected action and his interest therein; (3) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it; (4) the names or a description of the persons he expects will be adverse parties and their addresses so far as known; and (5) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) *Notice and Service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing, the notice shall be served either within or without the state in the manner provided in Rule 4 for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent, the provisions of Rule 17(b) apply.

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the deposition shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules, and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in the courts of this state, it may be used in any action involving the same subject matter subsequently brought in a circuit court of this state in accordance with the provisions of Rule 32(a).

(b) *Pending Appeal.* If an appeal has been taken from a judgment of a circuit court or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking



of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the court. In such case the party who desires to perpetuate the testimony may make a motion in the circuit court for leave to take the depositions, upon the same notice and service thereof as if the same were pending in that court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure of justice, it may make an order allowing the depositions to and may make orders of the character provided for by Rule 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed these rules for depositions taken in actions pending in the circuit court.

(c) *Perpetuation by Action.* This rule does not limit the power of a court to entertain an action to perpetuate testimony. (Amended May 24, 2001, effective July 1, 2001.)

**Reporter's Notes to Rule 27:** 1. With minor wording changes to accommodate it to state practice, Rule 27 is essentially the same as FRCP 27. It is likewise essentially the same as superseded *Ark. Stat. Ann.* § 28-349 (Repl. 1962), and thus works no change in Arkansas practice and procedure.

2. Except under this rule, a person must actually have commenced suit and be involved in litigation before the usual discovery tools are available to him. *B & C Tire Co. v. Internal Revenue Service*, 376 F. Supp. 708 (D. C. Ala., 1974). This rule in no way determines substantive rights, but merely provides an aid

in the eventual adjudication of such rights in an action to be commenced later. *Mosseller v. United States*, 158 F.2d 380 (C.C.A. 2nd, 1946).

**Addition to Reporter's Notes, 2001 Amendment:** The reference to chancery courts in subdivision (a)(4) has been deleted in light of Constitutional Amendment 80, which established circuit courts as the "trial courts of original jurisdiction" in the state and abolished the separate chancery and probate courts. Also, the references to "trial court" in subdivision (b) have been changed to "circuit court" or "court."

## RESEARCH REFERENCES

**ALR.** Construction and Application of Fed. R. Civ. P. 27. 37 ALR Fed. 2d 573.

## CASE NOTES

### ANALYSIS

In general.  
Applicability.  
Party to action.

### In General.

Former section 16-44-117 was superseded by this rule. *Hegwood v. State*, 297 Ark. 218, 760 S.W.2d 859 (1988).

### Applicability.

Subsection (a) of this rule applies in situations where the petitioner expects to be a party to an action, but is presently unable to bring it. The procedures set out in subsection (a) allow the petitioner to preserve testimony that is critical to his case so that it will be

available when the petitioner is able to bring an action. *Hegwood v. State*, 297 Ark. 218, 760 S.W.2d 859 (1988).

### Party to Action.

Plaintiff adequately and fairly represented the interests of the two subclasses despite defendant's contention that plaintiff suffered no damage herself and therefore did not have a sufficient interest in the case. *Direct Gen. Ins. Co. v. Lane*, 328 Ark. 476, 944 S.W.2d 528 (1997).

**Cited:** In re Implementation of Amendment 80: Amendments to Rules of Civ. Procedure & Inferior Court Rules, — Ark. —, — S.W.3d —, 2001 Ark. LEXIS 707 (May 24, 2001).

**Rule 28. Persons before whom depositions may be taken.**

(a) *Within this State and Elsewhere in the United States.* Within this state and elsewhere in the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of this State or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(b) *In Foreign States or Countries.* In a foreign state or country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to any applicable treaty or convention or pursuant to a letter of request, whether or not captioned a letter rogatory. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impractical or inconvenient, and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To The Appropriate Authority in (name of the country)." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.

(c) *For Use in Foreign Countries.* A party desiring to take a deposition or have a document or other thing produced for examination in this state, for use in a judicial proceeding in a foreign country, may produce to a judge of the circuit court in the county where the witness or person in possession of the document or thing to be examined resides or may be found, letter rogatory, appropriately authenticated, authorizing the taking of such deposition or production of such document or thing on notice duly served; whereupon it shall be the duty of the court to issue a subpoena requiring the witness to attend at a specified time and place for examination. In case of failure of the witness to attend or refusal to be sworn or to testify or to produce the document or thing requested, the court may find the witness in contempt.

(d) *Disqualification for Interest.* No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action. (Amended November 20, 1989, effective January 1, 1990; amended November 18, 1996, effective March 1, 1997; amended May 24, 2001, effective July 1, 2001.)

**Reporter's Notes (as modified by the Court) to Rule 28:** 1. Rule 28 is very similar to FRCP 28. This rule is a slightly modified

version of superseded *Ark. Stat. Ann.* § 28-350 (Repl. 1962) which tracked FRCP 28 prior to the 1963 amendments thereto. This rule



does not make any appreciable changes in Arkansas law. As a practical matter, anyone authorized by law to administer oaths is qualified to take depositions.

2. Section (c) is a combination of 28 U.S.C. Section 1782 and superseded *Ark. Stat. Ann.* § 28-346 (Repl. 1962). Nothing in this rule requires that the deposition actually be taken before the court. In this sense the rule may be a departure from the superseded statute.

**Addition to Reporter's Notes, 1989**

**Amendment:** Rule 28(c) is amended to apply only to the taking of depositions for use in judicial proceedings in foreign countries. Rule 45(f), as amended in 1989, now governs the taking of depositions for use in proceedings in other states.

**Addition to Reporter's Notes, 1997**

**Amendment:** This revision, based on a 1993 change in federal Rule 28(b), is intended to

make effective use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and of any similar treaties that the United States may enter into in the future which provide procedures for taking depositions abroad. The term "letter of request" has been substituted for "letter rogatory" because it is the primary method provided by the Hague Convention. A letter rogatory is essentially a form of a letter of request.

**Addition to Reporter's Notes, 2001**

**Amendment:** Subdivision (c) has been amended by deleting the reference in the first sentence to chancery and probate courts. Constitutional Amendment 80 established circuit courts as the "trial courts of original jurisdiction" in the state and abolished the separate chancery and probate courts.

## RESEARCH REFERENCES

**Ark. L. Notes.** Watkins, Recent Amendments to the Arkansas Rules of Civil and Appellate Procedure, 1988 *Ark. L. Notes* 47.

**Ark. L. Rev.** Recent Developments — 1997 Amendments to the Arkansas Rules of Civil

Procedure and the Rules of Appellate Procedure — Civil, 50 *Ark. L. Rev.* 149.

**U. Ark. Little Rock L.J.** Survey, Civil Procedure, 13 *U. Ark. Little Rock L.J.* 321.

## CASE NOTES

**Cited:** *Transit Homes, Inc. v. Bellamy*, 282 Ark. 453, 671 S.W.2d 153 (1984), overruled *Peters v. Pierce*, 314 Ark. 8, 858 S.W.2d 680 (1993); *In re Implementation of Amendment*

80: Amendments to Rules of Civ. Procedure & Inferior Court Rules, — *Ark.* —, — *S.W.3d* —, 2001 *Ark. LEXIS* 707 (May 24, 2001).

## Rule 29. Stipulations regarding discovery procedures.

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice and in any manner and when so taken may be used like any other depositions; and (2) modify the procedures provided by these rules for other methods of discovery.

**Reporter's Notes to Rule 29:** 1. Rule 29 is a modified version of FRCP 29. Under the latter, prior court approval must be secured to extend the time to (a) answer interrogatories; (b) produce documents, etc.; or (c) respond to requests for admissions of fact. This prior approval has been rejected by such states as Massachusetts and Arizona when adopting procedural rules patterned after the Federal Rules of Civil Procedure. See Rule 29 of the Massachusetts Rules of Civil Procedure and "Arizona and the Federal Rules" 41 *F.R.D.* 79 (1966).

2. Agreements between counsel to modify

the discovery rules have been commonplace in Arkansas practice. No particular problems have arisen and the notion that prior court approval is necessary was rejected by the Committee. Should agreements of counsel get out of hand, the court has the power under Rule 29 to overrule or reject any stipulation or agreement of counsel. Therefore, any problems which may arise in this area may be corrected by the court on a case by case basis.

3. Prior Arkansas law was found in superseded *Ark. Stat. Ann.* § 28-351 (Repl. 1962), which was identical to FRCP 29 as it existed prior to its 1970 amendments.

## RESEARCH REFERENCES

**Ark. L. Notes.** Bailey, "Usual Stipulations" Are Usually a Mistake At the Oral Deposition, 1991 Ark. L. Notes 3.

## CASE NOTES

**Cited:** *Turner v. Bailey*, 271 Ark. 215, 607 S.W.2d 674 (1980); *Ford Life Ins. Co. v. Parker*, 277 Ark. 516, 644 S.W.2d 239 (1982), overruled *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998), questioned *Vinson v. Ritter*, 86 Ark. App. 207, 167 S.W.3d 162 (2004); *Transit Homes, Inc. v. Bellamy*, 282 Ark. 453, 671 S.W.2d 153 (1984),

overruled *Peters v. Pierce*, 314 Ark. 8, 858 S.W.2d 680 (1993); *First Nat'l Bank v. Griffin*, 310 Ark. 164, 832 S.W.2d 816 (1992), cert. denied 507 U.S. 919, 113 S. Ct. 1280, 122 L. Ed 2d 673 (1993); *Taggart v. Northeast Ark. Rehabilitation Hosp.*, 316 Ark. 39, 870 S.W.2d 717 (1994).

**Rule 30. Depositions upon oral examination.**

(a) *When Depositions May Be Taken.* After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of a witness may be compelled by subpoena as provided in Rule 45, but a subpoena is not necessary if the witness is a party or a person designated under subdivision (b)(6) of this rule to testify on behalf of a party. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) *Notice of Examination; General Requirements; Special Notice; Method of Recording; Production of Documents and Things; Deposition of Organization.* (1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff under subdivision (a) if the notice (A) states that the person to be examined is about to go out of this state, or is about to go out of the United States, and will be unavailable for examination unless his deposition is taken before expiration of the 30 day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice and his signature constitutes a certification by him that to the best of his knowledge, information and belief, the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

(3) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it



may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means. With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes: (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request. The court may on motion, with or without notice, allow a shorter or longer time.

(6) A party may in his notice and in the subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized by these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For purposes of these rules, a deposition by such means is taken at the place where the deponent is to answer questions.

(c) *Examination and Cross-Examination; Record of Examination; Oath; Objections.* Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Arkansas Rules of Evidence, except Rule 103. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by subdivision (b)(3) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence

presented, to the conduct of any party, or to any other aspect of the proceedings, shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on either the party taking the deposition in which event he shall (1) transmit such questions to the office, or (2) directly upon the officer, who shall propound them to the witness and record the answers verbatim.

(d) *Schedule and Duration; Motion to Terminate or Limit Examination.*

(1) Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under paragraph (4).

(2) The court may by order limit the time permitted for the conduct of a deposition, but must allow additional time if needed for a fair examination of the deponent or if the deponent or another person impedes or delays the examination.

(3) If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorneys' fees incurred by any parties as a result thereof.

(4) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) *Review by Witness; Changes; Signing.* If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

(f) *Certification by Officer; Exhibits; Copies; Notice of Filing.* (1) The officer shall certify that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. This certificate shall be in writing and accompany the record of the deposition. The officer shall place the deposition in an envelope or package indorsed with the title of the action and marked 'Deposition of (name of witness)' and, if ordered by the court in which the action is pending pursuant to Rule 5(c), promptly file it with the clerk of that court. Otherwise, the officer shall send it to the attorney who arranged for the transcript or recording, who shall



store it under conditions that will protect it against loss, destruction, tampering, or deterioration. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to the deposition if it is to be used at trial.

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain, for the period established for transcripts of court proceedings in the retention schedule for official court reporters, stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent; provided that it shall be the duty of the party causing the deposition to be taken to furnish one copy of the transcript, or if the deposition was recorded solely by sound or sound-and-visual as provided for in Rule 30(b)(3), a copy of the recording, to any opposing party, or in the event there is more than one opposing party, a copy may be filed with the clerk for the use of all opposing parties, and the party filing the deposition shall give prompt notice of its filing to all other parties.

(g) *Failure to Attend or to Serve Subpoena; Expenses.* (1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by an attorney pursuant to the notice, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by an attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees. (Amended July 9, 1984, effective September 1, 1984; amended November 11, 1991, effective January 1, 1992; amended November 18, 1996, effective March 1, 1997; amended January 22, 1998; amended March 13, 2003; amended February 10, 2005; amended June 2, 2011, effective July 1, 2011.)

**Reporter's Notes to Rule 30:** 1. Rule 30 is, with the exception of minor wording changes, the same as FRCP 30. This rule also closely follows superseded *Ark. Stat. Ann.* § 28-352 (Repl. 1962), which was patterned after FRCP 30 as it existed prior to the series of amendments thereto beginning in 1970.

2. Section (a) is identical to FRCP 30(a). It is comparable to superseded *Ark. Stat. Ann.*

§ 28-348 (Repl. 1962), and works no appreciable change in Arkansas law.

3. Section (b)(1) is identical to FRCP 30(b)(1) and substantially follows superseded *Ark. Stat. Ann.* § 28-352(a) (Repl. 1962). It does not change Arkansas law. Section (b)(2) is revised from FRCP 30(b)(2). The latter, in subpart (A) refers to one who is bound on a voyage at sea whereas this rule is applicable

to any person leaving the state or country. There was no comparable provision under prior Arkansas law and this should resolve the question of when an emergency or rush deposition could be taken.

4. Rule 30(b)(3) is identical to FRCP 30(b)(3). Similar language was found in superseded *Ark. Stat. Ann.* § 28-352(a) (Repl. 1962).

5. Section 30(b)(4) is identical to FRCP 30(b)(4). Under this provision, the court has the discretion to order that a deposition may be taken by other than stenographic means. Under proper safeguards, a deposition may be taken by photographic-sound devices. *Carson v. Burlington Northern, Inc.*, 52 F. R. D. (D.C. Neb., 1971). Superseded *Ark. Stat. Ann.* § 28-352(c) (Repl. 1962), permitted the parties to agree on some form or method of taking a deposition other than stenographically. Where proper safeguards are made, video taped depositions are certainly proper.

6. Section 30(b)(5) closely follows FRCP 30(b)(5) and establishes a method whereby a party can request that certain documents and tangible items may be brought to the deposition. The procedure described in Rule 34 is applicable and the deponent may refuse to produce the requested documents in which event the moving party is required to present the matter to the court for a determination of whether the documents or items should have been produced. This rule also permits the court to shorten or extend the time limit set by Rule 34 for responding to the request. To such extent, this rule differs from the Federal Rule.

7. With exception of minor wording changes, Section (c) is identical to FRCP 30(c) and substantially the same as superseded *Ark. Stat. Ann.* § 28-352(c) (Repl. 1962).

8. Section (d) is identical to FRCP 30(d) and substantially follows superseded *Ark. Stat. Ann.* § 28-352(e) (Repl. 1962).

9. Section (e) is identical to Section (e) of the Federal Rule and follows closely superseded *Ark. Stat. Ann.* § 28-352(e). Under this and the Federal Rule, if the deponent has not signed the deposition within 30 days of its submission to him, the officer is directed to sign the deposition and give the reason for the deponent's failure or refusal to sign the deposition.

10. Section 30(f)(1) is identical to FRCP 30(f)(1). Section (f)(2) is, however, reworded from the Federal Rule to delete the requirement that the deposition be filed.

11. Section (g) is identical to FRCP 30(g) and is also substantially the same as superseded *Ark. Stat. Ann.* § 28-352(g) (Repl. 1962).

**Addition to Reporter's Notes, 1984 Amendment:** Rule 30(f) is amended to remove references to the filing requirement

which no longer exists in view of the change to Rule 5(c). The provision for optional filing as a means of giving access to the deposition to multiple parties remains, and the provision for notice of filing formerly found in Rule 30(f)(3) is contained in Rule 30(f)(2).

**Addition to Reporter's Notes, 1986 Amendment:** New subsection (b)(7) is based upon the corresponding federal rule. Although depositions by telephone have been available by stipulation under Rule 29, this subsection authorizes that method by order of the court as well. The second sentence of the new subsection, under which the telephone deposition is deemed "taken" at the place where the witness is to answer the questions (rather than the place where the questions are propounded), is necessary as a definitional provision in light of other rules involving the place of a deposition. See Rules 37(a)(1), 37(b)(1), and 45(d).

**Addition to Reporter's Notes, 1991 Amendment:** Under subdivision (c), "[e]vidence objected to shall be taken subject to the objections." Thus, it is generally not proper for a lawyer to instruct a deponent to refuse to answer a question. The 1991 amendment expressly states that such an instruction is impermissible absent exceptional circumstances or a reasonable, good faith assertion of a privilege. In light of the amendment, a contention that the question seeks irrelevant information beyond the scope of discovery under Rule 26(b)(1) is not a basis for instructing the deponent not to answer, unless exceptional circumstances — such as harassment or irrelevant questions that unnecessarily touch on sensitive areas — are present. The 1991 amendment is consistent with case law applying Federal Rule 30(c). See, e.g., *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890 (7th Cir. 1981); *International Union of Electrical, Radio & Machine Workers v. Westinghouse Elec. Corp.*, 91 F.R.D. 277 (D.D.C. 1981); *Preyer v. United States Lines, Inc.*, 64 F.R.D. 430 (E.D. Pa. 1973).

**Addition to Reporter's Notes, 1997 Amendment:** The changes that have been made in subdivisions (b)-(f) of this rule track the 1993 amendments to Federal Rule 30 and are designed in part to take into account the use of video and other recording methods. Provisions in the federal rule limiting the number of depositions were not adopted.

The last sentence of subdivision (b)(2), which dealt with use of the deposition of a party unable to obtain counsel, has been deleted, and this matter is now covered by Rule 32(a)(3). The primary change in subdivision (b) is that parties will be authorized to record deposition testimony by nonstenographic means without first having to obtain permission of the court or agreement from other



counsel. Under paragraph (3), the party taking the deposition has the choice of the method of recording. Objections to nonstenographic recording of a deposition, when warranted by the circumstances, can be presented to the court by motion pursuant to Rule 26(c). Other parties may arrange, at their own expense, for the recording of a deposition by a means in addition to the method designated by the person noticing the deposition. A party choosing to record a deposition only by videotape or audiotape should understand that a transcript will be required if the deposition is later to be offered as evidence at trial under amended Rule 32(c) or on a dispositive motion under Rule 56.

Revised paragraph (4) of subdivision (b) requires that all depositions be recorded by an officer designated or appointed under Rule 28 and contains special provisions designed to provide basic safeguards to assure the utility and integrity of recordings taken other than stenographically. Paragraph (7) has been amended to allow the taking of a deposition not only by telephone but also by other remote electronic means, such as satellite television, when agreed to by the parties or authorized by the court.

Minor changes have been made in subdivision (c). First, the reference to Rule 43(b) has been replaced with a reference to the Arkansas Rules of Evidence. The examination and cross-examination of a deponent are governed by those rules, with the exception of Rule 103, which deals with evidentiary rulings. Second, subdivision (c) has been revised to reflect the changes made in subdivision (b) regarding the method by which a deposition is to be recorded. Finally, the provision that dealt with instructing the deponent not to answer has been deleted and moved to subdivision (d)(1).

Unlike its federal counterpart, subdivision (c) does not contain an exception from Rule 615 of the Rules of Evidence. By virtue of this exception in the federal rule, other potential witnesses are not automatically excluded from a deposition at a party's request, although the court can order their exclusion via a protective order. Because such an exception is not included in revised subdivision (c), depositions in Arkansas will continue to be subject to Rule 615.

The first sentence of subdivision (d)(1) provides that any objections during a deposition must be made concisely and in a non-argumentative and non-suggestive manner. Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the witness should respond. While objections may, under the revised rule, be made during a deposition, they should ordinarily be limited to those that under Rule 32(d)(3) might be waived if not made at that time, i.e., objec-

tions on grounds that might be immediately obviated or cured, such as the form of a question or the responsiveness of an answer. Under Rule 32(b), other objections can, even without the so-called "usual stipulation" preserving objections, be raised for the first time at trial and therefore should be kept to a minimum during a deposition.

The second sentence of subdivision (d)(1) addresses an even more disruptive practice, i.e., instructing the deponent not to answer a question. This provision previously appeared, in slightly different form, in subdivision (c), having been added in 1991. The former language has been retained as to "reasonable, good faith claims of privilege," but new grounds based on the federal rule — to enforce a limitation on evidence imposed by the court and to present a motion under what is now designated as paragraph (3) — have been added.

Paragraph (2) of subdivision (d) dispels any doubts regarding the power of the court to limit, by order, the length of a deposition. This provision also expressly authorizes the court to impose the cost resulting from obstructive tactics that unreasonably prolong a deposition on the person engaged in such obstruction. This sanction may be imposed on a non-party witness as well as a party or attorney. Unlike the federal rule, paragraph (2) does not empower a trial court to establish limits on deposition length by local rule, since such rules are not permissible in Arkansas.

Paragraph (3) authorizes appropriate sanctions not only when a deposition is unreasonably prolonged, but also when an attorney engages in other practices that frustrate the fair examination of the deponent, such as making improper objections or giving directions not to answer prohibited by paragraph (1). In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. The making of an excessive number of objections may itself constitute sanctionable conduct.

Various changes have been made in subdivision (e) to reduce problems sometimes encountered when depositions are taken stenographically. Reporters frequently have difficulties obtaining signatures from deponents and the return of depositions. Under the revision, pre-filing review by the deponent is required only if requested before the deposition is completed. If review is requested, the deponent will be allowed 30 days to review the transcript or recording and to indicate any changes in form or substance. Signature of the deponent will be required only if review is requested and changes are made.

Subdivision (f) has been revised to reflect changes made in subdivision (b) as to the methods by which a deposition may be taken.

If the court does not order the deposition to be filed pursuant to Rule 5(c), the reporter can transmit the transcript or recording to the attorney taking the deposition or ordering the transcript or record, who then becomes custodian for the court of the original record of the deposition. Pursuant to paragraph (2), as under the prior rule, any other party is entitled to secure a copy of the deposition from the officer designated to take it. New language makes clear that the officer must retain a copy of the record or the stenographic notes, unless otherwise ordered by the court or agreed by the parties. The retention period is the same as that specified for transcripts of court proceedings in the record retention schedule for official court reporters in Arkansas.

#### **Addition to Reporter's Notes, 1998**

**Amendment:** As amended in 1997, Rule 30(f)(1) provided that the officer taking the deposition "shall securely seal" it in an envelope or package and either file it with the clerk, if so ordered, or send it to the attorney who arranged for the deposition. The term "seal" could be read as implying that the attorney who received the deposition was obligated to keep it sealed. Such a result was not intended, and Rule 30(f)(1) has been amended to require that the officer "place" the deposition in an envelope. The obligation that the attorney "store it under conditions that will protect it against loss, destruction, tampering, or deterioration" remains unchanged.

#### **Addition to Reporter's Notes, 2003**

**Amendment:** The penultimate sentence of subdivision (a) has been rewritten to expressly provide that a subpoena is not mandatory if the deponent is a party or a person designated under subdivision (b)(6) to testify on behalf of a party. Notice of the deposition is the sole requirement in these circumstances.

Rule 30 of the Federal Rules of Civil Procedure does not explicitly state that a subpoena is unnecessary when the deponent is a party. Under Fed. R. Civ. P. 37(d), however, sanctions may be imposed against a party or person designated to testify on behalf of a party who does not appear at a deposition

"after being served with a proper notice." On the basis of this language, which also appears in the corresponding Arkansas rule, the federal courts "have reasoned that notice alone, without subpoena, is sufficient." 8A *Wright, Miller & Marcus, Federal Practice & Procedure* § 2107 (1994).

#### **Addition to Reporter's Notes, 2005**

**Amendment:** Rule 30(d) has been amended and its subsections renumbered. For many years, Arkansas Rule 30 has been substantially similar to Federal Rule 30. The 2005 amendments to Rule 30(d) track changes made in 2000 to the Federal Rule and clarify the terms about behavior during depositions. The amendments confirm that the Rule's limitations extend beyond parties to all persons present at a deposition. They also clarify when a privilege may be asserted against a question. Former subsection (2) has been divided into new subsections (2) and (3), and former (3) has been renumbered as (4). See generally, Advisory Committee Note, 2000 Amendments to FRCP 30(d). The Federal Rule's presumptive limitation on the duration of any deposition to one seven-hour day has not been incorporated into the Arkansas Rule.

#### **Addition to Reporter's Notes, 2011**

**Amendment:** Subdivision (f)(2) is revised to clarify that a party taking a deposition is not obligated to provide the opposing party or parties a copy of any sound or sound and video recording of the deposition unless no written transcript was made. Since former subdivision (f)(2) required that the party taking the deposition provide the opposing party a copy of the deposition (if multiple parties, to file a copy with the clerk for use by all parties), the rule could have been read as requiring the party taking the deposition to incur the additional expense of providing a copy of the nonstenographic sound or sound and video recording in addition to the written transcript. Under the amendment, a party taking a deposition only by sound or sound and video recording is still obligated to provide the opposing party with a copy of the deposition or, in a case involving multiple parties to file a copy for use of all opposing parties.

## RESEARCH REFERENCES

**Ark. L. Notes.** Bailey, "Usual Stipulations" Are Usually a Mistake At the Oral Deposition, 1991 Ark. L. Notes 3.

**Ark. L. Rev.** Recent Developments — 1997 Amendments to the Arkansas Rules of Civil Procedure and the Rules of Appellate Procedure — Civil, 50 Ark. L. Rev. 149.

**U. Ark. Little Rock L.J.** Survey — Civil Procedure, 10 U. Ark. Little Rock L.J. 105.

Sullivan, The Need for a Business or Payroll Records Affidavit for Use in Child Support Matters, 11 U. Ark. Little Rock L.J. 651.

Jones, Lex, Lies & Videotape, 18 U. Ark. Little Rock L.J. 613.



## CASE NOTES

## ANALYSIS

Criminal proceedings.

Motion to strike.

Telephone.

Termination or limitation.

**Criminal Proceedings.**

The discovery procedures permitted in this rule and ARCP 34 are applicable only to civil actions; they are not applicable in criminal proceedings unless there is a specific statute so providing. *Kelley v. State*, 7 Ark. App. 130, 644 S.W.2d 638 (1983).

**Motion to Strike.**

Trial court did not err in denying a patient's request to strike a physician's deposition after the physician corrected his initial statement regarding the standard of care and the suturing of a patient's bladder during a hysterec-

tomy; it could not be determined from the record whether notice was given, to whom it was given, or when the transcript was made available to the physician. *Crowell v. Barker*, 369 Ark. 428, 255 S.W.3d 858 (2007).

**Telephone.**

Deposition by telephone not permitted. *Thomas v. Pacheco*, 293 Ark. 564, 740 S.W.2d 123 (1987), limited *R.N. v. J.M.*, 347 Ark. 203, 61 S.W.3d 149 (2001).

**Termination or Limitation.**

The unilateral termination of depositions without a court order contravenes subsection (d) of this rule and is wrong. *Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989).

**Cited:** *Security Pac. Hous. Servs., Inc. v. Friddle*, 315 Ark. 178, 866 S.W.2d 375 (1993).

**Rule 31. Depositions upon written questions.**

(a) *Serving Questions; Notice.* (1) Any party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(2) A party must obtain leave of court if the person to be examined is confined in prison or if, without the written stipulation of the parties, a plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required if a defendant has served a notice of taking deposition or otherwise sought discovery, or if special notice is given as provided in Rule 30(b)(2).

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (A) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (B) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

(4) Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) *Officer to Take Responses and Prepare Record.* A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e) and (f) to take the

testimony of the witness in response to the questions and to prepare, certify and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) *Copies; Notice of Filing.* The party causing the deposition to be taken shall furnish one copy of the deposition to any opposing party, or if there is more than one opposing party, a copy may be filed with the clerk for the use of all opposing parties, and the party filing the deposition shall give prompt notice of its filing to all other parties. (Amended July 9, 1984; effective September 1, 1984; amended November 18, 1996, effective March 1, 1997.)

**Reporter's Notes to Rule 31:** 1. Rule 31 is identical to FRCP 31 and is a revised version of superseded *Ark. Stat. Ann.* § 28-353(1)(a) through (c) (Repl. 1962). Deleted from the Federal Rule by the 1970 amendments thereto was former section (d) which was a part of this superseded statute. That section provided that the court could make such orders as were necessary for the protection of the parties, including the right to require that the deposition be taken upon oral examination. This provision is not retained in Rule 31 in light of Rule 26(c) which provides that the Court may order that one discovery device be used in place of another.

2. The time limits prescribed in Section (a) are taken from the Federal Rule. Superseded *Ark. Stat. Ann.* § 28-353(1)(a) (Repl. 1962) was patterned [after] the Federal Rule insofar as time limits are concerned as it existed prior to the 1970 amendments. Overall, this rule should have little effect upon Arkansas practice.

**Addition to Reporter's Notes, 1984**

**Amendment:** Rule 31(c) is amended to make it consistent with the amendment to Rule 5(c) making filing of discovery documents optional. The same means of giving access to upon written questions as are found in the amended Rule 30 with respect to depositions upon oral examination are provided in the amendment.

**Addition to Reporter's Notes, 1997**

**Amendment:** Subdivision (a) has been divided into four numbered paragraphs. The first two paragraphs make the rule consistent with Rule 30 as to the circumstances under which leave of court is required. Paragraph (3) is the former second paragraph, without substantive change. Paragraph (4) is the former third paragraph, but the total time for developing cross-examination, redirect, and recross questions is reduced from 50 days to 28 days.

## RESEARCH REFERENCES

**Ark. L. Rev.** Recent Developments — 1997 Amendments to the Arkansas Rules of Civil Procedure and the Rules of Appellate Procedure — Civil, 50 *Ark. L. Rev.* 149.

**U. Ark. Little Rock L.J.** Spears, Comment: The 1979 Civil Procedure Rules, 2 *U. Ark. Little Rock L.J.* 89.

## CASE NOTES

**Cited:** *Weathers v. Weathers*, 9 *Ark. App.* 300, 658 S.W.2d 427 (1983).

## Rule 32. Use of depositions in court proceedings.

(a) *Use of Depositions.* At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any other purpose permitted by the Arkansas Rules of Evidence.



(2) The deposition of a party or of anyone who, at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of this state, unless it appears that the absence of a witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. A deposition taken without leave of court pursuant to a notice under Rule 30(b)(2) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Arkansas Rules of Evidence.

(b) *Objections to Admissibility.* Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) *Form of Presentation.* Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. The transcript must be prepared by a certified court reporter from the nonstenographic recording. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

(d) *Effect of Errors and Irregularities in Depositions.*

(1) *As To Notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As To Disqualification Of Officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As To Taking Of Deposition.*

(A) Objections to the competency of a witness or to the competency, relevancy or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) *As To Completion And Return Of Deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such is, or with due diligence might have been ascertained. (Amended July 9, 1984, effective September 1, 1984; amended November 20, 1989, effective January 1, 1990; amended November 11, 1991, effective January 1, 1992; amended November 18, 1996, effective March 1, 1997; amended January 22, 1998.)

**Reporter's Notes to Rule 32:** 1. With the exception of minor wording changes necessary to adapt FRCP 32 to state practice, Rule 32 is essentially the same as the Federal Rule. This rule tracks *Ark. Stat. Ann.* §§ 28-348 and 28-354 (Repl. 1962) and does not work any significant changes in Arkansas practice.

2. Section (c) of FRCP 32 was abrogated in 1972 and the Federal Rules of Evidence now control the effect of taking or using depositions in federal courts. This section is also omitted from Rule 32 as the Uniform Rules of Evidence adopted in this State also control on this same question.

**Addition to Reporter's Notes, 1984**

**Amendment:** Rule 32(a)(1) is amended to broaden the uses of depositions at trial beyond impeachment by permitting their use for any purpose permitted by the evidence rules.

**Addition to Reporter's Notes, 1989**

**Amendment:** As initially adopted, the second paragraph of Rule 32(a)(4) provided that a prior action must have been dismissed before depositions taken for use in it could be used in a subsequent action. The 1989 amendment permits the use of a deposition from a prior action to the extent allowed by the Rules of Evidence. The corresponding federal rule was so amended in 1980. In addition, the 1989 amendment eliminates the requirement that a deposition taken in a prior action must have been filed in order for it to be used in a subsequent action. This change is consistent with Rule 5(c), which, as amended in 1984, does not require that depositions be filed as a matter of course.

**Addition to Reporter's Notes, 1997**

**Amendment:** Subdivision (a)(3) has been amended by adding a new paragraph that includes not only the substance of provisions formerly found in Rule 30(b)(2), but also new



language dealing with the situation in which a party who receives minimal notice of a deposition is unable to obtain a court ruling on a motion for protective order seeking to delay or change the place of the deposition. Ordinarily, a party does not obtain protection merely by the filing of a motion under Rule 26(c); any such protection is dependent upon the court's ruling. Under the revision, a party receiving less than 11 days notice of a deposition can, provided that its motion for a protective order is filed promptly, be spared the risks resulting from nonattendance at the deposition held before its motion is ruled upon. Although the revision covers only the risk that the deposition could be used against the non-appearing movant, it should also follow that, when the proposed deponent is the movant, the deponent would have "just cause" for failing to appear for purposes of Rule 37(d)(1). Inclusion of this provision is not intended to signify that 11 days' notice is the minimum advance notice for all depositions or that greater than 10 days should necessarily be deemed sufficient in all situations.

Former subdivision (c) has been redesignated as subdivision (d), without change, and a new subdivision (c) added to reflect the increased opportunities for video and audio recording of depositions under revised Rule 30. Under the new provision, a party may offer deposition testimony in any of the forms

authorized under Rule 30(b) but, if offering it in a nonstenographic form, must provide the court with a transcript of the portions so offered. On request of any party in a jury trial, deposition testimony offered other than for impeachment purposes is to be presented in a nonstenographic form if available, unless the court directs otherwise.

**Addition to Reporter's Notes, 1998 Amendment:** Subdivision (c) requires that the court be furnished with a transcript of any deposition testimony presented at trial in nonstenographic form. It was not clear, however, whether the transcript had to be certified by the officer before whom the deposition was taken. If that were so, the rule would as a practical matter require the presence of a court reporter at video depositions; under Section 9 of the rules providing for certification of court reporters, 'transcripts . . . will be accepted only if they are certified by a court reporter who holds a valid certificate under this Rule.' Such a result would be at odds with Rule 30(b), which contemplates depositions taken by nonstenographic means only. Accordingly, a new second sentence has been added to Rule 32(c) making plain that the transcript must be prepared by a certified court reporter from the audio or video tape recording of the deposition, thereby ensuring that the transcript accurately reflects what is on the tape offered at trial.

RESEARCH REFERENCES

**Ark. L. Notes.** Bailey, "Usual Stipulations" Are Usually a Mistake At the Oral Deposition, 1991 Ark. L. Notes 3.  
**Ark. L. Rev.** Recent Developments — 1997 Amendments to the Arkansas Rules of Civil Procedure and the Rules of Appellate Procedure — Civil, 50 Ark. L. Rev. 149.

**U. Ark. Little Rock L.J.** Survey — Evidence, 11 U. Ark. Little Rock L.J. 205.  
 Sullivan, The Need for a Business or Payroll Records Affidavit for Use in Child Support Matters, 11 U. Ark. Little Rock L.J. 651.  
 Survey, Civil Procedure, 13 U. Ark. Little Rock L.J. 321.

CASE NOTES

ANALYSIS

- In general.
- Error in admitting deposition.
- Error in excluding deposition.
- Expert witnesses.
- Objection to admissibility.
- Part of deposition.
- Testimony admitted.

In General.

This rule is essentially the same as Fed. R. Civ. P. 32, which has been construed to point out that any party, not only the party who took the deposition, may use the deposition of a witness, whether or not a party, for any purpose at the trial or hearing, if the party demonstrates to the court the existence of one of the conditions specified in subdivision (a)(3)

of this rule. *Shelter Mut. Ins. Co. v. Tucker*, 295 Ark. 260, 748 S.W.2d 136 (1988).

This rule outlines the use of depositions; it does not distinguish between discovery depositions and evidentiary depositions. Yet, members of the bar commonly describe depositions as being either discovery or evidentiary. *Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989).

Where the parties and the court obviously thought that they were dealing with "discovery" depositions, and, accordingly, there was an implied agreement that they were not "evidentiary" depositions and could not be used as evidence at the trial, the literal wording of this rule was waived. *Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989).

This rule does not distinguish between discovery and evidentiary depositions. *Whitney v. Holland Retirement Ctr., Inc.*, 323 Ark. 16, 912 S.W.2d 427 (1996); *National Bank of Commerce v. Quirk*, 323 Ark. 769, 918 S.W.2d 138 (1996), amended, 325 Ark. 31, 922 S.W.2d 717 (1996), overruled in part on other grounds, *Ark. HHS v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006).

Any party, not only the party who took the deposition, may use the deposition of a witness, whether or not a party, for any purpose at the trial or hearing, if the party demonstrates to the court the existence of one of the conditions specified in subdivision (a)(3) of this rule. *Kristie's Katering v. Ameri*, 72 Ark. App. 102, 35 S.W.3d 807 (2000).

Because subdivisions (a)(1) and (a)(3) of this rule presented a different criterion for use of a deposition, to prevail on appeal, the partnership had to focus its argument on the section that was actually used by the trial judge in her ruling, and the partnership made no argument concerning (a)(1); accordingly, the failure was fatal to its argument on appeal, that the use of the owner's wife's deposition to impeach the owner was improper. *DC Xpress, L.L.C. v. Briggs*, 2009 Ark. App. 651, 343 S.W.3d 603 (2009).

#### **Error in Admitting Deposition.**

Where the record did not show that any of the five conditions contained in subdivision (a)(3) of this rule existed so as to permit the introduction of the pre-trial depositions of plaintiff or her husband and, in fact, plaintiff and her husband were present in court when their depositions were introduced and admitted into evidence, and they both testified at the same proceeding, admission of the depositions was error. *Crisp v. Brown*, 4 Ark. App. 208, 628 S.W.2d 596 (1982).

#### **Error in Excluding Deposition.**

Where there was no dispute that both expert witnesses were out of state at the time of trial and no allegation that the absence of either expert was procured by the party offering the depositions, this rule clearly provided for the admission of both depositions. *National Bank of Commerce v. Quirk*, 323 Ark. 769, 918 S.W.2d 138 (1996), amended, 325 Ark. 31, 922 S.W.2d 717 (1996), overruled in part on other grounds, *Ark. HHS v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006).

#### **Expert Witnesses.**

Exclusion of the deposition testimony of expert witnesses held prejudicial error where the plaintiff's burden of proving the applicable standard of care and the defendant's failure to comply with that standard required expert testimony. *National Bank of Commerce v. Quirk*, 323 Ark. 769, 918 S.W.2d 138 (1996), amended, 325 Ark. 31, 922 S.W.2d 717

(1996), overruled in part on other grounds, *Ark. HHS v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006).

#### **Objection to Admissibility.**

Subsection (b) of this rule provides that an objection may be made at the trial or hearing to receiving into evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness was then present and testifying; since appellee's counsel complied with subsection (b), the court's mistaken assertion as to the existence of a stipulation between the parties was of no consequence. *Benson v. Shuler Drilling Co.*, 316 Ark. 101, 871 S.W.2d 552 (1994).

Where a doctor's expert witness in a medical malpractice action was more than 100 miles away on the trial date, the trial court improperly refused to rule on the admissibility of the expert's deposition, taken on the day before on the basis of a discovery scheduling order, because the plaintiff's was an evidentiary objection, not a discovery objection. *Hill v. Billups*, 85 Ark. App. 166, 148 S.W.3d 288 (2004).

When the videotaped deposition testimony by plaintiff's treating physician was played in plaintiff's medical malpractice action against defendant, a circuit court did not err in ruling that defendant waived the objection to the qualification of plaintiff's treating physician as an expert because defendant did not make the objection at the time of the deposition, in accordance with this rule, and it was the type of objection that could have been obviated or removed had it been made at the time of the deposition. *Padilla v. Archer*, 2011 Ark. App. 746, — S.W.3d —, 2011 Ark. App. LEXIS 807 (Dec. 7, 2011).

#### **Part of Deposition.**

Once one party has used part of a deposition at trial, an opposing party may introduce any other parts, regardless of the declarant's availability, subject, of course, to the rules of evidence. *Ouachita Mining & Exploration, Inc. v. Wigley*, 318 Ark. 750, 887 S.W.2d 526 (1994).

#### **Testimony Admitted.**

Discovery deposition testimony held admissible pursuant to subdivision (a)(3) of this rule. *Southwestern Bell Tel. Co. v. Blastech, Inc.*, 313 Ark. 202, 852 S.W.2d 813 (1993); *F.L. Davis Bldrs. Supply, Inc. v. Knapp*, 42 Ark. App. 52, 853 S.W.2d 288 (1993).

Where federal regulations prevented a witness from testifying at trial, the trial court properly admitted witness' pretrial deposition into evidence. *Whitney v. Holland Retirement Ctr., Inc.*, 323 Ark. 16, 912 S.W.2d 427 (1996).

A deposition was properly introduced at trial where (1) in his deposition, the deponent testified that he was moving to Colorado, but



that if he was notified of the trial date, he would come back to Arkansas for trial, but (2) plaintiff's counsel informed the court that when he tried to notify the deponent of the trial date by telephone, he was only able to leave a message on an answering machine, and that the deponent had not returned his calls and, further, that the plaintiff had spoken to the deponent's roommate who told him that the deponent was incarcerated in Colorado over a dispute with his girlfriend. *Kristie's Katering v. Ameri*, 72 Ark. App. 102, 35 S.W.3d 807 (2000).

Where the patient brought a medical negligence suit against a doctor and a medical center, defendants were permitted to admit at trial video-deposition testimony of a nurse and the patient under subdivision 32(a)(2) of this rule. The patient's counsel participated in the cross-examination of the nurse in the video deposition and had the right to mount any objections during at that time; the patient waived any objection to the admission of the nurse's deposition testimony under subdivi-

sion 32(a)(3). *Nelson v. Stubblefield*, 2009 Ark. 256, 308 S.W.3d 586 (2009).

**Cited:** *Gibson v. Boling*, 274 Ark. 53, 622 S.W.2d 180 (1981); *Transit Homes, Inc. v. Bellamy*, 282 Ark. 453, 671 S.W.2d 153 (1984), overruled *Peters v. Pierce*, 314 Ark. 8, 858 S.W.2d 680 (1993); *Woods v. Woods*, 285 Ark. 175, 686 S.W.2d 387 (1985); *Kelley v. Wiggins*, 291 Ark. 280, 724 S.W.2d 443 (1987); *Prater ex rel. Estate of Prater v. St. Paul Ins. Co.*, 293 Ark. 547, 739 S.W.2d 676 (1987); *Morris v. Torch Club, Inc.*, 295 Ark. 461, 749 S.W.2d 319 (1988); *Missouri Pac. R.R. v. Mackey*, 297 Ark. 137, 760 S.W.2d 59 (1988), cert. denied 490 U.S. 1067, 109 S. Ct. 2067, 104 L. Ed. 2d 632 (1989); *Truck Ctr. of Tulsa, Inc. v. Autrey*, 310 Ark. 260, 836 S.W.2d 359 (1992); *In re Estate of Spears*, 314 Ark. 54, 858 S.W.2d 93 (1993); *Thompson v. Perkins*, 322 Ark. 720, 911 S.W.2d 582 (1995); *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001); *Arrow Int'l v. Sparks*, 81 Ark. App. 42, 98 S.W.3d 48 (2003); *Simmons v. State*, 95 Ark. App. 114, 234 S.W.3d 321 (2006).

### Rule 33. Interrogatories to parties.

(a) *Availability*. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

(b) *Answers and Objections*. (1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable. (2) The party answering interrogatories shall repeat each interrogatory immediately before the answer or objection. The answers are to be signed by the person making them and the objections signed by the attorney making them. (3) The party upon whom the interrogatories have been served shall serve a copy of the answers, or objections within 30 days after the service of the interrogatories, except that a defendant must serve answers or objections within 30 days after the service of the interrogatories upon him or within 45 days after the summons and complaint have been served upon him, whichever is longer. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. (4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown. (5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(c) *Scope; Use at Trial.* Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(d) *Option to Produce Business Records.* Where the answers to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained. (Amended February 22, 1982; amended July 9, 1984, effective September 1, 1984; amended September 28, 1992, effective January 1, 1993; amended November 18, 1996, effective March 1, 1997; amended January 28, 1999.)

**Reporter's Notes (as modified by the Court) to Rule 33:** 1. Rule 33 is similar to FRCP 33. Prior Arkansas law was governed by superseded *Ark. Stat. Ann.* § 28-353 (Repl. 1962) which followed former FRCP 33. Although there are several wording changes from prior statutes, there is little substantive change. This rule does, however, extend the time for answering or objecting to interrogatories to 30 days or 45 days after service of summons.

2. Omitted from this rule is the language which was contained in superseded *Ark. Stat. Ann.* § 28-355 (Repl. 1962), which provided that the number of sets of interrogatories was not limited except as may be required to protect a party. These rules do not mention the limiting of interrogatories although it is clear that under Rule 26(a), the court does have discretion to limit the use of discovery techniques. See Wright & Miller, *Federal Practice And Procedure*, Section 2168.

3. Rule 33(b) abolishes right to object to interrogatories because they call for conclusions or opinions. Under this rule, an interrogatory is not objectionable merely because it calls for an opinion, conclusion of law or contention. Wright & Miller, *Federal Practice And Procedure*, Section 2167.

4. Section (c) is intended to relieve a party from those situations where a substantial burden is placed upon the party to search

through records and documents for the requested information. Under this rule, the party who propounded the interrogatories may be referred to the books and records by designation and he may be required to expend his own time and effort in seeking the information sought.

**Addition to Reporter's Notes, 1982 Amendment:** The second sentence of the second paragraph of Rule 33(a) was added.

**Addition to Reporter's Notes, 1984 Amendment:** Rule 33(a) is amended by changing the fourth sentence in the second paragraph to make it clear that a party responding to interrogatories must do so within 30 days after they are served or 45 days after service of the summons and complaint, whichever period is longer.

**Addition to Reporter's Notes, 1992 Amendment:** Subdivisions (d) and (e), neither of which was based on the corresponding federal rule, have been deleted. Their elimination should not affect Arkansas practice in any meaningful way, since the subjects they addressed are adequately covered by other rules. See generally D. Newbern, *Arkansas Practice & Procedure* § 17-9 (1985).

Subdivision (d) provided that a party who by interrogatory "requests copies of documents to be attached ... may be required to pay the reasonable cost of reproduction of each document." This provision allowed a



party to use interrogatories for purposes of document production, despite the fact that Rule 34 specifically governs that discovery device. Under Rule 34, the requesting party may “inspect and copy” documents and must bear the expense of making copies. The party from whom discovery is sought is not required to make copies for the convenience of his opponent. See 4A *Moore’s Federal Practice* ¶ 34.19[2] & [3] (2d ed. 1992).

Under subdivision (e), a court could award costs, including a reasonable attorney’s fee, to a party who obtained a protective order on the basis of unnecessary interrogatories propounded by another party. This provision is unnecessary in light of Rules 26(c) and 37, which provide such protection against abusive use of interrogatories.

**Addition to Reporter’s Notes, 1997 Amendment:** Subdivision (a) of the former version of this rule has been divided into two subdivisions, and former subdivisions (b) and (c) have been redesignated as (c) and (d), respectively.

Paragraph (1) of subdivision (b) is based on the former second paragraph of subdivision (a). It emphasizes the duty of the responding party to provide full answers to the extent not objectionable. If, for example, an interrogatory seeking information about numerous facilities or products is deemed objectionable, but an interrogatory seeking information about a lesser number of facilities or products would not have been objectionable, the interrogatory should be answered with respect to

the latter even though an objection is raised as to the balance of the facilities or products. Similarly, the fact that additional time may be needed to respond to some questions or parts of questions should not justify a delay in responding to those questions or portions that can be answered within the prescribed time.

Paragraph (2) is taken without change from the former second paragraph of subdivision (a). Paragraph (3) provides, in accordance with the prior version of the rule, that the court may shorten or lengthen the time for responding to interrogatories. New language expressly permits the parties to extend or shorten the response time by written agreement, a modification in discovery procedures that is permissible under Rule 29. Paragraph (4), which is new, makes clear that objections must be specifically justified and that unstated or untimely grounds for objection are ordinarily waived.

**Addition to Reporter’s Notes, 1999 Amendment:** Subdivision (d) has been amended by adding the last sentence. Taken from the corresponding federal rule, this provision makes clear that a party responding to interrogatories by producing business records has the duty to specify, by category and location, the records from which answers to interrogatories can be derived. Without such guidance, the burden of deriving the answers would not be substantially the same for the party serving the interrogatories as for the responding party. A similar requirement has been added to Rule 34(b).

RESEARCH REFERENCES

**Ark. L. Rev.** Recent Developments — 1997 Amendments to the Arkansas Rules of Civil Procedure and the Rules of Appellate Procedure — Civil, 50 Ark. L. Rev. 149.

**U. Ark. Little Rock L.J.** Spears, Com-

ment: The 1979 Civil Procedure Rules, 2 U. Ark. Little Rock L.J. 89.

Sullivan, The Need for a Business or Payroll Records Affidavit for Use in Child Support Matters, 11 U. Ark. Little Rock L.J. 651.

CASE NOTES

ANALYSIS

Construction with other rules.  
Discovery sanctions.  
Time for completion.  
Use of interrogatories as evidence.

Construction with Other Rules.

The failure of the plaintiffs to serve full and complete answers to interrogatories could not be excused under ARCP 37(d) where their objections to some of the interrogatories were not made within 30 days, as required by subsection (b) of this rule, and they did not apply for a protective order under ARCP 26(c). *Calandro v. Parkerson*, 333 Ark. 603, 970 S.W.2d 796 (1998).

Discovery Sanctions.

Trial court did not abuse its discretion in imposing the discovery sanction of a default judgment against an alternative medicine practitioner and his school in a suit brought by the state pursuant to the Arkansas Deceptive Trade Practices Act, § 4-88-101 et seq., where the court had already granted the state’s motion to compel discovery, yet the practitioner destroyed the very information that the state had sought when the student files were redacted. *Southern College of Naturopathy v. State ex rel. Beebe*, 360 Ark. 543, 203 S.W.3d 111 (2005).

Because a nursing home owner failed to

raise a timely objection to interrogatories or requests for production, as required by subsection (b) of this rule and Ark. R. Civ. P. 34(b)(2), a trial court did not err in imposing a sanction striking part of the owner's answer. *Lake Vill. Healthcare Ctr., LLC v. Hatchett*, 2012 Ark. 223, — S.W.3d —, 2012 Ark. LEXIS 254 (May 24, 2012).

#### **Time for Completion.**

Order extending the time for completion of discovery from the 30 days allowed by this rule to 45 days after the issuance of the order was not error. *Loosey v. Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988).

#### **Use of Interrogatories As Evidence.**

The plaintiffs in a personal injury suit could not introduce into evidence the original and amended interrogatories and answers made by the defendant pursuant to subsection (b) of this rule in order to impeach the credibility of the defendants' witnesses, since the plaintiffs did not demonstrate that the answers given fell within a recognized exception to the hearsay rule. *Hunter v. McDaniel Constr. Co.*, 274 Ark. 178, 623 S.W.2d 196 (1981).

Although answers to interrogatories may be used to the extent permitted by the rules of evidence, objections to interrogatories are not answers, and the circuit court correctly sustained defendant's objection at trial when plaintiff sought to present to the jury defendant's objections to certain interrogatories. *Piercy v. Wal-Mart Stores, Inc.*, 311 Ark. 424, 844 S.W.2d 337 (1993).

Answers to interrogatories are hearsay and generally are inadmissible as part of a party's case-in-chief; however, such answers may be admissible to impeach the answering party. *Piercy v. Wal-Mart Stores, Inc.*, 311 Ark. 424, 844 S.W.2d 337 (1993).

Answers to interrogatories may qualify as admissions by a party-opponent which are not hearsay, as defined, and therefore may constitute substantive evidence and be admissible in a party's case-in-chief; if an objection to such answers is raised on foundational or other grounds, it then becomes a matter for the trial court's discretion. *Piercy v. Wal-Mart Stores, Inc.*, 312 Ark. 434A, 844 S.W.2d 337 (1993).

Answers to interrogatories are admissible for consideration in summary judgment proceedings. *Piercy v. Wal-Mart Stores, Inc.*, 312 Ark. 434A, 844 S.W.2d 337 (1993).

The defendant could use the plaintiff's answers to interrogatories to impeach her testimony where the answers to interrogatories at issue pertained to an effort to settle her claim with the defendant. *J. E. Merit Constructors, Inc. v. Cooper*, 345 Ark. 136, 44 S.W.3d 336 (2001).

**Cited:** *Morris v. Torch Club, Inc.*, 295 Ark. 461, 749 S.W.2d 319 (1988); *Graham v. Sledge*, 28 Ark. App. 122, 771 S.W.2d 296 (1989); *Divelbliss v. Suchor*, 311 Ark. 8, 841 S.W.2d 600 (1992); *Chiodini v. Lock*, 2010 Ark. App. 340, — S.W.3d —, 2010 Ark. App. LEXIS 353 (Apr. 21, 2010).

### **Rule 34. Production of documents and things and entry upon land for inspection and other purposes.**

(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

#### **(b) Procedure.**

(1) The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and



describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts.

(2) The party upon whom the request has been served shall serve a written response within 30 days after the service of the request, except that a defendant must serve a response within 30 days after the service of the request upon him or within 45 days after the summons and complaint have been served upon him, whichever is longer. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(3) A party who produces documents for inspection shall (A) organize and label them to correspond with the categories in the production request or (B) produce them as kept in the usual course of business if the party seeking discovery can locate and identify the relevant records as readily as can the party who produces the documents.

(c) *Persons Not Parties.* This rule does not preclude an independent action against a person not a party for permission to enter upon land. As provided in Rule 45(b), a person not a party may be compelled to produce documents or tangible things. (Amended November 18, 1996, effective March 1, 1997; amended January 13, 1997, effective March 1, 1997; amended January 28, 1999; amended June 3, 2010, effective July 1, 2010.)

**Reporter's Notes to Rule 34:** 1. Rule 34 is identical to FRCP 34. Prior Arkansas law was governed by superseded *Ark. Stat. Ann.* § 28-356 (Repl. 1962) which tracked FRCP 34 prior to the 1970 amendments thereto. Under prior Arkansas law, a party seeking the production of documents, etc., was required to show good cause and obtain a court order to permit same. Under this and FRCP 34, the party seeking discovery need only serve a request upon opposing counsel. Should the opposition refuse to produce the document or thing requested, the party seeking discovery must move for an order compelling the production of the item. Thus, unless documents are produced by agreement, a hearing is still required.

2. Rule 34 and FRCP 34 omit any reference to privileged matter. Although this particular rule does not specifically preclude the production and inspecting of privileged matters, Rule 26(b)(1) makes it quite clear that matters which are deemed privileged are beyond the scope of discovery.

**Addition to Reporter's Notes, 1997 Amendment:** The first and second sentences of the second paragraph of Rule 34(b) have been amended to track Rule 33(b)(3). In ac-

cordance with the prior version of Rule 34(b), the court may shorten or lengthen the time for responding to requests for production. New language expressly permits the parties to extend or shorten the response time by written agreement, a modification in discovery procedures that is permissible under Rule 29.

**Addition to Reporter's Notes, 1999 Amendment:** The first and second paragraphs of subdivision (b) have been numbered and a new paragraph (3) added. The fourth sentence of the second paragraph has been amended to require a party who objects to part of a request for production to permit inspection with respect to the unobjectionable portions. The corresponding federal rule was so amended in 1993. A similar requirement for answers to interrogatories appears in Rule 33(b)(1).

The new third paragraph, based on Federal Rule 34(b), provides that a party from whom production is sought must (1) organize and label the documents in accordance with the categories set out in the production request, or (2) produce them as kept in the usual course of business. However, the second option is available only if "the party seeking

discovery can locate and identify the relevant documents as readily as can the party who produces them." This requirement is intended to eliminate a problem that has arisen under the federal rule, which appears to give the producing party the right to produce records as kept in the usual course of business even though the party seeking discovery would be forced to sift through a jumble of documents in order to find those that are responsive to the production request. A similar requirement

has been added to Rule 33(d), which allows the production of business records in response to interrogatories.

**Addition to Reporter's Notes, 2010 Amendment:** Subdivision (c) has been amended to reflect the 2010 amendment to Rule 45(b), which allows subpoenas for the production of books, papers, documents, or tangible things without a related appearance at a deposition, hearing, or trial.

## RESEARCH REFERENCES

**Ark. L. Notes.** Watkins, Using the Freedom of Information Act as a Discovery Device, 1994 Ark. L. Notes 59.

**Ark. L. Rev. Comment,** To the Spoliator Go the Spoils: Arkansas Rejects Spoliation of Evidence as a Tort Cause of Action, 61 Ark. L. Rev. 283.

**U. Ark. Little Rock L.J.** Sullivan, The Need for a Business or Payroll Records Affidavit for Use in Child Support Matters, 11 U. Ark. Little Rock L.J. 651.

## CASE NOTES

### ANALYSIS

In general.

Criminal proceedings.

Discovery sanctions.

### In General.

Trial court properly dismissed administrator's tort claim for a third-party's alleged spoliation of the evidence in a wrongful death suit because a remedy had to be sought through a means other than an individual tort claim; criminal sanctions were still available under § 5-53-111, even though a new tort was not recognized, and attorneys who were guilty of spoliation were still subject to discipline. *Downen v. Redd*, 367 Ark. 551, 242 S.W.3d 273 (2006).

### Criminal Proceedings.

The discovery procedures permitted in ARCP 30 and this rule, are applicable only to

civil actions; they are not applicable in criminal proceedings unless there is a specific statute so providing. *Kelley v. State*, 7 Ark. App. 130, 644 S.W.2d 638 (1983).

### Discovery Sanctions.

Because a nursing home owner failed to raise a timely objection to interrogatories or requests for production, as required by Ark. R. Civ. P. 33(b) and subdivision (b)(2) of this rule, a trial court did not err in imposing a sanction striking part of the owner's answer. *Lake Vill. Healthcare Ctr., LLC v. Hatchett*, 2012 Ark. 223, — S.W.3d —, 2012 Ark. LEXIS 254 (May 24, 2012).

**Cited:** *Ashmore v. Ford*, 267 Ark. 854, 591 S.W.2d 666 (1979), limited *Druckenmiller v. Cluff*, 316 Ark. 517, 873 S.W.2d 526 (1994); *First Nat'l Bank v. Newport Hosp. & Clinic*, 281 Ark. 332, 663 S.W.2d 742 (1984); *Cook v. Wills*, 305 Ark. 442, 808 S.W.2d 758 (1991).

## Rule 35. Physical and mental examination of persons.

(a) *Order for Examination.* When the mental or physical condition (including the blood group) of a party, or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician or a mental examination by a physician or a psychologist or to produce for the examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

(b) *Report of Examining Physician or Psychologist.*

(1) If requested by the party against whom an order is made under Rule



35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician or psychologist setting out his findings, including results of all tests made, diagnoses and conclusions, together with all like reports of all earlier examinations of the same condition. After delivery, the party causing the examination shall be entitled, upon request to receive from the party against whom the order is made, a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just and if a physician or psychologist fails or refuses to make a report, the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered, or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect to the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule or statute of this state.

(c) *Medical Records.*

(1) A party who relies upon his or her physical, mental, or emotional condition as an element of his or her claim or defense shall, within 30 days after the request of any other party, execute an authorization to allow such other party to obtain copies of his or her medical records. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. The term "medical records" means any writing, document, or electronically stored information pertaining to or created as a result of treatment, diagnosis, or examination of a patient.

(2) Any informal, ex parte contact or communication between a party or his or her attorney and the physician or psychotherapist of any other party is prohibited, unless the party treated, diagnosed, or examined by the physician or psychotherapist expressly consents. A party shall not be required, by order of court or otherwise, to authorize any communication with his or her physician or psychotherapist other than (A) the furnishing of medical records, and (B) communications in the context of formal discovery procedures. (Amended May 13, 1991, effective July 1, 1991; amended November 18, 1996, effective March 1, 1997; amended January 22, 1998; amended January 22, 2004.)

**Reporter's Notes to Rule 35:** 1. Rule 35 is identical to FRCP 35. Prior Arkansas law was governed by superseded *Ark. Stat. Ann.* § 28-357 (Repl. 1962) which tracked FRCP 35 prior to its 1970 amendments. This rule does not work any appreciable changes in Arkansas law.

2. FRCP 35 provides that it does not pre-

clude the taking of a deposition or discovery of a medical report in accordance with the provisions of any other rule. Rule 35 follows this and provides that any statute of this State may provide for additional discovery. Specifically, this rule does not affect *Ark. Stat. Ann.* § 28-607 (Supp. 1975).

**Addition to Reporter's Notes, 1990**

**Amendment:** New subdivision (c) of this rule sets out the circumstances under which a party must authorize release of his medical records to another party. It also makes plain that a party may not be required to allow an adversary to communicate with the party's physician or psychotherapist outside the formal discovery process. This safeguard is deemed necessary to protect the confidential relationship between a party and his physician or psychotherapist.

**Addition to Reporter's Notes, 1997**

**Amendment:** Subdivision (a) has been amended to permit the appointment of psychologists to conduct mental examinations, and subdivision (b) has been revised to reflect this change. As amended, the Arkansas rule is similar to the version of the corresponding federal rule that was in effect from 1988 to 1991. The current federal rule is broader, allowing physical or mental examinations "by a suitably licensed or certified examiner." Because the impact of such an expansive provision at the state level could be considerable, only an incremental step — i.e., permitting mental examinations by psychologists — has been taken at this time, and that step is consistent with Arkansas practice. Under Rule 702 of the Arkansas Rule of Evidence, a psychologist may testify as an expert about the mental condition of a party or other person. See, e.g., *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993) (divorce); *Walker v. Walker*, 262 Ark. 648, 559 S.W.2d 716 (1978) (child custody). It makes little sense, therefore, to preclude a psychologist from conducting an examination pursuant to Rule 35. Moreover, psychologists are trained to conduct mental examinations, which are a routine, widely

accepted part of the practice of psychology in both forensic and non-forensic settings.

The amendment to subdivision (c) imposes a 30-day deadline for responding to a request for an authorization to obtain copies of a party's medical records. A companion change in Rule 37(a) provides for a motion to compel if the authorization is not provided in a timely manner.

**Addition to Reporter's Notes, 1998**

**Amendment:** Subdivision (c) has been divided into numbered paragraphs and reorganized. It has been also amended to address an issue on which the Arkansas federal courts have disagreed. Compare *Harlan v. Lewis*, 141 F.R.D. 107 (E.D. Ark. 1992), *aff'd*, 982 F.2d 1255 (8th Cir. 1993), with *King v. Ahrens*, 798 F. Supp. 1371 (W.D. Ark. 1992). Consistent with the result reached in *Harlan*, the first sentence of paragraph (2) provides that a party or his or her attorney cannot interview or otherwise informally contact another party's treating physician or psychotherapist without that party's consent. This new provision reflects the intent of the original version of the rule, i.e., to limit communications with a party's physician or psychotherapist to the formal discovery process. A corresponding change has been made in Rule 503(d)(3), Ark. R. Evid.

**Addition to Reporter's Notes, 2004**

**Amendment:** A new sentence has been added to subdivision (c)(1) to provide that the 30-day response time may be lengthened or shortened by the court or by written agreement of the parties. Corresponding provisions appear in Rule 33(b) and Rule 34(b)(2), which apply to interrogatories and production of documents, respectively.

## RESEARCH REFERENCES

**Ark. L. Notes.** Gitelman and Watkins, No Requiem for Ricarte: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

**Ark. L. Rev.** Recent Developments — 1997 Amendments to the Arkansas Rules of Civil Procedure and the Rules of Appellate Procedure — Civil, 50 Ark. L. Rev. 149.

**U. Ark. Little Rock L.J.** Survey, Evidence, 14 U. Ark. Little Rock L.J. 365.

Note, Constitutional Law — Confrontation Clause — Arkansas Child Hearsay Exception Regarding Sexual Offenses, Abuse, Or Incest Is Unconstitutional. *George v. State*, 306 Ark. 360, 813 S.W.2d 792 (1991), 14 U. Ark. Little Rock L.J. 579.

## CASE NOTES

### ANALYSIS

Communications with physician.  
Evaluation standards.  
Medical records.

### Communications with Physician.

In a medical malpractice and wrongful death action, the trial court should have disqualified opposing counsel based on his communications with a mother's doctor under

Ark. R. Evid. 503(d)(3)(B) or subdivision (c)(2) of this rule because opposing counsel's advice to and communication with a second doctor were in service to the second doctor. *Bulsara v. Watkins*, 2009 Ark. App. 409, 319 S.W.3d 274 (2009).

### Evaluation Standards.

Although it could be argued that the mental health of parents or guardians was always an



issue in cases involving the placement of children, the circuit court abused its discretion where it did not apply the correct legal standard in evaluating the motion for psychological evaluation under subsection (a) of this rule. As such, the circuit court erred in granting the grandparents' motion for psychological evaluation over the mother's objection in her petition to terminate guardianship. *Troeskyn v. Herrington (In re S.H.)*, 2012 Ark. 245, — S.W.3d —, 2012 Ark. LEXIS 260 (May 31, 2012).

#### **Medical Records.**

Circuit court judge had jurisdiction to enter an order compelling discovery of medical records, pursuant to subsection (c) of this rule,

and thus a writ of prohibition to prevent the court from enforcing its order would not be proper. *McGlothlin v. Kemp*, 314 Ark. 495, 863 S.W.2d 313 (1993).

Writ of certiorari was proper, because the court erred in denying the husband's motion to quash several subpoenas concerning his medical records, when the husband was not a party to the underlying custody dispute, the husband did nothing to bring his medical condition into issue, and the husband's mental health was examined through other admissible evidence; a nonparty's medical records could not be subpoenaed under the circumstances presented in the instant case. *McKenzie v. Pierce*, 2012 Ark. 190, — S.W.3d —, 2012 Ark. LEXIS 212 (May 3, 2012).

### **Rule 36. Requests for admission.**

(a) *Request for Admission.* A party may serve upon any other party a written request for the admission, for purposes of the pending action, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. However, a defendant shall have 30 days after service of the request or 45 days after he has been served with the summons and complaint to answer, whichever time is longer. These time periods may be shortened or lengthened by the court. If objection is made, the reasons therefor shall be stated. The party answering requests for admissions shall repeat each request immediately before the answer or objection. The answer shall specifically admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an

objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

If an attorney for a party to whom requests for admission are addressed signs an answer, his signature shall be deemed his oath as to the correctness of the answer and his specific authority to bind the party on whose behalf he signs.

(b) *Effect of Admission.* Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose, nor may it be used against him in any other proceeding.

(c) *Separate Document.* Requests for admissions must be filed in a separate document so titled and shall not be combined with interrogatories, document production requests, or any other material. (Amended February 22, 1982; amended May 16, 1983; amended July 9, 1984, effective September-1, 1984; amended November 11, 1991, effective January 1, 1992.)

**Reporter's Notes (as modified by the Court) to Rule 36:** 1. Rule 36 is similar to FRCP 36. Prior Arkansas law was found in superseded *Ark. Stat. Ann.* § 28-358 (Repl. 1962) which tracked the Federal Rule prior to its 1970 amendments. This rule does effect certain changes in Arkansas law. One major change is the extension of time to respond to requests to a full 30 days. Additionally, the rule expands the scope of matters which may be determined through the use of requests to include statements and opinions of fact.

**Addition to Reporter's Notes, 1982 Amendment:** The fourth sentence of the second paragraph of Rule 36(a) was added.

**Addition to Reporter's Notes, 1983 Amendment:** The words "or the application of law to fact" have been added in the first sentence of Rule 36(a).

The second paragraph of Rule 36(a) has been amended to permit an attorney to sign, on behalf of his client, a response to a request for admission. The last paragraph of Rule

36(a) has been added to establish the effect of the attorney's signature.

The word "Rule" has been added to the last sentence of the third paragraph of Rule 36(a).

**Addition to Reporter's Notes, 1984 Amendment:** Rule 36(a) is amended by stating separately the power of the court to shorten or lengthen the response time and by changing the third sentence of the second paragraph to make it clear that a party responding to admissions requests must do so within 30 days after the requests are served or 45 days after service of the summons and complaint, whichever period is longer.

**Addition to Reporter's Notes, 1986 Amendment:** Under new subsection (c), it is impermissible to combine requests for admissions with interrogatories or other discovery devices. The amendment is consistent with the practice followed in the Arkansas federal courts. See Rule 15(e), Rules of the U.S. District Courts for the Eastern and Western Districts of Arkansas (as amended effective May 1, 1985).



## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Spears, Comment: The 1979 Civil Procedure Rules, 2 U. Ark. Little Rock L.J. 89.

Arkansas Law Survey, Price, Civil Procedure, 9 U. Ark. Little Rock L.J. 91.

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Sullivan, The Need for a Business or Payroll Records Affidavit for Use in Child Support Matters, 11 U. Ark. Little Rock L.J. 651.

**U. Ark. Little Rock L. Rev.** Annual Survey of Caselaw, Civil Procedure, 24 U. Ark. Little Rock L. Rev. 893.

## CASE NOTES

## ANALYSIS

In general.

Purpose.

Effect of admission.

Effect of nonsuit.

Failure to respond to request.

Request directed to party.

Request improper.

Request proper.

Timeliness of response.

Verifications.

**In General.**

Requests for admissions are generally considered to be designed to ascertain an adversary's position; they are not discovery devices to ascertain relevant facts. In re Dailey, 30 Ark. App. 8, 784 S.W.2d 782 (1989).

In an employment discrimination case, where two attorneys should have been admitted pro hac vice, the decisions to grant a default judgment and to deem certain responses admitted were also erroneous. Tobacco Superstore, Inc. v. Darrough, 362 Ark. 103, 207 S.W.3d 511 (2005).

Although two of the appellant's requests for admission from the appellee were improper requests of law under this rule, summary judgment in favor of the appellant was proper as the remaining admissions left no issue of material fact in dispute. Hatchell v. Wren, 363 Ark. 107, 211 S.W.3d 516 (2005).

**Purpose.**

The purpose of this rule is to facilitate trial by weeding out facts about which there is no true controversy but which are often difficult or expensive to prove. In re Dailey, 30 Ark. App. 8, 784 S.W.2d 782 (1989).

**Effect of Admission.**

Where the parties had stipulated that the balance owed defendant by plaintiff on the original contract was \$5,000, and there was no motion seeking, or order granting, a withdrawal or amendment of the admission, plaintiff was bound by its response to defendant's request for admissions that it had withheld \$5,000. Jacon, Inc. v. Hoover, 61 Ark. App. 10, 964 S.W.2d 213 (1998).

Admissions made in response to requests for admissions cannot be used against the

defendant in a criminal proceeding arising from the same facts. Maxwell v. State, 73 Ark. App. 45, 41 S.W.3d 402 (2001).

While admissions by the driver of the vehicle as to fault, liability, and lack of insurance did not bind the insurer by constituting conclusive proof of those elements, they did constitute evidence of those elements; the driver admitted, by failure to respond to the requests for admission, that she believed herself to be at fault, liable, uninsured, and without any defense and, while the insurer was free to offer evidence to the contrary, it did not. Gailey v. Allstate Ins. Co., 362 Ark. 568, 210 S.W.3d 40 (2005).

Where a borrower admitted in response to a lender's request for admissions that he borrowed the money from the lender to buy a vehicle and a trailer and made partial payments by way of direct deposits into the lender's bank account, the admissions conclusively established those facts for purposes of trial. Cobb v. Leyendecker, 89 Ark. App. 167, 200 S.W.3d 924 (2005).

**Effect of Nonsuit.**

A second cause of action involving the same parties and claims, filed after a previous voluntary nonsuit pursuant to ARCP 41, is not an "other proceeding" under this rule and, therefore, admissions made under this rule in the nonsuited action may not be used against a party in the second case. Head v. Giles, 343 Ark. 478, 36 S.W.3d 344 (2001).

Admissions made under this rule in an action that ends in a nonsuit under ARCP 41 may not be used against the admitting party in the event the suit is reinstated; such admissions lose their effectiveness upon the grant of a nonsuit under ARCP 41. Norrell v. Giles, 343 Ark. 504, 36 S.W.3d 342 (2001).

**Failure to Respond to Request.**

The trial court erred in denying the plaintiff's motion to strike the defendant's responses to the plaintiff's requests for admissions where the responses were not served and filed within the 30 days allowed by this rule, and the only excuse offered by the defendant's attorneys was that their secretary must have neglected to send the responses. Barnett Restaurant Supply, Inc. v. Vance, 279

Ark. 222, 650 S.W.2d 568 (1983).

Where the interrogatories and request for admission concerning fact of marriage were never received by widow and undisputed evidence showed that the decedent and his widow were married at the time of his death, summary judgment granted on basis of failure to respond to request would be set aside. *Beck v. Merritt*, 280 Ark. 331, 657 S.W.2d 549 (1983).

Trial court erred in entered judgment in favor of a promisee in his action against a promisor to recover judgment on a promissory note because the promisee failed to answer the promisor's requests for admission; the promisee was given ample opportunity to respond to the requests or to otherwise request relief from the trial court, but he did neither. *Borland v. Travis*, 2010 Ark. App. 461, — S.W.3d —, 2010 Ark. App. LEXIS 506 (June 2, 2010).

#### **Request Directed to Party.**

This rule contemplates that the request for admission be directed to the adverse party, to be answered by that party not his attorney, and trial judge properly rejected the defendant's attempt to require opposing counsel to respond to such a request. *B. & J. Byers Trucking, Inc. v. Robinson*, 281 Ark. 442, 665 S.W.2d 258 (1984).

#### **Request Improper.**

A request for admission of a pure matter of law is improper. *In re Dailey*, 30 Ark. App. 8, 784 S.W.2d 782 (1989).

Although subsection (a) of this rule allows for a request for an admission which concerns the application of law to fact, admissions designed to directly discover what legal conclusions the opposing attorney intends to draw from those facts are improper. *In re Dailey*, 30 Ark. App. 8, 784 S.W.2d 782 (1989).

In a case alleging conversion and unjust enrichment, even though the requests for admission were improper because they called for bare conclusions of law, summary judgment was still properly granted to a driver as there was no issue of material fact regarding an owner's act of improperly keeping insurance proceeds and a repaired car. *Hatchell v. Wren*, 363 Ark. 107, 211 S.W.3d 516 (2005).

#### **Request Proper.**

Plaintiff's written request that defendant admit that the statements in exhibit were true copies of statements submitted by plaintiff to defendant conformed to the requirements of this rule. *Wilkinson v. Amos Enderlin Contracting Co.*, 7 Ark. App. 56, 644 S.W.2d 313 (1982).

An element of the burden of proof, or even the ultimate issues in the case, may be addressed in a request for admission under this rule, and the admission of these matters may not be avoided because the request calls for

application of the facts to the law, the truth of an ultimate issue, or opinion or conclusion, so long as the opinion called for is not on an abstract proposition of law. It is the concession of the issue, otherwise determinable by the trier of fact, which comes into evidence, not the assumptions of the party who makes the admission. *In re Dailey*, 30 Ark. App. 8, 784 S.W.2d 782 (1989).

#### **Timeliness of Response.**

Under subsection (b) of this rule the trial court was correct in deeming plaintiff's requests for admissions admitted because the responses were inexcusably not filed within the 30 days allowed by subsection (a) of this rule. *Womack v. Horton*, 283 Ark. 227, 674 S.W.2d 935 (1984).

Where excusable neglect was neither pleaded nor proven, and the response to the requests for admission was not timely filed, the untimely response resulted in an admission of the matters contained in the requests for admissions. *Borg-Warner Acceptance Corp. v. Kesterson*, 288 Ark. 611, 708 S.W.2d 606 (1986).

Supreme Court requires compliance with the rule governing responses to requests for admission, but when the facts warrant, it requires acceptance of late responses. *Belcher v. Bowling*, 22 Ark. App. 248, 738 S.W.2d 804 (1987).

Where plaintiffs had justifiable reason for delay in response to request for admissions, and defendant was not prejudiced by delay, court properly refused to deem the requests admitted. *Belcher v. Bowling*, 22 Ark. App. 248, 738 S.W.2d 804 (1987).

Trial court did not err in failing to find the requests for admissions "admitted" due to wife's failure to file a timely response; the trial judge accepted wife's explanation that the requests were not timely answered because she did not receive them at the time the other papers were served on her, and this explanation was consistent with the fact that the wife stood to lose a substantial amount of support in the pending litigation. *Gibson v. Gibson*, 87 Ark. App. 62, 185 S.W.3d 122 (2004).

Circuit court did not abuse its discretion in refusing to deem certain requests admitted based on a late response because counsel's neglect was excusable where counsel did not simply ignore the requests, but was ill and required surgery. *Chiodini v. Lock*, 2010 Ark. App. 340, — S.W.3d —, 2010 Ark. App. LEXIS 353 (Apr. 21, 2010).

#### **Verifications.**

To avoid having the matter in a request for admissions deemed admitted, the responses must be sworn to by the responding parties, not merely by their counsel. *Thomas v. Poff*, 268 Ark. 939, 597 S.W.2d 838 (1980).



Verification by the parties is no longer necessary on requests for admission. In re Dailey, 30 Ark. App. 8, 784 S.W.2d 782 (1989).

**Cited:** Heritage Ins. Co. v. White County,

279 Ark. 94, 649 S.W.2d 170 (1983); In re Amendments to Rules of Civil Procedure, 279 Ark. 470, 651 S.W.2d 63 (1983).

### **Rule 37. Failure to make discovery; sanctions.**

(a) *Motion for Order Compelling Discovery.* A party, upon reasonable notice to all parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the place where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the place where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested, or fails to permit inspection as requested, or if a party, in response to a request under Rule 35(c), fails to provide an appropriate medical authorization, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion shall include a statement that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(3) *Evasive or Incomplete Answer or Response.* For purposes of this subdivision, an evasive or incomplete answer or response is to be treated as a failure to answer or respond.

(4) *Expenses and Sanctions.*

(A) If the motion is granted or if the requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them, to pay to the moving party the reasonable expenses incurred in making the motion, including attorneys' fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's response or objection was substantially justified or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorneys' fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after

affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) *Failure to Comply with Order.*

(1) *Sanctions By Court In Place Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the place in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions By Court In Which Action Is Pending.* If a party or an officer, director or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B) and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on Failure to Admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) *Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.* If a party, or an officer, director or managing agent of a party or person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party, fails (1) to appear before the



officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B) and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a statement that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any other order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided in Rule 26(c).

(e) *Failure to Supplement Responses.* If a party fails to supplement responses seasonably as required by Rule 26(e), and another party suffers prejudice, then upon motion of the prejudiced party made before or at trial, the court may make any order which justice requires to protect the moving party, including but not limited to imposing any sanction allowed by subdivision (b)(2)(A)-(C) of this rule.

(f) *Expenses Against State.* Except to the extent permitted by statute, expenses and fees may not be awarded against the state of Arkansas under this rule. (Amended November 18, 1996, effective March 1, 1997; amended January 13, 1997, effective March 1, 1997; amended March 13, 2003; amended May 25, 2006.)

**Reporter's Notes to Rule 37:** 1. With the exception of minor wording changes and the omission of Section (e) of FRCP 37, this rule [is] identical in substance to the Federal Rule. Prior Arkansas law was found in *Ark. Stat. Ann.* § 28-359 (Repl. 1962) which tracked the Federal Rule prior to its 1970 amendments.

2. As under prior Arkansas law, the imposition of sanctions for failure to make discovery rests in the discretion of the trial court. *Diaz v. Southern Drilling Co.*, 427 F. 2d 1118 (C.C.A. 5th, 1970); *Marshall v. Ford Motor Company*, 446 F. 2d 712 (C.C.A. 10th, 1971). Overall, this rule should not effect any significant changes in Arkansas practice.

**Addition to Reporter's Notes, 1997 Amendment:** The major change in this rule appears in paragraph (2) of subdivision (a) and corresponds to an amendment to Rule 26(c). Under paragraph (2), a party moving to compel discovery must state in the motion, subject to Rule 11, that it has attempted to resolve the dispute informally before seeking judicial intervention. Another change corresponds to an amendment to Rule 35(c) establishing a 30-day deadline for responding to a

request for authorization to obtain medical records. As amended, paragraph (2) provides for a motion to compel if the authorization is not provided in a timely manner. In addition, the last sentence of paragraph (2) has been moved to paragraph (4).

Under revised paragraph (3) of subdivision (a), evasive or incomplete disclosures and responses to interrogatories and production requests are treated as failures to disclose or respond. Interrogatories and requests for inspection should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions.

Paragraph (4) of subdivision (a) has been divided into three subparagraphs for ease of reference, and in each the phrase "after opportunity for hearing" has been changed to "after affording an opportunity to be heard" to make clear that the court can consider such questions on written submissions as well as on oral hearings. Subparagraph (A) has been revised to cover the situation in which information that should have been produced with-

out a motion to compel is produced after the motion is filed but before a hearing. It also provides that a party should not be awarded expenses for filing a motion that could have been avoided by conferring with opposing counsel. Subparagraph (C) has been amended to include the provision formerly contained in subdivision (a)(2) with respect to protective orders and to include the same requirement of an opportunity to be heard that is specified in subparagraphs (A) and (B).

Under revised subdivision (d), a party seeking discovery via interrogatory or inspection request must make an effort to obtain responses before filing a motion for sanctions. Similar requirements to attempt resolution of discovery disputes without court action appear in revised Rules 26(c) and 37(a)(2).

**Addition to Reporter's Notes, 2003 Amendment:** In subdivision (b)(2), the word "person" in the first clause has been replaced

with "party," thus making the provision consistent with the corresponding federal rule.

**Addition to Reporter's Notes, 2006 Amendment:** The Rule has been amended by adding a new subdivision (e) and renumbering former subdivision (e) as (f). New subdivision (e) draws on the principles embodied in the 2000 amendment to Federal Rule of Civil Procedure 37, but establishes a different rule. Under this new Arkansas Rule, when a party fails to supplement discovery responses seasonably with new information, and prejudice results, then the prejudiced party may move the circuit court for relief. New subdivision (e) gives the circuit court wide discretion, including imposing any sanction allowed by Arkansas Rule of Civil Procedure 37, in handling any failure to supplement. This new provision works in tandem with the companion change in Arkansas Rule of Civil Procedure 26(e) to strengthen every party's duty to supplement discovery responses promptly.

## RESEARCH REFERENCES

**Ark. L. Notes.** Watkins, Recent Developments under the Arkansas Freedom of Information Act, 1987 Ark. L. Notes 59.

**Ark. L. Rev.** Recent Developments — 1997 Amendments to the Arkansas Rules of Civil Procedure and the Rules of Appellate Procedure — Civil, 50 Ark. L. Rev. 149.

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**U. Ark. Little Rock L.J.** Spears, Comment: The 1979 Civil Procedure Rules, 2 U. Ark. Little Rock L.J. 89.

Sullivan, The Need for a Business or Payroll Records Affidavit for Use in Child Support Matters, 11 U. Ark. Little Rock L.J. 651.

Survey — Civil Procedure, 12 U. Ark. Little Rock L.J. 135.

## CASE NOTES

### ANALYSIS

Applicability.

Discretion.

Motion.

No hearing required.

Refusal to respond.

Sanctions.

### Applicability.

Subdivision (b)(2)(C) of this rule does not provide authority for trial courts to award unliquidated damages; judgment may be entered as to liability only. *Sphere Drake Ins. Co. v. Bank of Wilson*, 307 Ark. 122, 817 S.W.2d 870 (1991).

### Discretion.

The court did not abuse its discretion when it dismissed the complaint with prejudice where the plaintiffs failed to answer interrogatories in a timely manner and failed to comply with an order which required them to "fully and completely" respond to the interrogatories. *Calandro v. Parkerson*, 333 Ark. 603, 970 S.W.2d 796 (1998).

Circuit court did not abuse its discretion in finding an employee's attorney failed to comply with this rule by filing motions to compel without first conferring with opposing counsel because the discovery problems could have been resolved by conferring in writing with opposing counsel, the attorney failed to take advantage of opportunities presented to him to obtain the information, and opposing counsel had already provided the attorney with the only information they had. *Lancaster v. Red Robin Int'l, Inc.*, 2011 Ark. App. 706, — S.W.3d —, 2011 Ark. App. LEXIS 758 (Nov. 16, 2011).

In a nursing-home abuse and neglect action, the trial court did not abuse its discretion in finding that appellants' failure to produce emails merited imposing sanctions under subdivision (b)(2)(C) of this rule because appellants failed to produce the emails in response to a discovery request, failed to produce them when ordered by the trial court, and failed to timely notify the trial court of



compliance problems. *Lake Vill. Healthcare Ctr., LLC v. Hatchett*, 2012 Ark. 223, — S.W.3d —, 2012 Ark. LEXIS 254 (May 24, 2012).

Husband failed to show that the trial court erred in sanctioning him for failing to comply with discovery by not permitting him to testify at the final hearing, because subdivision (b)(2) of this rule allowed the court to prohibit the husband's testimony. *Waggoner v. Waggoner*, 2012 Ark. App. 286, — S.W.3d —, 2012 Ark. App. LEXIS 404 (Apr. 25, 2012).

#### **Motion.**

Defense counsel's complaint to the trial court of defendant's non-compliance with the discovery process served as the functional equivalent of a formal motion for purposes of subsection (d) of this rule. *Cook v. Wills*, 305 Ark. 442, 808 S.W.2d 758 (1991).

#### **No Hearing Required.**

Trial court properly dismissed complaint after plaintiff failed to answer interrogatories within 10 days as required by court order, since subdivision (b)(2)(C) of this rule permits the court to render judgment by default against a disobedient party, and requires no hearing prior to doing so. *Burton v. Sparler*, 272 Ark. 254, 613 S.W.2d 394 (1981).

Evidentiary hearing was required on a motion for sanctions, under subdivision (a)(4)(A) of this rule, based on the financial statement submitted in response to a discovery request, where a contrary financial statement was obtained from the bank of the party submitting the discovery response, to determine which financial statement was accurate. *Allen v. Greenland*, 347 Ark. 465, 65 S.W.3d 424 (2002).

#### **Refusal to Respond.**

Blanket refusals to answer questions in response to a valid discovery request are insufficient to relieve a party of the duty to respond to each question asked. Such a blanket refusal to answer, coupled with a lack of any particularized showing of the potentially incriminating nature of each question, is not sufficient to meet burden of establishing a foundation for the assertion of the privilege against self-incrimination. *Dunkin v. Citizens Bank*, 291 Ark. 588, 727 S.W.2d 138 (1987).

A party claiming a privilege to refuse to answer interrogatories may obtain a protective order under ARCP 26(c), which would protect the party from discovery or from inquiry into certain matters. Subsection (d) of this rule states that the failure to serve answers or objections to interrogatories "may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided in ARCP 26(c)." *Dunkin v. Citizens Bank*, 291 Ark. 588, 727 S.W.2d 138 (1987).

This rule does not require a finding of willful or deliberate disregard of discovery obligations where party fails to attend depositions. *Cagle v. Fennel*, 297 Ark. 353, 761 S.W.2d 926 (1988).

Suit may properly be dismissed with prejudice for failure to attend scheduled depositions and failure to pay costs charged as a result of nonattendance. *Cagle v. Fennel*, 297 Ark. 353, 761 S.W.2d 926 (1988).

Where claim was controverted, discovery started by the parties before the claim was set for hearing was authorized by the Worker's Compensation Commission's Rule 16, and this rule authorized the law judge to make proper orders pertaining to that discovery, including dismissal of the action for failure to comply with discovery orders. *Loosey v. Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988).

The failure of the plaintiffs to serve full and complete answers to interrogatories could not be excused under subsection (d) of this rule where their objections to some of the interrogatories were not made within 30 days, as required by ARCP 33(b), and they did not apply for a protective order under ARCP 26(c). *Calandro v. Parkerson*, 333 Ark. 603, 970 S.W.2d 796 (1998).

#### **Sanctions.**

The trial court proceeded properly in imposing sanctions and expenses, including attorney's fees, on the attorney for the failure of his clients to appear at the time and place notified for the taking of depositions. *Helton v. Fuller*, 299 Ark. 341, 772 S.W.2d 343 (1989).

There is no authority under this rule which authorizes sanctions against an attorney for not being prepared for trial. However, such an abdication of responsibility could be the subject of a contempt proceeding or could be referred to the Supreme Court's Committee on Professional Conduct. *Helton v. Fuller*, 299 Ark. 341, 772 S.W.2d 343 (1989).

The imposition of sanctions for the failure to make discovery rests in the trial court's discretion. *Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989); *Rodgers v. McRaven's Cherry Pickers, Inc.*, 302 Ark. 140, 788 S.W.2d 227 (1990).

This rule does not mandate a showing of bad faith or willfulness, or resulting prejudice to the party seeking discovery, before the sanctions of dismissal or the entry of a default judgment can be imposed. *Graham v. Sledge*, 28 Ark. App. 122, 771 S.W.2d 296 (1989).

Rules of civil procedure do not require a finding of willful or deliberate disregard under the circumstances before sanctions may be imposed for failure to comply with the discovery rules. *Cook v. Wills*, 305 Ark. 442, 808 S.W.2d 758 (1991); *Viking Ins. Co. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992).

Where defendant was ordered to produce

her 1988 income tax return, repeatedly agreed to the production yet failed to do so, the trial court did not abuse its discretion in imposing severe sanctions. *Cook v. Wills*, 305 Ark. 442, 808 S.W.2d 758 (1991).

Where the trial court ordered defendant Insurance Company to produce its "entire claim file," and it did not do so, sanctions for "Failure to Comply with Order" pursuant to subsection (b) of this rule were proper. *Viking Ins. Co. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992).

A finding of willful or deliberate disregard of the court's order is not required before sanctions may be applied. *Tricou v. ACI Mgt., Inc.*, 37 Ark. App. 51, 823 S.W.2d 924 (1992).

Where the court granted a default judgment after finding that the defendant willfully failed to comply with an order which directed it to furnish information promised in its deposition, until more than seven months after ordered, and then he complied only after counsel warned defendant to furnish the information if he wanted him to stay on the case, the sanction of a default judgment imposed by the court was not an abuse of the court's discretion. *Tricou v. ACI Mgt., Inc.*, 37 Ark. App. 51, 823 S.W.2d 924 (1992).

Where the court awarded liability for compensatory damages for failing to furnish information, to also have awarded liability for punitive damages would smack of double punishment, and an abuse of the court's discretion. *Tricou v. ACI Mgt., Inc.*, 37 Ark. App. 51, 823 S.W.2d 924 (1992).

There is no authority under this rule for sanctions in the amount of damages prayed for when the damages are unliquidated. *Clark v. Michael Motor Co.*, 322 Ark. 570, 910 S.W.2d 697 (1995).

A court has the authority to stay further proceedings where a party fails to comply with discovery orders, pursuant to subdivision (b)(2)(C) of this rule. *May Constr. Co. v. Riverdale Dev. Co., LLC*, 345 Ark. 239, 45 S.W.3d 815 (2001).

After continued disputes regarding discovery, the circuit court had the authority, pursuant to subdivision (b)(2)(C) of this rule, to stay arbitration pending compliance by a party with the circuit court's discovery orders. *May Constr. Co. v. Riverdale Dev. Co., LLC*, 345 Ark. 239, 45 S.W.3d 815 (2001).

Trial court did not abuse its discretion in entering summary judgment against a business as a sanction for the business's failure to respond to the state's discovery requests and refusal to appear at a hearing on the state's motion to compel discovery set three days before the scheduled trial date after the business had been granted three continuances of the hearing date; trial court did not have to issue an order compelling discovery before

imposing the sanction. *Nat'l Front Page v. State*, 350 Ark. 286, 86 S.W.3d 848 (2002).

Trial court did not abuse its discretion in striking a corporation's response to interrogatories posed to them by an injured party and his wife where the corporation lied in their response despite the fact that they filed a supplemental response immediately upon realization that incomplete and incorrect information had been furnished; prejudice to the other party and the lack of an order compelling discovery were both irrelevant. *Coulson Oil Co. v. Tully*, 84 Ark. App. 241, 139 S.W.3d 158 (2003).

Trial court did not abuse its discretion in imposing the discovery sanction of a default judgment against an alternative medicine practitioner and his school in a suit brought by the state pursuant to the Arkansas Deceptive Trade Practices Act, § 4-88-101 et seq., where the court had already granted the state's motion to compel discovery, yet the practitioner destroyed the very information that the state had sought when the student files were redacted. *Southern College of Naturopathy v. State ex rel. Beebe*, 360 Ark. 543, 203 S.W.3d 111 (2005).

Court of appeals refused to consider the possibility that plaintiff's case was not dismissed under Ark. R. Civ. P. 41(b) for failure to prosecute but was instead dismissed for failure to comply with discovery rules pursuant to subsection (d) of this rule because there were pending discovery issues to be resolved in the case and there was no indication in the court's statements at the hearing or in the court's order of dismissal that discovery violations were contemplated as a basis for the dismissal. *Jones v. Vowell*, 99 Ark. App. 193, 258 S.W.3d 383 (2007).

Under subdivision (b)(2) of this rule, the trial court did not err in striking the husband's motion and denying him the right to seek reimbursement of the overpayment of alimony where he had to know the extent of his income, the amount he owed creditors, and his average monthly expenses; his actions were a flagrant disregard of the trial court and its orders. *Matthews v. Matthews*, 2009 Ark. App. 400, 322 S.W.3d 15 (2009).

Circuit court did not abuse its discretion in striking appellant's answer as a sanction for discovery violations. The sanction was imposed only after the circuit court considered all of the circumstances surrounding appellant's conduct, including the failure to obey the circuit court's discovery order. *Ross Sys. v. Advanced Env'tl. Recycling Techs., Inc.*, 2011 Ark. 473, — S.W.3d —, 2011 Ark. LEXIS 554 (Nov. 10, 2011).

It was not an abuse of discretion for the trial court to dismiss appellant's complaint without prejudice due to appellant's failure to timely complete interrogatories and requests



for documents sent because although appellant argued that she was unable to procure an expert witness since she was not provided with her medical records, appellee's counsel stated that he had given them to her prior attorney; by dismissing the case without prejudice, the trial court was allowing appellant more time to procure her records, along with an expert witness, and to then refile her case. *Maguire v. Jines*, 2011 Ark. App. 359, — S.W.3d —, 2011 Ark. App. LEXIS 378 (May 11, 2011).

**Cited:** *Adams v. State*, 269 Ark. 548, 601 S.W.2d 881 (1980); *Smith v. Smith*, 272 Ark.

199, 612 S.W.2d 736 (1981); *Dawson v. Picken*, 1 Ark. App. 168, 613 S.W.2d 846 (1981); *Harper v. Nash Implement Co.*, 281 Ark. 161, 662 S.W.2d 811 (1984); *Nationwide Mut. Fire Ins. Co. v. Dunkin*, 850 F.2d 441 (8th Cir. 1988); *Bliss v. Lockhart*, 891 F.2d 1335 (8th Cir. 1989); *PolSELLI v. Aulgur*, 328 Ark. 111, 942 S.W.2d 832 (1997); *Chlanda v. Killebrew*, 329 Ark. 39, 945 S.W.2d 940 (1997); *Nance v. Norris*, 392 F.3d 284 (8th Cir. 2004), cert. denied 546 U.S. 858, 126 S. Ct. 133, 163 L. Ed. 2d 136 (2005); *Dodson v. Norris*, 374 Ark. 501, 288 S.W.3d 662 (2008).

## ARTICLE VI. TRIALS

### Rule 38. Jury trial of right.

(a) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by filing with the clerk a demand therefor in writing at any time after the commencement of the action and not later than 20 days prior to the trial date. Such demand may be indorsed upon a pleading of the party.

(b) *Same: Specification of Issues.* In his demand, a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand, or such lesser time as the court may order, may file a demand for trial by jury of any other or all of the issues of fact in the action.

(c) *Waiver.* The failure of a party to file a demand as required by this rule and as required by Rule 5(c) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties. (Amended November 11, 1991, effective January 1, 1992; Reporter's Notes amended May 24, 2001, effective July 1, 2001.)

**Reporter's Notes to Rule 38:** 1. As does FRCP 38, this rule recognizes the constitutional right to trial by jury. Rule 38 does, however, extend the period of time within which a party must request a jury trial. Under FRCP 38, the demand for jury trial must be made not later than 10 days after service of the last pleading directed to the issue subject to jury trial. Under this rule, demand for trial by jury may be made at any time up to 20 days prior to trial. Under prior Arkansas law, the time for demanding a jury trial was governed by Rule 4(c) of the Uniform Rules for Circuit and Chancery Courts. That rule permitted the trial court to determine whether any of the parties desired a trial by jury. Unless one of the parties affirmatively requested a jury trial within 10 days after being contacted by the court, the right was waived, provided, of course, that no prior demand for jury trial had been made. Thus, a party normally had until just prior to trial to

request a jury trial and this procedure has seemingly worked well. For this reason, the Committee did not see the need to fix an earlier time by which demand for jury trial has to be made.

2. Since Rule 18(a) permits the joinder of legal and equitable claims, problems could arise when equitable issues are resolved in circuit court; however, Rule 18(b) permits the trial court to make such orders respecting severance and transfer as may be appropriate and this should cure most potential problems. There may be instances, however, where a circuit judge might be called upon to decide equitable issues in a case where a jury is sitting. In those instances, the court should follow the federal practice of having the jury resolve the legal issues with the court itself resolving the equitable issues. *Wright & Miller, Federal Practice And Procedure*, Sections 2305 and 2306.

3. Under the Federal Rule, demand for a

trial by jury is served upon opposing counsel. Under this rule, the demand or request for the jury is filed with the court clerk. The purpose of this provision is to insure that the court itself and its administrators will promptly know if a jury is requested.

**Addition to Reporter's Notes, 2001:** Article 2, Section 7 of the Constitution of 1874 provides, in part, that "[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy . . ." Rule 38 sets out the procedure for asserting the right to a jury trial.

Constitutional Amendment 80, which merged courts of law and equity, did not repeal or modify Article 2, Section 7. As a result of the merger, however, the Supreme Court will be required to determine the parameters of the right to trial by jury in the new system. The possible impact is most clearly seen in cases involving legal issues formerly decided in chancery court under the cleanup doctrine. In this situation, the Supreme Court held that a litigant was not deprived of his or her right to trial by jury because that right is limited to cases that

would have been decided "at law" in 1874. By virtue of the cleanup doctrine, which was well-established by 1874, legal issues could be decided by the chancellor without a jury. *Colclasure v. Kansas City Life Ins. Co.*, 290 Ark. 585, 720 S.W.2d 916 (1986).

In a merged system, the question is whether Article 2, Section 7 requires trial by jury with respect to legal issues which, prior to merger, would have been heard in chancery under the cleanup doctrine. Faced with this question after the merger of law and equity in the federal courts, the U.S. Supreme Court held that in a case involving both legal and equitable issues, the former will ordinarily be tried first to the jury in order to avoid the preclusive effect of an initial decision by the court on the equitable issues. *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres v. Westover*, 359 U.S. 500 (1958). Federal cases on this point are not binding, because the right to jury trial in state court is governed not by the Seventh Amendment but by state law. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996); *Colclasure v. Kansas City Life Ins. Co.*, *supra*.

## CASE NOTES

### ANALYSIS

Constitutionality.

In general.

Bifurcation of trial.

Demand timely.

Demand untimely.

Local court rules.

Supersession of statute.

Waiver.

### Constitutionality.

The Arkansas Constitution is not violated by this rule because Ark. Const., Art. 2, § 7, states "a jury trial may be waived by the parties in all cases in the manner prescribed by law." *Venable v. Becker*, 287 Ark. 236, 697 S.W.2d 903 (1985).

### In General.

This rule simply sets out the procedure by which a party may demand a jury when he has a right to one, rather than guarantee such a right. *Colclasure v. Kansas City Life Ins. Co.*, 290 Ark. 585, 720 S.W.2d 916 (1986), cert. denied 481 U.S. 1069, 107 S. Ct. 2462, 95 L. Ed 2d 871 (1987).

Where the \$2000 defendant paid an agent for drugs had remained in possession of the drug task force (DTF) without court order as evidence in a case which could not be filed, since the state failed to file timely criminal charges or a timely forfeiture action, the trial court properly held that defendant's \$2,000 was the subject of seizure and defendant was

entitled to return of the money; moreover, no jury was needed as under ARCP 39(a), the right to trial by jury was not absolute, and there were no factual issues to be decided. *Drug Task Force v. Hoffman*, 353 Ark. 182, 114 S.W.3d 213 (2003).

Plaintiff can never bring an interlocutory appeal of the denial of his request for a jury trial, nor can a defendant who simply requests a jury trial by filing with the clerk a demand therefor in writing. *Liberty Life Ins. Co. v. McQueen*, 364 Ark. 367, 219 S.W.3d 172 (2005).

While a jury demand may be included in the body of a pleading and thereby be considered by the trial court to meet the requirement that the demand be "indorsed upon a pleading," a demand does not address the merits of the case and, therefore, is not part of an answer for purposes of circumventing the final-order requirement to appeal. *Liberty Life Ins. Co. v. McQueen*, 364 Ark. 367, 219 S.W.3d 172 (2005).

Court dismissed insurer's appeal of an order denying its demand for a jury trial in insured's action for payment on a claim because a demand for a jury trial, even when requested in an answer, was not "part of the answer" for purposes of the exception set forth in Ark. R. App. P. Civ. 2(a)(4). *Liberty Life Ins. Co. v. McQueen*, 364 Ark. 367, 219 S.W.3d 172 (2005).



**Bifurcation of Trial.**

The bifurcation of a personal injury trial, pursuant to ARCP 42, on the issues of liability and damages does not deprive the plaintiffs of their right to a jury trial as guaranteed by Ark. Const., Art. 2, § 7, and this rule and ARCP 39. *Hunter v. McDaniel Constr. Co.*, 274 Ark. 178, 623 S.W.2d 196 (1981).

**Demand Timely.**

Where the 20th day prior to the scheduled trial date was a Saturday and the following Monday was Labor Day, a legal holiday, a request for a jury trial filed on Tuesday was timely. *Delight Oak Flooring Co. v. Arkansas La. Gas Co.*, 14 Ark. App. 24, 684 S.W.2d 271 (1985).

**Demand Untimely.**

Where the counsel for defendant had received notice of the trial date, but made no demand whatsoever for a jury trial until the day of the trial, which was over seven months after the action was first commenced, the trial court did not err when it proceeded to trial over the defense counsel's objection that a jury trial had never been waived. *Johnson v. Coleman*, 4 Ark. App. 58, 627 S.W.2d 564 (1982).

The court did not abuse its discretion in refusing to grant the defendants a trial by

jury, where the request for jury trial was filed only 12 days prior to the date the case was set for trial. *Duncan v. McGaugh*, 19 Ark. App. 276, 719 S.W.2d 710 (1986).

**Local Court Rules.**

Local court rules which provided that requests for a jury trial had to be made at least 21 days prior to pretrial conflicted with subsection (a) of this rule and were therefore not controlling. *Delight Oak Flooring Co. v. Arkansas La. Gas Co.*, 14 Ark. App. 24, 684 S.W.2d 271 (1985).

**Supersession of Statute.**

This rule superseded former statute governing waiver of jury trial. *Venable v. Becker*, 287 Ark. 236, 697 S.W.2d 903 (1985).

**Waiver.**

Given the absence of a waiver, defendant's argument that she was denied her right to trial by jury may be raised without a contemporaneous objection. *Grimming v. City of Pine Bluff*, 322 Ark. 45, 907 S.W.2d 690 (1995).

**Cited:** In re Implementation of Amendment 80: Amendments to Rules of Civ. Procedure & Inferior Court Rules, — Ark. —, — S.W.3d —, 2001 Ark. LEXIS 707 (May 24, 2001).

**Rule 39. Trial by jury or by the court.**

(a) *By Jury.* When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court, upon motion or of its own initiative, finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of this State.

(b) *By the Court.* Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion, upon motion, may order a trial by a jury of any or all issues.

(c) *Advisory Jury and Trial by Consent.* In all actions not triable of right by a jury, the court upon motion or of its own initiative, may try any issue with an advisory jury or, with the consent of all parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right. (Amended November 11, 1991, effective January 1, 1992.)

**Reporter's Notes to Rule 39:** 1. With the exception of minor wording changes in Section (c), Rule 39 is otherwise identical to FRCP 39. The purpose behind this rule is to insure that when a jury trial has been requested, it will be granted on all issues triable by jury unless the parties thereafter affirma-

tively waive this right. Under Section (b), the trial court retains discretion to grant a trial by jury even though timely request or demand has not been made.

2. Section (c) authorizes the trial court to submit any issue to an advisory jury where it would otherwise not be triable by jury or, with

the consent of all parties, may order that the verdict of such jury shall be binding as if the issues were triable by jury as a matter of right. Superseded *Ark. Stat. Ann.* § 27-1705 (Repl. 1962) provided that all issues not triable by jury as a matter of right were to be tried by the court, subject to its power to order any issue to be tried by jury, whether at law or in equity. Thus, the trial courts in this State have previously had the inherent right to submit any issue to a jury. This rule would, however, limit the effect of a jury verdict under Section (c) unless all parties consent to a binding effect.

3. Under the circumstances outlined in Section (c), it is possible to have a binding jury verdict in equity proceedings. This is a change in Arkansas law as jury verdicts in chancery court have heretofore been considered as advisory only and not binding upon the court. *Sullivan v. Wilson Mercantile Co.*, 172 Ark. 914, 290 S.W. 938 (1927); *City of Magnolia v. Davies*, 188 Ark. 19, 64 S.W.2d 85 (1933).

## CASE NOTES

### ANALYSIS

Bifurcation of trial.  
Directed verdict.  
Untimely demand.  
Waiver of jury trial.

### Bifurcation of Trial.

The bifurcation of personal injury trial, pursuant to ARCP 42, on the issues of liability and damages does not deprive the plaintiffs of their right to a jury trial as guaranteed by Ark. Const., Art. 2, § 7, and ARCP 38 and this rule. *Hunter v. McDaniel Constr. Co.*, 274 Ark. 178, 623 S.W.2d 196 (1981).

### Directed Verdict.

Where plaintiff in action on promissory note moved for directed verdict and court denied the motion, whereupon defendant also moved for a directed verdict, the trial court erred in taking the case away from the jury and deciding it in favor of plaintiff and such error was a substantive defect so that the case should be reversed irrespective of the fact that counsel for defendant failed to object to

the error. *Bussey v. Bank of Malvern*, 270 Ark. 37, 603 S.W.2d 426 (1980).

### Untimely Demand.

The court did not abuse its discretion in refusing to grant the defendants a trial by jury, where the request for jury trial was filed only 12 days prior to the date the case was set for trial. *Duncan v. McGaugh*, 19 Ark. App. 276, 719 S.W.2d 710 (1986).

### Waiver of Jury Trial.

The right to jury trial is a constitutional right which is so fundamental that the rule that cures error where counsel fails to object ought not to be readily applied to the denial of rights protected in the Constitution of Arkansas and described therein as "inviolable"; procedural rules governing jury trials are not intended to diminish the right to a jury trial and should be interpreted so as not to give effect to dubious waivers of rights. *Bussey v. Bank of Malvern*, 270 Ark. 37, 603 S.W.2d 426 (1980).

## Rule 40. Trial settings and continuances.

(a) *Settings.* Cases shall be set for trial at the request of any party after the issues have been joined. The court may assign a trial date, on its own motion, even though neither party has requested a setting. Precedence shall be given to actions entitled thereto by any statute of this State.

(b) *Continuances.* The court may, upon motion and for good cause shown, continue any case previously set for trial.

(c) *Suits in Which Party or Attorney is Member or Officer of Legislature.*

(1) Any and all proceedings in suits pending in any of the courts of this State in which any attorney for either party to any suit is a member of the Senate or of the House of Representatives or is a Clerk of either branch of the General Assembly, or Lieutenant Governor, while presiding as president of the Senate, and any and all proceedings in suits pending in any of the courts of this State in which any member of the Legislature or Clerk of either branch of the General Assembly, or Lieutenant-Governor, while presiding as president of the Senate, is a party, shall be stayed for a time not



to exceed fifteen (15) days preceding the convening of the General Assembly and not less than thirty (30) days after its adjournment.

(2) Any and all proceedings in suits pending in any of the courts in this State in which any attorney for either party to any suit is a member of the Legislative Council, or the Legislative Audit Committee, or any Joint Interim Committee of the General Assembly, shall be stayed, or reset if scheduled, if said proceeding has been scheduled on any day upon which the Legislative Council, Legislative Audit Committee, or any Joint Interim Committee is meeting, provided, however, that said attorney shall be a member of the Committee, or alternate member attending in place of a regular member, which is meeting, and provided, further, that said attorney shall request the continuance of the Court no less than three (3) days before said proceeding is to commence.

(3) The term "adjournment" as used in subsection (c) shall mean the adjournment without the establishment of a day certain for reconvening, or adjournment or recess to a date more than thirty (30) days in the future.

(4) The provisions of subsection (c) shall be applicable in the case of special or extraordinary sessions of the General Assembly as well as regular sessions. (Amended February 5, 1979.)

**Reporter's Notes to Rule 40:** 1. Rule 40 deviates substantially in its wording from FRCP 40, although the intent of the rule is essentially the same as the Federal Rule. Section (a) basically follows prior Arkansas law as promulgated in Rule 4(a) of the Uniform Rules for Circuit and Chancery Courts. Thus, the method of setting cases for trial in this State will remain unchanged.

2. Section (a) recognizes the practice of giving certain types of cases precedence in the setting of cases for trial. An example of an action which has precedence under Arkansas law is an election contest. *Ark. Stat. Ann.* § 3-1002 (Repl. 1962).

3. FRCP 40 sets no guidelines for determining when a continuance should be granted. The federal courts have taken the position that the matter of granting or refusing to grant a continuance rests in the discretion of the trial court. *McSurely v. McClellan*, 426 F. 2d 664 (C.C.A. D.C., 1970); *Connell v. Steel Haulers, Inc.*, 455 F. 2d 688 (C.C.A. 8th, 1972). Prior Arkansas law made a continuance mandatory under superseded *Ark. Stat. Ann.* § 27-1401 (Repl. 1962) when a party was represented by an attorney who was in the legislature and it was in session; otherwise, the matter of continuances rested within the discretion of the trial court. *Balti-*

*more & Ohio Ry. Co. v. McGill Bros. Rice Mill*, 185 Ark. 108, 46 S.W.2d 651 (1932); *Wallace v. Hamilton*, 238 Ark. 406, 382 S.W.2d 363 (1964). Under this rule, a continuance is never mandatory as was previously the case involving a member of the legislature. To this extent, Rule 40 changes Arkansas law.

4. Rule 40 does not require that a motion for continuance be in writing. Neither does it require that notice be afforded to opposing counsel that a continuance is sought. The court can, in its discretion, require such notice and as a practical matter notice, either orally or in writing, should be given to opposing counsel in most instances.

**Addition to Reporter's Notes, 1979 Amendment:** Section (c) of Rule 40 did not appear in the original version of the Rules of Civil Procedure adopted by the Supreme Court in December 1978 but was added less than two months later. See *In re Rules of Civil Procedure, Rule 40*, 265 Ark. 963 (1979). Thus, this provision was in place when the Rules went into effect on July 1, 1979, although the Reporter's Notes were not modified to reflect its addition. Section (c) is virtually identical to a superseded statute, *Ark. Stat. Ann.* § 27-1401 (Repl. 1962), as amended by Act 333 of 1979 [now see § 16-63-406].

## RESEARCH REFERENCES

**ALR.** Pendency of Criminal Prosecution as Ground for Continuance or Postponement of Civil Action Involving Facts or Transactions

upon which Prosecution Is Predicated — State Cases. 37 ALR 6th 511.

## CASE NOTES

## ANALYSIS

Denial of continuance.

—Absence of witnesses.

Discretion of court.

Stay of proceedings.

**Denial of Continuance.**

Where the trial court denied the defendant's motion for a continuance, which was based on the defense counsel's lack of time to adequately prepare the defense, the trial court did not abuse its discretion because the case had been pending for over two years, it had been called at pretrial at least three times, and the defendant had already been granted one continuance, four months prior to the trial date, in order to obtain counsel. *Bolden v. Carter*, 269 Ark. 391, 602 S.W.2d 640 (1980).

Where the trial court denied the defendant's motion for a continuance, which was based on the absence of two witnesses who were to testify on the defendant's behalf, the trial court did not abuse its discretion because the motion was made after the jury had begun to deliberate, and the defense counsel made no proffer of what their testimony would be nor was any evidence offered of their unavailability except a statement by the defense counsel. *Bolden v. Carter*, 269 Ark. 391, 602 S.W.2d 640 (1980).

Where, in an action brought by affected landowners challenging a rezoning decision, the landowners moved for a continuance in order to subpoena certain witnesses, but it was apparent from the record that the plaintiffs had ample opportunity to subpoena whomever they wished before the hearing and that the plaintiffs had waited until eight witnesses had testified before asking for the continuance, the chancellor did not abuse his discretion in refusing to grant the continuance. *Smith v. City of Little Rock*, 279 Ark. 4, 648 S.W.2d 454 (1983).

Trial court did not err in refusing to grant a continuance to the wife in a divorce and child custody case where the case was filed in July 2003, the wife was served in August 2003, and she filed her pro se answer on September 8, 2003; the trial court found that there was ample time for the wife to have obtained an attorney for the October 14, 2003, trial date; however, the trial court indicated it would consider a continuance in the event that the wife obtained counsel and counsel requested

time to prepare. *Dorothy v. Dorothy*, 88 Ark. App. 358, 199 S.W.3d 107 (2004).

There was no abuse of discretion in the trial court's denial of the motion for a continuance, because the trial court took the steps necessary to ensure the husband's attendance at the hearing by issuing the delivery order and by arranging for the husband's transportation, however, the husband's absence at the hearing was directly attributable to his own misconduct and connivance, when the attack on the officer who was going to transport the husband was unprovoked, and it was plausible that the husband's antics could be construed as a misguided ploy designed to delay the proceedings. *Frost v. Frost*, 2009 Ark. App. 290, 307 S.W.3d 41 (2009).

**—Absence of Witnesses.**

A trial judge does not abuse his discretion in denying a motion for a continuance based on the absence of witnesses where no proffer is made as to what the witnesses would testify to. *Bone v. Bone*, 12 Ark. App. 163, 671 S.W.2d 217 (1984).

**Discretion of Court.**

The granting or denial of a continuance is a matter within the sound discretion of the court, and such a ruling will not be disturbed unless the trial court abused that discretion by acting arbitrarily and capriciously. *Smith v. City of Little Rock*, 279 Ark. 4, 648 S.W.2d 454 (1983).

Whether a motion for continuance should be granted is addressed to the discretion of the trial judge, and his decision will not be overturned unless that discretion is manifestly abused. *Bone v. Bone*, 12 Ark. App. 163, 671 S.W.2d 217 (1984).

**Stay of Proceedings.**

Counsel cannot participate in the litigation during the period of the stay, pursuant to subsection (c) of this rule, receive an adverse decision, and then urge that the matter was stayed and seek a second hearing on the matters previously resolved. *Tucker v. Lake View Sch. Dist.*, 321 Ark. 618, 906 S.W.2d 295 (1995), appeal dismissed 323 Ark. 693, 917 S.W.2d 530 (1996).

**Cited:** *In re Local Admin. Rules of Chancery Court*, 299 Ark. 335, 772 S.W.2d 600 (1989); *Neves da Rocha v. Ark. Dep't of Human Servs.*, 93 Ark. App. 386, 219 S.W.3d 660 (2005).

**Rule 41. Dismissal of actions.***(a) Voluntary Dismissal; Effect Thereof.*

(1) Subject to the provisions of Rule 23(e) and Rule 66, an action may be dismissed without prejudice to a future action by the plaintiff before the



final submission of the case to the jury, or to the court where the trial is by the court. Although such a dismissal is a matter of right, it is effective only upon entry of a court order dismissing the action.

(2) A voluntary dismissal under paragraph (1) operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based upon or including the same claim, unless all parties agree by written stipulation that such dismissal is without prejudice.

(3) In any case where a set-off or counterclaim has been previously presented, the defendant shall have the right of proceeding on his claim although the plaintiff may have dismissed his action.

(b) *Involuntary Dismissal*. In any case in which there has been a failure of the plaintiff to comply with these rules or any order of court or in which there has been no action shown on the record for the past 12 months, the court shall cause notice to be mailed to the attorneys of record, and to any party not represented by an attorney, that the case will be dismissed for want of prosecution unless on a stated day application is made, upon a showing of good cause, to continue the case on the court's docket. A dismissal under this subdivision is without prejudice to a future action by the plaintiff unless the action has been previously dismissed, whether voluntarily or involuntarily, in which event such dismissal operates as an adjudication on the merits.

(c) *Dismissal of Counterclaim, Cross-Claim or Third-Party Claim*. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim or third-party claim.

(d) *Costs of Previously Dismissed Action*. If a plaintiff who has once dismissed an action, or who has suffered an involuntary dismissal in any court, commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order. For purposes of this rule, the term "costs" means those items taxable as costs under Rule 54(d)(2). (Amended July 9, 1984, effective September 1, 1984; amended November 11, 1991, effective January 1, 1992; amended January 28, 1999; amended March 13, 2003.)

**Reporter's Notes to Rule 41:** 1. Rule 41 differs significantly from FRCP 41 and basically follows prior Arkansas law. Under the Federal Rule, a plaintiff has the unqualified right to dismiss his claim without prejudice only until the defendant has filed his answer. Thereafter, court approval is required in order to dismiss without prejudice and the court has discretion to deny such a motion. *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 67 S. Ct. 752 (1947). Indeed, FRCP 41 was purposely adopted to prevent a plaintiff from taking a voluntary non-suit at any stage of the proceedings and to put the control in the hands of the trial judge. *Ockert v. Union Barge Line Corp.*, 190 F. 2d 303 (C.C.A. 3rd, 1951).

2. Section (a) rejects the limitations contained in FRCP 41 and instead follows prior Arkansas law as set forth in superseded *Ark.*

*Stat. Ann.* § 27-1405 (Repl. 1962), by permitting one voluntary non-suit at any stage of the case prior to its submission to the jury or the court sitting as the fact finder. This Section does recognize, however, that court approval must be obtained in order to dismiss a claim under Rule 23 (d) and Rule 66.

3. Section (a) retains the provisions of superseded *Ark. Stat. Ann.* § 27-1407 (Repl. 1962), which permitted a defendant to proceed on his set-off or counterclaim even though the plaintiff's claim has been dismissed.

4. Section (b) also marks a significant variation from FRCP 41(b). Under this rule, the trial court has the right to dismiss on its own motion a claim for failure to prosecute the action or failure to comply with these rules or any order of the court. Under the Federal Rule, such dismissal must be on motion of the

defendant or other party affected. Also, under FRCP 41, a dismissal by the court under Section (b) is generally with prejudice, whereas under this rule, such a dismissal is without prejudice provided the case has not been previously dismissed in which event the second dismissal is with prejudice. The Federal Rule was rejected for the reason that while it states that an involuntary dismissal is with prejudice, the appellate courts have been quick to find an abuse of discretion on the part of the trial court in dismissing a claim. *Pond v. Braniff Airways, Inc.*, 453 F.2d 347 (C.C.A. 5th, 1972); *Dyotherm Corp. v. Turbo Machine Co.*, 392 F.2d 146 (C.C.A. 3rd, 1968). The Committee believed that the better practice is to make an involuntary nonsuit without prejudice, but limit the number of times a case can be dismissed, whether voluntarily or involuntarily.

5. Omitted from Rule 41 is the provision found in FRCP 41(b) relative to dismissals after the completion of plaintiff's case when it is tried without a jury. Rule 50(a) accomplishes the same purpose whether the case is tried with or without a jury. This is the procedure previously followed in Arkansas and it has seemingly worked well.

6. Section (d) goes beyond the language of FRCP 41(d) by expressly permitting the trial court to impose costs or sanctions against a party who has previously had his claim dismissed, whether voluntarily or involuntarily. While the Federal Rule does not expressly confer such power upon the trial court, it has been held that the court does possess such power. *Gainey v. Brotherhood R. & S. S. Clerks*, 34 F.R.D. 8 (D.C. Pa., 1963). This rule

is designed to clear any misunderstanding or confusion on this point.

#### **Addition to Reporter's Notes, 1984**

**Amendment:** Rule 41(b) is amended to make specific the time period after which the court must order cause to be shown why the case should not be dismissed for want of prosecution. While Rule 10 of the Uniform Rules for Circuit and Chancery Courts provided such a dismissal was without prejudice, this rule provides it is with prejudice if it is the second dismissal, whether the previous dismissal was voluntary or involuntary.

#### **Addition to Reporter's Notes, 1999**

**Amendment:** Subdivision (a) has been divided into three numbered paragraphs and revised to reflect case law. In *Blaylock v. Shearson Lehman Brothers, Inc.*, 330 Ark. 620, 954 S.W.2d 939 (1997), the Supreme Court noted that it had "long interpreted [Rule 41(a)] as creating an absolute right to a nonsuit prior to submission of the case to the jury or to the court." In the same case, the Court held that "a court order is necessary to grant a nonsuit and the judgment or decree must be entered to be effective."

A new sentence has been added to subdivision (d) defining "costs" as those recoverable under Rule 54(d)(2), a new provision. A definition was deemed advisable in light of continuing confusion as to expenses that can be taxed as costs. See, e.g., *Wood v. Tyler*, 317 Ark. 319, 877 S.W.2d 582 (1994); *Sutton v. Ryder Truck Rental, Inc.*, 305 Ark. 231, 807 S.W.2d 905 (1991).

#### **Addition to Reporter's Notes, 2003**

**Amendment:** The reference to "Rule 23(d)" in subdivision (a)(1) has been corrected to read "Rule 23(e)."

## RESEARCH REFERENCES

**Ark. L. Rev.** Brill, The Election of Remedies Doctrine in Arkansas, 37 Ark. L. Rev. 385.

Note: Middleton v. Lockhart: Rule 41(b), a Fraudulent Transfer, a Homestead, and a Homicide — Did This Hard Case Make Bad Law?, 56 Ark. L. Rev. 113.

**U. Ark. Little Rock L.J.** Legislation of the

1983 General Assembly, Criminal Law, 6 U. Ark. Little Rock L.J. 613.

Arkansas Law Survey, Greene, Civil Procedure, 7 U. Ark. Little Rock L.J. 167.

**U. Ark. Little Rock L. Rev.** Annual Survey of Case Law: Practice, Procedure, and Courts, 29 U. Ark. Little Rock L. Rev. 905.

## CASE NOTES

### ANALYSIS

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### In General.

This rule clearly allows a plaintiff to nonsuit a claim, and this court has consistently upheld that provision; it creates an absolute right to such a nonsuit. *Whetstone v. Chadduck*, 316 Ark. 330, 871 S.W.2d 583 (1994).

A plaintiff is a party who asserts a cause of action against another, and the right to dismiss an action rests only with the plaintiff. *M.T. v. Arkansas Dep't of Human Servs.*, 58 Ark. App. 302, 952 S.W.2d 177 (1997).

Where clinic and its insurer were completely dismissed from the lawsuit pursuant to the first summary-judgment order, and the nonsuit as to the individual doctors excused them in the lawsuit, the order granting summary judgment was final and appealable after the voluntary nonsuit and, as the administrator did not file a notice of appeal within 30 days, the order granting summary judgment could not be reviewed on appeal. *Winkler v. Bethell*, 362 Ark. 614, 210 S.W.3d 117 (2005).

While the provisions of this rule and res judicata are often discussed and treated in similar manners, they are two separate issues. *Jordan v. Circuit Court*, 366 Ark. 326, 235 S.W.3d 487 (2006).

### Construction.

From the decision that subsection (a) of this rule permitted a voluntary nonsuit without prejudice after the notice of appeal was filed, it follows that § 16-56-126 allows the appeal to be refiled within one year. *Sosebee v. County Line Sch. Dist.*, 320 Ark. 412, 897 S.W.2d 556 (1995).

### Applicability.

Where one of two dismissals is on the motion of the defendant and not the plaintiff, subsection (a) of this rule is not applicable. *Carton v. Missouri Pac. R.R.*, 295 Ark. 126, 747 S.W.2d 93 (1988).

ARCP 4(i) applies when there is a failure to obtain service and nothing more; subsection (b) of this rule, however, is expressly addressed to a situation where there has been more than one dismissal, whether voluntary or involuntary. *Bakker v. Ralston*, 326 Ark. 575, 932 S.W.2d 325 (1996).

The one-year statute of limitations in in § 9-9-216(b)(1) provides a special procedure which cannot be annulled by subsection (a) of this rule and the savings statute, § 16-56-126, that allows an action dismissed without prejudice to be refiled within one year of the dismissal. *In re Martindale*, 327 Ark. 685, 940 S.W.2d 491 (1997).

Subsection (a) of this rule did not apply, because the trial court orally granted defen-

dant's motion to dismiss based upon plaintiff's defective summons and failure to timely serve a corrected summons, and the trial court's second order expressly stated that it was granting defendant's motion to dismiss; since one of the two dismissals was on the motion of defendant, neither subsection (a) nor the written-stipulation exception applied. *Mack v. Union Pac. R.R. Co.*, 2012 Ark. App. 115, — S.W.3d —, 2012 Ark. App. LEXIS 231 (Feb. 8, 2012).

### Actions Involving Parents.

Because a dismissal with prejudice is void in a paternity action, such a ruling does not bar future proceedings. *State Office of Child Support Enforcement v. Flowers*, 57 Ark. App. 223, 944 S.W.2d 558 (1997).

Termination of parental rights is a remedy available only to the Department of Human Services (DHS) and not to private litigants; therefore, the right of dismissal accrues to DHS as the petitioner, and not to a parent. *M.T. v. Arkansas Dep't of Human Servs.*, 58 Ark. App. 302, 952 S.W.2d 177 (1997).

### Admissions.

A second cause of action involving the same parties and claims, filed after a previous voluntary nonsuit pursuant to this rule, is not an "other proceeding" under ARCP 36 and, therefore, admissions made under ARCP 36 in the nonsuited action may not be used against a party in the second case. *Head v. Giles*, 343 Ark. 478, 36 S.W.3d 344 (2001).

Admissions made under ARCP 36 in an action that ends in a nonsuit under this rule may not be used against the admitting party in the event the suit is reinstated; such admissions lose their effectiveness upon the grant of a nonsuit under this rule. *Norrell v. Giles*, 343 Ark. 504, 36 S.W.3d 342 (2001).

### Appellate Review.

Where a guardian filed a complaint against a trustee for an accounting, the trial court granted the trustee's motion to dismiss under subsection (b) of this rule because the claims were barred based on dismissals in two previous lawsuits. The Court of Appeals of Arkansas could not review the matter, as the pleadings or orders from the previous cases were not made part of the record on appeal. *Merritt v. Thornton*, 2009 Ark. App. 735, — S.W.3d —, 2009 Ark. App. LEXIS 895 (2009).

### Claim Preclusion.

Claim preclusion did not bar appellee's quiet title counterclaim as a prior suit's dismissal under subsection (b) of this rule was not an adjudication on the merits; there was no indication in the record that appellee previously had a claim dismissed. *Sutton v. Gardner*, 2011 Ark. App. 737, — S.W.3d —, 2011 Ark. App. LEXIS 787 (Nov. 30, 2011).

**Costs of Previous Action.**

The court in the first action has no authority under subsection (d) of this rule, once the second action is filed, to do anything in respect to ordering the payment of costs or to stay proceedings in the second action for it no longer has jurisdiction; only the court in which the second action is pending has jurisdiction to make such orders. Therefore, where a state action was nonsuited and an action was filed in federal court, the federal court had jurisdiction to award attorney's fees and expenses relating to the state action. *Transit Homes, Inc. v. Bellamy*, 287 Ark. 487, 701 S.W.2d 126 (1985).

Circuit court erred in assessing against appellant against costs associated with a trial in which he took a voluntary dismissal pursuant to this rule prior to the refiling of the suit because the circuit court ordered the payment of costs on the same day the first nonsuit was entered, and there had been no showing that appellant had commenced the same claim against the same defendant; according to the plain language of subsection (d) of this rule, the refiling of the same suit or the commencement of the same claim against the same defendant is a condition precedent to a court's authority to order the payment of costs associated with the the action previously dismissed. *Kesai v. Almand*, 2011 Ark. 207, — S.W.3d —, 2011 Ark. LEXIS 201 (May 12, 2011).

**Counterclaims.**

When appellant law firm nonsuited its Freedom of Information Act claim under § 25-19-105, the circuit court did not err in permitting appellees, several doctors, an attorney, and a hospital, to move forward on their counterclaim. Under subdivision (a)(3) of this rule, a defendant has the right to pursue a counterclaim even though the plaintiff has dismissed its original claim. *Harrill & Sutter, PLLC v. Farrar*, 2012 Ark. 180, — S.W.3d —, 2012 Ark. LEXIS 195 (Apr. 26, 2012).

**Discretion of Court.**

This rule is a tool for trial courts to dispose of cases filed and forgotten, and, ordinarily, the disposition for lack of prosecution should be without prejudice, allowing the plaintiff the right to refile the case; but this rule does not absolutely prohibit a trial court from dismissing with prejudice a case for lack of prosecution. *Professional Adjustment Bureau v. Strong*, 275 Ark. 249, 629 S.W.2d 284 (1982).

Although this rule does not provide for it, the trial court has the discretion to permit a nonsuit without prejudice even after final submission of the case. *Blaylock v. Shearson Lehman Bros.*, 330 Ark. 620, 954 S.W.2d 939 (1997).

**Dismissal by Stipulation.**

Court erred in dismissing the case with prejudice based on this rule, because the railroad did not dispute that the claimant dismissed his first case at its request and with its agreement, and a dismissal by stipulation entered into by the parties was not a dismissal by the plaintiff for purposes of subdivision (a)(2) of this rule, and a second filing of the cause of action was not barred by the two-dismissal rule. *Richard v. Union Pac. R.R. Co.*, 2012 Ark. 129, — S.W.3d —, 2012 Ark. LEXIS 156 (Mar. 29, 2012).

**Dismissal of Federal Court Action.**

The dismissal of a federal court action by stipulation of all parties does not constitute a dismissal by the plaintiff under subdivision (a)(2) of this rule and, therefore, does not trigger the two-dismissal rule since federal procedural rules do not allow a plaintiff to unilaterally dismiss an action and the defendant obtains a benefit by stipulating to a dismissal in federal court. *Smith v. Washington*, 340 Ark. 460, 10 S.W.3d 877 (2000).

**Dismissal with Prejudice.**

Where dismissal with prejudice did not indicate that the trial court considered whether settlement for medical expenses, past support and future support of child would be to the child's benefit, the order of dismissal violated the public policy protecting minors and was therefore void on its face. *Davis v. Office of Child Support Enforcement*, 322 Ark. 352, 908 S.W.2d 649 (1995).

Circuit court properly dismissed buyer's action against the car dealership with prejudice where, pursuant to subsection (b) of this rule, the second dismissal was an adjudication on the merits because the involuntary dismissal of the buyer's amended complaint in 2002 operated as the second dismissal against the dealership due to the buyer's previous voluntary nonsuit in 1999. *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 120 S.W.3d 525 (2003).

Trial court's decision to dismiss the action was proper because guardian's wrongful death claim was derivative of her negligence action, and the negligence action was subject to dismissal with prejudice as it was undisputed that guardian's second complaint contained the same negligence allegations set out in her first suit, which she voluntarily nonsuited; however, the guardian never properly served the second complaint alleging negligence within the extended time for service and Ark. R. Civ. P. 4(i) mandated dismissal of the negligence claim, thus, under subsection (b) of this rule, the dismissal operated as an adjudication of the merits, making the dismissal with prejudice. *Brown v. Pine Bluff Nursing Home*, 359 Ark. 471, 199 S.W.3d 45 (2004).



Where appellants had previously taken a voluntary nonsuit of their medical malpractice case, the dismissal of their case for failing to strictly comply with the service requirements of Ark. R. Civ. P. 4(i) was with prejudice. *Nyenan v. Peek*, 359 Ark. 486, 199 S.W.3d 51 (2004).

Court granted physician's petition for a writ of certiorari in administratrix's third medical negligence and wrongful death action where the dismissal of the administratrix's second complaint resulted in an adjudication on the merits; the trial judge erred in denying the physician's motion to dismiss the third complaint with prejudice. *Jordan v. Circuit Court*, 366 Ark. 326, 235 S.W.3d 487 (2006).

Although a court, in dismissing on certain grounds, may specify that its decision is "with prejudice" or "on the merits," a judgment may not have an effect contrary to that prescribed by the statutes, rules of court, or other rules of law operative in the jurisdiction in which the judgment is rendered. Therefore, even though an original case against a city based on a property dispute was dismissed with prejudice for failing to join indispensable parties, this did not mean that res judicata was properly asserted as a defense in a subsequent action because this was contrary to subsection (b) of this rule. *Croney v. Lane*, 99 Ark. App. 346, 260 S.W.3d 316 (2007).

#### **Dismissal Without Prejudice.**

Where in an action to collect a debt the plaintiff's attorney failed to appear in court on the date of the trial, the trial court should not have dismissed the action with prejudice for lack of prosecution since it was the first trial setting, it was evidently a case of one-time neglect by counsel, and a dismissal without prejudice would have been in order and consistent with the intent of this rule. *Professional Adjustment Bureau v. Strong*, 275 Ark. 249, 629 S.W.2d 284 (1982).

The probate court's dismissal of will contest was necessarily with prejudice. Any reconsideration of the dismissal would therefore relate to the dismissal itself, and not to the merits of the will contest. *Brantley v. Davis*, 305 Ark. 68, 805 S.W.2d 75 (1991).

Where the earlier order was a dismissal without prejudice, it was error for the trial judge to grant summary judgment and preclude defendant's claim on the grounds of res judicata. *Magness v. McEntire*, 305 Ark. 503, 808 S.W.2d 783 (1991).

Trial court's decision to dismiss the buyer's motion to intervene was not an abuse of discretion; however, such dismissals were to be made without prejudice and the dismissal, while affirmed, was modified to be without prejudice. *Gore v. Heartland Cmty. Bank*, 356 Ark. 665, 158 S.W.3d 123 (2004).

Appellate court affirmed trial court's order denying attorney fees to a firm as the fact that

the firm prevailed on the forum selection clause issue did not mean that it was the prevailing party as to the substantive issues, and the former partner's involuntary dismissal of the case without prejudice did not cause the firm to be the prevailing party where the substantive issues remained. *BKD, LLP v. Yates*, 367 Ark. 391, 240 S.W.3d 588 (2006).

#### **Involuntary Dismissal.**

Where attorney for plaintiff had not prepared necessary instruction at time of pretrial conference, as required by local rule, and failed to present such instruction at second pretrial conference despite trial judge's specific order that he do so, trial judge was within his authority in dismissing plaintiff's action and dismissal would be without prejudice. *Superior Seeds, Inc. v. Crain*, 280 Ark. 142, 655 S.W.2d 415 (1983).

Subsection (b) of this rule was intended to allow the trial courts to clean up their dockets and get stale cases off the active docket. *Cory v. Mark Twain Life Ins. Corp.*, 286 Ark. 20, 688 S.W.2d 934 (1985).

Where the claim arose in 1982, the plaintiff filed her complaint in 1983, there were various amendments, and finally in 1989, the trial court gave the moving party ten days to amend the complaint to show that it was the real party in interest, the trial court's dismissal for failure to comply with a ten-day time limitation was not arbitrary or an abuse of discretion. *Insurance from CNA v. Keene Corp.*, 310 Ark. 605, 839 S.W.2d 199 (1992).

Dismissals based on failure to serve defendant should have been with prejudice where plaintiffs had previously taken voluntary nonsuits. *Bakker v. Ralston*, 326 Ark. 575, 932 S.W.2d 325 (1996).

Suit should not have been dismissed for want of prosecution where a bankruptcy stay order was in effect. *Boatmen's Nat'l Bank v. Moss*, 330 Ark. 391, 953 S.W.2d 583 (1997).

The appellants were not entitled to an involuntary dismissal under subsection (b) of this rule on the ground that they prevailed on two motions to dismiss under ARCP 12(b)(6), since the plaintiffs's cause of action was not decided by the trial court when it granted the two motions to dismiss under the latter rule. *Middleton v. Lockhart*, 344 Ark. 572, 43 S.W.3d 113 (2001).

Trial court erred in dismissing a suit pursuant to subsection (b) of this rule for plaintiff's failure to appear at the trial because: (1) she had not received notice; (2) it could not be said that, pursuant to subsection (b) of this rule, there had been no action shown on the record for the past 12 months; (4) the court should have complied with subsection (b) of this rule and given notice of its intention to dismiss; and (5) plaintiff's due process rights were violated. *Jones v. Vowell*, 99 Ark. App. 193, 258 S.W.3d 383 (2007).

Court of appeals refused to consider the possibility that plaintiff's case was not dismissed under subsection (b) of this rule for failure to prosecute but was instead dismissed for failure to comply with discovery rules pursuant to Ark. R. Civ. P. 37(d) because there were pending discovery issues to be resolved in the case and there was no indication in the court's statements at the hearing or in the court's order of dismissal that discovery violations were contemplated as a basis for the dismissal. *Jones v. Vowell*, 99 Ark. App. 193, 258 S.W.3d 383 (2007).

Trial court erred in dismissing a suit pursuant to subsection (b) of this rule for plaintiff's failure to appear at the trial because, *inter alia*, it appeared on the record that plaintiff's case was dismissed based on her failure to attend a hearing of which she had no notice, which violated one of the basic tenets of due process. *Jones v. Vowell*, 99 Ark. App. 193, 258 S.W.3d 383 (2007).

Because plaintiff did not know until after the entry of the final order that her case had been dismissed, she therefore had no reason prior to the dismissal to apprise the trial court of any argument regarding lack of notice; the trial court had the means to determine the situation regarding notice or lack thereof but instead dismissed the case without inquiry. Although plaintiff might have explained her circumstances in a postjudgment motion, nothing required that she did so. *Jones v. Vowell*, 99 Ark. App. 193, 258 S.W.3d 383 (2007).

Circuit court did not err in dismissing a corporation's action against a limited liability company without prejudice under subsection (b) of this rule due to the corporation's complaint for failure to obtain service because the corporation's failure to comply with Ark. R. Civ. P. 4(b) operated as an involuntary dismissal for purposes of subsection (b) of this rule and did not trigger the two-dismissal rule of subsection (b); the prior dismissal of the suit in district court was due to a lack of subject-matter jurisdiction and was not a voluntary nonsuit or a voluntary dismissal under subsection (a) of this rule because the corporation had no choice and no unilateral right to allow the case to proceed in district court, and the literal application of subsection (b) to the case would bring about a harsh and absurd result that did not serve the purpose behind the two-dismissal rule. *Jonesboro Healthcare Ctr., LLC v. Eaton-Moery Envtl. Servs.*, 2011 Ark. 501, — S.W.3d —, 2011 Ark. LEXIS 585 (Dec. 1, 2011).

Dismissal for lack of subject-matter jurisdiction is not contemplated within the two-dismissal rule of subsection (b) of this rule because a dismissal from a court that lacks subject-matter jurisdiction cannot operate under subsection (b) as an adjudication on the

merits; dismissal for lack of subject matter jurisdiction is not the type of voluntary dismissal contemplated by subsection (a) of this rule, nor the type of involuntary dismissal that is contemplated by subsection (b). *Jonesboro Healthcare Ctr., LLC v. Eaton-Moery Envtl. Servs.*, 2011 Ark. 501, — S.W.3d —, 2011 Ark. LEXIS 585 (Dec. 1, 2011).

Court did not err in dismissing the complaint with prejudice under subsection (b) of this rule, because the second dismissal operated as an adjudication on the merits due to the claimant's prior nonsuit; the claimant nonsuited his first case, then refiled his second case, and the claimant's second case was involuntarily dismissed since he failed to timely effectuate service with a proper summons. *Mack v. Union Pac. R.R. Co.*, 2012 Ark. App. 115, — S.W.3d —, 2012 Ark. App. LEXIS 231 (Feb. 8, 2012).

### Nonsuit.

The privilege to take a nonsuit before final submission of a case is absolute. *Duty v. Watkins*, 298 Ark. 437, 768 S.W.2d 526 (1989); *Brown v. St. Paul Mercury Ins. Co.*, 300 Ark. 241, 778 S.W.2d 610 (1989); *Jenkins v. Goldsby*, 307 Ark. 558, 822 S.W.2d 842 (1992).

A circuit court nonsuit without prejudice, of an appeal from a justice of the peace court ruling, is tantamount to a dismissal of an appeal so as to leave the judgment of the justice court in force. *Wilson v. C & M Used Cars*, 46 Ark. App. 281, 878 S.W.2d 427 (1994).

A client effectively waived any negligence claim she might have against attorneys for their decision to seek a nonsuit of the client's medical malpractice claim where the client apparently consented to the nonsuit, did not allege that she did not understand the concept of taking a nonsuit, and retained the attorneys well into filing a second complaint. *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997).

A nonsuit is not effective upon filing; a court order is necessary to grant a nonsuit and the judgment or decree must be entered to be effective. *Blaylock v. Shearson Lehman Bros.*, 330 Ark. 620, 954 S.W.2d 939 (1997).

Although *res judicata* generally does not bar claims that are nonsuited, buyer was precluded from raising claim of breach of contract when he should have raised it earlier in foreclosure action brought by seller. *Pentz v. Romine*, 75 Ark. App. 274, 57 S.W.3d 235 (2001).

Judgment in favor of a seller in its foreclosure action against purchasers, which also granted the purchasers' motion for nonsuit of their compulsory counterclaims, was not a final, appealable order because the purchasers were not barred from bringing its claims again; therefore, the purchasers' appeal of the judgment was dismissed without prejudice



because the record did not contain an order granting Ark. R. Civ. P. 54 certification. *Martin v. Kat's Bar & Grill, LLC*, 2009 Ark. App. 737, — S.W.3d —, 2009 Ark. App. LEXIS 897 (2009).

Supreme court dismissed for lack of jurisdiction the appeal of a limited liability company and a debtor from a judgment entered in favor of a bank on its petition for foreclosure because there was no final appealable order since there was a counterclaim that had not been resolved; the LLC and debtor were granted a voluntary nonsuit as to two of their three counter claims, negligence and interference with business expectancies, and the voluntary nonsuit did not operate to make the circuit court's order final and appealable because the counterclaims could be refiled. *Grand Valley Ridge, LLC v. Metro. Nat'l Bank*, 2010 Ark. 402, — S.W.3d —, 2010 Ark. LEXIS 502 (Oct. 28, 2010).

#### **Notice.**

When a trial court dismissed a matter brought by a driver and arising out of a car accident, although the trial court failed to provide notice of the dismissal, the driver and his attorney had a duty to remain diligent as to how the case was progressing. As a result, the trial court properly denied the driver's motion pursuant to Ark. R. Civ. P. 60. *Watson v. Connors*, 372 Ark. 56, 270 S.W.3d 826 (2008).

Dismissal of a contractor's action to gain access to a highway for want of prosecution was valid because the failure of the contractor to receive notice of the dismissal under subsection (b) of this rule did not render the dismissal void. *City of Little Rock v. McGeorge Contr. Co.*, 2010 Ark. App. 765, — S.W.3d —, 2010 Ark. App. LEXIS 795 (Nov. 10, 2010).

#### **Parties.**

Dismissal of medical malpractice action against doctor who died properly dismissed where the motion for substitution of parties pursuant to ARCP 25 was not timely filed; however, in accordance with subsection (b) of this rule, the dismissal should have been without prejudice. *Wolford v. St. Paul Fire & Marine Ins. Co.*, 331 Ark. 426, 961 S.W.2d 743 (1998).

#### **Standing on Appeal.**

Where appellees ultimately took a voluntary nonsuit pursuant to subsection (a) of this rule, the appellants have no standing to appeal from rulings of the trial court having to do with the merits of their claim because the litigation has been resolved in their favor. *Cowan v. Schmidle*, 312 Ark. 256, 848 S.W.2d 421 (1993).

#### **Voluntary Dismissal.**

Where, in an action by a mobile home buyer against the seller and the nonresident manu-

facturer of the mobile home, the defendants argued that two prior voluntary dismissals of the action by the plaintiff operated as an adjudication on the merits, their argument constituted an attack, not on the trial court's authority in the present action, but on the correctness of its ruling regarding their defense of *res judicata*, a ruling on a defense which could not be tested by a petition for a writ of prohibition. *Tucker Enters., Inc. v. Hartje*, 278 Ark. 320, 650 S.W.2d 559 (1983).

An interlocutory decree of adoption, while it is in force, has the same legal effect as a final decree of adoption and cannot be voluntarily dismissed. *Toai Cong Pham v. Hanh My Truong*, 291 Ark. 442, 725 S.W.2d 569 (1987).

After a compulsory counterclaim has been filed, a plaintiff may once voluntarily dismiss his complaint without prejudice, to refile it within one year. *Lemon v. Laws*, 305 Ark. 143, 806 S.W.2d 1 (1991).

The doctrine of *res judicata* does not bar a plaintiff from refileing a claim after he has exercised his right to one voluntary dismissal under this rule. *Lemon v. Laws*, 305 Ark. 143, 806 S.W.2d 1 (1991).

Where the appellant-client exercised his absolute right as a plaintiff to voluntarily dismiss his claim against the attorney, that first dismissal was without prejudice and was not an adjudication on the merits. *Lemon v. Laws*, 305 Ark. 143, 806 S.W.2d 1 (1991).

Under subsection (a) of this rule, a trial court may grant a request for voluntary nonsuit where the trial court has announced its decision to grant the defendants' motions for summary judgment but the order has not been entered. *Wright v. Eddinger*, 320 Ark. 151, 894 S.W.2d 937 (1995).

Under this rule, a defendant may once voluntarily dismiss his or her compulsory counterclaim without prejudice to refile it within one year. *Linn v. NationsBank*, 341 Ark. 57, 14 S.W.3d 500 (2000).

Trial court erred in granting the alleged tortfeasors' motion for summary judgment after it refused to grant the alleged victim's nonsuit pursuant to subsection (a) of this rule, where the alleged victim's submission of his voluntary nonsuit motion prior to the time argument had closed and the case had been submitted to the court meant that the trial court had no choice but to grant the motion. *Coombs v. Hot Springs Vill. Prop. Owners Ass'n*, 75 Ark. App. 364, 57 S.W.3d 772 (2001).

Trial court erred in not granting individual's motion for a nonsuit without prejudice and instead granting public entities' motion to dismiss where individual's motion was clearly presented to the trial court prior to submission of the case; moreover, entry of an order granting a nonsuit before submission of the case, as required by subsection (a) of this rule, was not discretionary with the trial court as

subsection (a) provided that only one voluntary dismissal without prejudice was allowed and an abuse of the nonsuit procedure by substituting plaintiffs for the same cause of action would subject the attorney to sanctions under ARCP 11. *White v. Perry*, 348 Ark. 675, 74 S.W.3d 628 (2002).

Trial court erred in granting state's motion to strike appellant's motion to dismiss a forfeiture action because, after voluntarily dismissing its first forfeiture complaint for failure to complete service of process, the state neglected to toll the limitations period to invoke the one-year savings statute because it did not file the forfeiture complaint within the 120-day period required by § 5-64-505(3). *Mitchell v. State*, 94 Ark. App. 304, 229 S.W.3d 583 (2006).

Dismissal of the patient's medical malpractice claim was appropriate because it was untimely under § 16-56-126(a)(1) since subdivision (a)(1) of this rule stated that the one-year period began when the circuit court entered an order granting the non-suit; additionally, Ark. R. Civ. P. 58 did not require courts to notify parties of the entry of an order of judgment. The patient also offered no proof that the hospital's attorney defrauded her or intended to defraud her in any way when he told her that the signing date was the date from which the statute would run. *Collins v. St. Vincent Doctors*, 98 Ark. App. 190, 253 S.W.3d 26 (2007), review denied — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 422 (May 10, 2007), cert. denied 552 U.S. 902, 128 S. Ct. 233, 169 L. Ed. 2d 174 (2007).

In a bank's foreclosure action, the homeowner's appeal was dismissed as the circuit court's order was not a final, appealable order under subsection (a) of this rule where the written order did not reflect the circuit court's disposition of the homeowner's voluntarily nonsuited counterclaims against the bank. *Bevans v. Deutsche Bank Nat'l Trust Co.*, 373 Ark. 105, 281 S.W.3d 740 (2008).

Where a discharged teacher took a voluntary nonsuit under this rule of the claim under § 6-17-1510(c) she filed in state county court, she had the right to refile that claim within one year, which she did. *Richardson v. Booneville Sch. Dist.*, — F. Supp. 2d —, 2011 U.S. Dist. LEXIS 6132 (W.D. Ark. Jan. 21, 2011).

Because the administrative hearing under

§ 6-17-1510(d) was clearly remedial and designed to correct the evidentiary record at the predetermination hearing, and the hearing was not a hearing de novo but only an opportunity to present additional evidence, the discharged teacher had the right to pursue the 42 U.S.C.S. § 1983 action even though she took a voluntary nonsuit in the state circuit court under this rule. *Richardson v. Booneville Sch. Dist.*, — F. Supp. 2d —, 2011 U.S. Dist. LEXIS 6132 (W.D. Ark. Jan. 21, 2011).

### Will Contest.

Dismissal of a suit contesting a will cannot be done without prejudice, since a probate proceeding is a special proceeding rather than an "action" because it is not a civil action under ARCP 2 or 3, and since a will contestant cannot take a nonsuit under this rule because such a contest is not an independent proceeding in itself; thus, dismissal with prejudice is necessary, since it would seriously disrupt the administration and distribution of estates if a will contest would be dismissed voluntarily or without prejudice and refiled at some indefinite later date. *Screeton v. Crumpler*, 273 Ark. 167, 617 S.W.2d 847 (1981).

**Cited:** *Kern v. TXO Prod. Corp.*, 738 F.2d 968 (8th Cir. 1984); *Mark Twain Life Ins. Corp. v. Cory*, 283 Ark. 55, 670 S.W.2d 809 (1984); *Trout v. Mathis*, 289 Ark. 24, 708 S.W.2d 629 (1986); *Patterson v. State*, 295 Ark. 147, 747 S.W.2d 99 (1988); *Dawson v. Gerritsen*, 295 Ark. 206, 748 S.W.2d 33 (1988); *Womack v. Newman Fixture Co.*, 27 Ark. App. 117, 766 S.W.2d 949 (1989); *Jackson v. Yowell*, 307 Ark. 222, 818 S.W.2d 950 (1991); *Story v. Spencer*, 41 Ark. App. 27, 847 S.W.2d 48 (1993); *International Resource Ventures, Inc. v. Diamond Mining Co. of Am.*, 326 Ark. 765, 934 S.W.2d 218 (1996); *Elliott v. Boone County Indep. Living, Inc.*, 56 Ark. App. 113, 939 S.W.2d 844 (1997); *Beverly Enterprises-Arkansas, Inc. v. Hillier*, 341 Ark. 1, 14 S.W.3d 487 (2000); *Mountain Pure LLC v. Affiliated Foods Southwest, Inc.*, 366 Ark. 62, 233 S.W.3d 609 (2006); *Beverly Enters. v. Keaton*, 2009 Ark. 431, — S.W.3d —, 2009 Ark. LEXIS 593 (2009); *Carr v. Nance*, 2010 Ark. 25, — S.W.3d —, 2010 Ark. LEXIS 37 (Jan. 21, 2010); *Martin v. Hallum*, 2010 Ark. App. 193, — S.W.3d —, 2010 Ark. App. LEXIS 188 (Feb. 24, 2010).

## Rule 42. Consolidation: separate trials.

(a) *Consolidation.* When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delays.



(b) *Separate Trials*. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or any number of claims, cross-claims, counterclaims, third-party claims, or issues.

**Reporter's Notes to Rule 42:** 1. Rule 42 is substantially the same as FRCP 42. Prior Arkansas law concerning consolidation of cases for trial was found in superseded *Ark. Stat. Ann.* §§ 27-1304 and 27-1305 (Repl. 1962) and little change is effected by this rule. Generally speaking, consolidation of cases is normally permitted for convenience and econ-

omy in judicial administration and not to merge claims into a single cause or change parties' rights. *Johnson v. Manhattan R. Co.*, 289 U.S. 479, 53 S. Ct. 721 (1933). The question of whether to order consolidation rests in the sound discretion of the trial court. *United States v. Knauer*, 149 F.2d 519 (C.C.A. 7th, 1945), *aff'd*, 328 U.S. 654, 66 S. Ct. 1304.

## RESEARCH REFERENCES

**Ark. L. Rev. Note**, Davidson v. Lonoke Production Credit Association: A Federal Court Explores Mutuality of Collateral Estoppel in Arkansas, 37 Ark. L. Rev. 486.

**U. Ark. Little Rock L.J. Note**, Civil Procedure — Rule 42(b) — Bifurcation of the

Issues of Liability and Damages at Trial. Hunter v. McDaniel Brothers Construction Co., 274 Ark. 178, 623 S.W.2d 196 (1981), 5 U. Ark. Little Rock L.J. 405.

Survey of Arkansas Law: Civil Procedure, 6 U. Ark. Little Rock L.J. 97.

## CASE NOTES

### ANALYSIS

In general.  
Purpose.  
Appeal.  
Bifurcation.  
Consolidation improper.  
Discretion of court.  
Separate trials.  
Severance improper.

### In General.

While subsection (b) of this rule does allow the trial court to order separate trials, under certain circumstances a separate trial order under this subsection usually results in but one judgment. *Barnhart v. City of Fayetteville*, 316 Ark. 742, 875 S.W.2d 79 (1994).

Trial court properly granted a change of custody in a dependency-neglect case that had been consolidated with a petition for a change of custody; even though reunification was often the goal throughout much of a dependency-neglect proceeding, it was not necessary to institute reunification if it proved to be against the best interest of the child and where the primary consideration was the welfare and best interest of the child. *Miller v. Ark. Dep't of Human Servs.*, 86 Ark. App. 172, 167 S.W.3d 153 (2004).

### Purpose.

The purpose of this rule is to further convenience, avoid delay and prejudice, and serve the needs of justice, and the primary concern is efficient judicial administration, rather than the wishes of the parties, as long

as no party suffers prejudice by the bifurcation. *Hunter v. McDaniel Constr. Co.*, 274 Ark. 178, 623 S.W.2d 196 (1981).

The primary purpose of this rule is to advance judicial economy as long as the parties are not prejudiced. *Pennington v. Harvest Foods, Inc.*, 326 Ark. 704, 934 S.W.2d 485 (1996).

### Appeal.

An order granting separate trials under this rule is not appealable as a final judgment. *Barnhart v. City of Fayetteville*, 316 Ark. 742, 875 S.W.2d 79 (1994).

Appellate court could not accept debtors' argument that the order of consolidation in the case somehow changed the procedural posture of their suit against bank; the action which was the subject of the appeal was one initiated by debtors and, thus, the bankruptcy stay was inapplicable. *Dwiggins v. Elk Horn Bank & Trust Co.*, 364 Ark. 344, 219 S.W.3d 181 (2005).

### Bifurcation.

A bifurcation should be used on a case by case basis based upon the informed discretion of the court; a routine bifurcation, however, would not be an exercise of discretion and, absent an abuse of discretion, the decision will not be disturbed on appeal. *Hunter v. McDaniel Constr. Co.*, 274 Ark. 178, 623 S.W.2d 196 (1981); *LLLL Constr. Co. v. Mehlburger, Tanner, Renshaw & Assocs.*, 16 Ark. App. 267, 702 S.W.2d 29 (1985).

Trial court did not abuse its discretion by

bifurcating issues of liability and damages in a personal injury action involving a vehicular collision. *Hunter v. McDaniel Constr. Co.*, 274 Ark. 178, 623 S.W.2d 196 (1981).

The bifurcation of a personal injury trial, pursuant to this rule, on the issues of liability and damages does not deprive the plaintiffs of their right to a jury trial as guaranteed by Ark. Const., Art. 2, § 7, and ARCP 38 and 39. *Hunter v. McDaniel Constr. Co.*, 274 Ark. 178, 623 S.W.2d 196 (1981).

Where testimony as to the amount of damages would have consumed a great deal of time as there were four parties to the suit and was unnecessary until the issue of liability had been resolved, bifurcation was not unjustifiable as it resulted in judicial economy and shortened proceeding with no abuse of discretion. *Fletcher v. Duke*, 5 Ark. App. 223, 635 S.W.2d 2 (1982).

Where the cause involved six parties and their respective tort and contractual claims, and the indemnity claims could not be determined until the issue of who, among four defendants, was liable for the plaintiffs' personal injuries, the trial court had good reason to bifurcate the trial, i.e., to avoid confusion and any resulting prejudice when considering the different and distinct claims of the respective parties. *LLLL Constr. Co. v. Mehlburger, Tanner, Renshaw & Assocs.*, 16 Ark. App. 267, 702 S.W.2d 29 (1985).

Where plaintiff filed suit for breach of a settlement contract claim, strict liability, negligence, breach of warranty, and misrepresentations, allowing all claims to be tried together would result in the admission of evidence of settlement negotiations which would unfairly prejudice the defense of the claims for liability other than breach of the settlement contract; the only way to avoid unfair prejudice would be to bifurcate the breach of settlement contract claim. *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992).

### **Consolidation Improper.**

Despite the fact that there were common issues of fact and law in the claims by landowners against railroad for punitive damages and that the consolidation also saved judicial time, ordering the consolidation amounted to an abuse of discretion because of the resulting prejudice where the consolidation of four cases placed undue emphasis on the need to penalize the tortfeasor. *Missouri Pac. R.R. v. Arkansas Sheriff's Boys' Ranch*, 280 Ark. 53, 655 S.W.2d 389 (1983).

The trial court erred in consolidating the case involving the determination of the amount of child support for the appellant mother's child with another case involving the determination of the amount of child support for another child born to the appellee by another woman where the appellee initi-

ated a petition to consolidate the cases when there was no pending litigation in either case and, in conjunction with this petition, he further sought to reduce the child support he paid to the appellant. *Moreland v. Hortman*, 72 Ark. App. 363, 39 S.W.3d 23 (2001).

### **Discretion of Court.**

An order of consolidation is a matter of discretion with the trial judge, and will not be reversed except for abuse of that discretion. *Missouri Pac. R.R. v. Arkansas Sheriff's Boys' Ranch*, 280 Ark. 53, 655 S.W.2d 389 (1983).

Absent an abuse of discretion the decision of the trial court on whether to separate the liability phase from the damage phase of a trial will not be disturbed on appeal. *Transit Homes, Inc. v. Bellamy*, 282 Ark. 453, 671 S.W.2d 153 (1984), overruled *Peters v. Pierce*, 314 Ark. 8, 858 S.W.2d 680 (1993).

A trial court's abuse of discretion in denying severance can be demonstrated by a showing of prejudice to the complaining party. *Pennington v. Harvest Foods, Inc.*, 326 Ark. 704, 934 S.W.2d 485 (1996).

### **Separate Trials.**

Severance should have been granted in case alleging several civil conspiracies involving several defendants. *Pennington v. Harvest Foods, Inc.*, 326 Ark. 704, 934 S.W.2d 485 (1996).

### **Severance Improper.**

In a negligence action, severance of appellants' cross-claims was not proper where the jury, responsible for apportioning fault, heard testimony about third parties' possible negligence but were told that appellees' claims against them were dropped; further, considering the fact that the third parties were present at trial and testified as to their role in the case, it is hard to fathom how severing the cross-claims promoted judicial economy. *FMC Corp. v. Helton*, 360 Ark. 465, 202 S.W.3d 490 (2005).

Severance of appellants' cross-claims in a negligence case was not proper where the jury heard testimony about third parties' possible negligence but were told that appellees' claims against them were dropped; further, because the third parties were present at trial and testified as to their role in the case, severing the cross-claims did not promote judicial economy. *FMC Corp. v. Helton*, 360 Ark. 465, 202 S.W.3d 490 (2005).

**Cited:** *Spickes v. Medtronic, Inc.*, 275 Ark. 421, 631 S.W.2d 5 (1982); *Dalrymple v. Simmons First Nat'l Bank*, 296 Ark. 534, 758 S.W.2d 5 (1988); *Smith v. Ferguson*, 302 Ark. 388, 790 S.W.2d 162 (1990); *Ice v. Bramlett*, 311 Ark. 157, 842 S.W.2d 29 (1992); *Bell v. Estate of Bell*, 318 Ark. 483, 885 S.W.2d 877 (1994); *McDonald Mobile Homes, Inc. v. BankAmerica Hous. Servs.*, 93 Ark. App. 256, 218 S.W.3d 376 (2005).



**Rule 43. Taking of testimony.**

(a) *Form.* In all trials, the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules or as otherwise provided by law. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

(b) *Affirmation in Lieu of Oath.* Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(c) *Evidence on Motions.* When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, or the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

(d) *Interpreters.* The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court. (Amended February 10, 2005.)

**Reporter's Notes to Rule 43:** 1. Prior to the 1975 amendments, FRCP 43 was entitled "Evidence" and provided the basic rule of evidence in civil cases in federal courts. The adoption of the Federal Rules of Evidence abrogated much of FRCP 43; hence its substantial revision in 1975. By enacting Act 723 of 1976, the Arkansas Legislature adopted the Uniform Rules of Evidence which are identical to the Federal Rules of Evidence insofar as the mode and order of interrogation and presentation of testimony are concerned. Hence, Rule 43 is identical to FRCP 43.

2. Sections (b) and (c) do not work any changes in Arkansas procedure. Superseded *Ark. Stat. Ann.* § 28-201 (Repl. 1962) permitted the use of affidavits upon motions although inherent in that statute was the right of the trial court to require oral or deposition testimony in lieu of affidavits.

3. Section (d) is identical to FRCP 43(f) and provides for the permissive appointment of an interpreter and the payment of his compensation. Rule 604 of the Uniform Rules of Evidence touches upon the use of interpreters and requires that he be subject to the provisions of the Uniform Rules concerning qualifications as an expert and the administration of an oath or affirmation that he will make a true translation.

**Addition to Reporter's Notes, 2005 Amendment:** Rule 43(a) has been amended in two ways. Continuing the substantial identity between the Arkansas Rule and FRCP 43, both of these changes mirror 1996 revisions of

the Federal Rule. First, the requirement that testimony be taken "orally" has been eliminated. The amendment allows testimony through non-verbal means (i.e., writing, sign language, or computer) from a witness who is unable to speak. Second, a new provision has been added. That provision gives the circuit court discretion to allow testimony in open court from a different location by contemporaneous transmission. Two important requirements must inform that discretion: good cause shown in compelling circumstances and appropriate safeguards.

Because our legal tradition strongly prefers testimony in the fact-finder's presence, the inconvenience to a witness of attending trial will not establish good cause or compelling circumstances. The amended Rule contemplates some unexpected event that makes attendance by the witness very difficult. Examples of such events include an accident, an illness, or the need for an emergency hearing. When the witness's absence can be reasonably anticipated, a deposition should be the preferred method of securing the testimony. See generally, Advisory Committee's Note, 1996 Amendment to FRCP 43(a).

The amended Rule also requires the circuit court to adopt appropriate safeguards when it allows testimony by contemporaneous transmission. Those safeguards should ensure accurate identification of the witness, protect against influence by persons present with the witness, and secure accurate transmission of the testimony.

## CASE NOTES

**Contempt Proceeding.**

Order entering a permanent restraining order requiring a mother to refrain from interfering with a father's visitation with their minor child, as well as an order holding the mother in contempt of court, were upheld where the trial court was within its discretion

in hearing the matter on affidavits pursuant to subsection (c) of this rule; the mother was aware of the contempt hearing but did not appear. *Brock v. Eubanks*, 102 Ark. App. 165, 288 S.W.3d 272 (2008).

**Cited:** *Brock v. Eubanks*, 102 Ark. App. 165, 288 S.W.3d 272 (2008).

**Rule 44. Proof of official record.****(a) Authentication.**

(1) *Domestic Record.* An official record kept within the United States, or any state, district or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record having jurisdiction in the governmental unit in which the record is kept, authenticated by the seal of the court, or by any public officer having a seal of office and having official duties in the governmental unit in which the record is kept, authenticated by the seal of his office.

(2) *Foreign Record.* A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication, or copy thereof, attested by a person authorized to make attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If a reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certificate or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.

(b) *Alternate Method for Certain Domestic and Foreign Records.* The statutes, codes, written laws, executive acts, or legislative or judicial proceedings of any domestic or foreign jurisdiction or governmental unit thereof may also be evidenced by any publication proved to be commonly accepted as proof thereof in the tribunals having jurisdiction in that governmental unit.

(c) *Lack of Record.* A written statement that after diligent search, no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of the rule in the case of a domestic record, or complying with the requirements of



subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(d) *Other Proof.* This rule does not prevent the proof of official records or of entry or lack of entry therein by an other method authorized by law. (Amended November 8, 1993, effective January 1, 1994.)

**Reporter's Notes to Rule 44:** 1. With the exception of minor wording changes, Rule 44 is substantially identical to FRCP 44. These changes are lifted from superseded *Ark. Stat. Ann.* § 27-2505 (Supp. 1975), which was taken largely from FRCP 44. These changes do not affect the substance of the Federal Rule.

2. In the last sentence of Section (a)(1), the phrase "of the district or political subdivision" which is found in the Federal Rule, is omitted and the phrase "having jurisdiction in the governmental unit" is inserted in lieu thereof. The effect of this change is to require that the judge making the certificate be the judge of a court which has jurisdiction.

3. Section (b) includes the alternate method of proving certain records previously found in superseded *Ark. Stat. Ann.* § 27-2505(c) (Supp. 1975). Although this provision is not found in FRCP 44, it has been held that such proof is proper. *United States v. Aluminum Company of America*, 1 F.R.D. 71 (D.C. N.Y., 1939). Also, it should be noted that Rule 902 (5) of the Uniform Rules of Evidence permits the use of official publications without extrinsic evidence of authenticity.

**Addition to Reporter's Notes, 1993**

**Amendment:** The changes made in subdivisions (a)(1) and (a)(2) are identical to those made in the corresponding federal rule in 1991. The amendment to subdivision (a)(1) strikes the references to specific territories, two of which are no longer subject to the jurisdiction of the United States, and adds a generic term to describe governments having a relationship with the United States such that their official record should be treated as domestic records.

The amendment to subdivision (a)(2) adds a sentence to dispense with the final certification by diplomatic officers when the United States and the foreign country where the record is located are parties to a treaty or convention that abolishes or displaces the requirement. In that event the treaty or convention is to be followed. This changes the former procedure for authenticating foreign official records only with respect to records from countries that are parties to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. It does not affect the former practice of attesting the records, but only changes the method of certifying the attestation. *See generally* Comment, 11 Harv. Int'l L.J. 476 (1970).

## CASE NOTES

**Cited:** *Weatherford v. State*, 286 Ark. 376, 692 S.W.2d 605 (1985); *Monark Boat Co. v. Fischer*, 292 Ark. 544, 732 S.W.2d 123 (1987).

### Rule 44.1. Determination of foreign law.

(a) *Notice.* A party who intends to raise an issue concerning the law of any jurisdiction or governmental unit thereof outside this State shall give notice in his pleading or other reasonable written notice.

(b) *Materials to Be Considered.* In determining the law of any jurisdiction or governmental unit thereof outside this State, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the rules of evidence.

(c) *Court Decision and Review.* The court, not the jury, shall determine the law of any jurisdiction or governmental unit thereof outside this State. Its determination is subject to review on appeal as a question of law.

**Reporter's Notes to Rule 44.1:** 1. Rule 44.1 is identical to superseded *Ark. Stat. Ann.* § 27-2504 (Supp. 1975) and therefore works no changes in Arkansas practice. This rule is

substantially the same as FRCP 44.1, but the wording is changed to adapt the rule to state practice. Whereas the Federal Rule is concerned only with the determination of the law

of a foreign country, this rule applies to the law of any governmental unit outside the State of Arkansas.

## RESEARCH REFERENCES

**Ark. L. Rev.** Leflar, Conflict of Laws: Arkansas, 1978-82, 36 Ark. L. Rev. 191.

## CASE NOTES

### ANALYSIS

Federal law.

Notice.

#### Federal Law.

Since federal specifications are terms and conditions relating to certain government contracts and are not matters of "federal law," this rule does not apply to litigation involving the interpretation of a specification; the appellate court is not dealing with a question of law which the trial court should have determined, but factual matters relating to the construction of a contractual agreement between the parties in litigation which were properly submitted to the jury. *Precision Steel Whse., Inc. v. Anderson-Martin Mach. Co.*, 313 Ark. 258, 854 S.W.2d 321 (1993).

This rule does not call for the "interpretation" of law but merely provides for notice and "determination" of foreign law. *Precision Steel Whse., Inc. v. Anderson-Martin Mach. Co.*, 313 Ark. 258, 854 S.W.2d 321 (1993).

Given that the circuit court allowed the employee to question witnesses about the OSHA regulations and gave a jury instruction about them, it did not abuse its discretion by refusing to take judicial notice of the OSHA regulations under Ark. R. Evid. 201; this rule provided the best method for invoking federal law. *Patterson v. UPS*, 102 Ark. App. 378, 285 S.W.3d 683 (2008).

### Notice.

Motion made on the date of the trial for the court to take judicial notice of foreign law did not comply with either alternative of this rule and the trial court properly denied the motion. *New Hampshire Ins. Co. v. Keller*, 3 Ark. App. 81, 622 S.W.2d 198 (1981).

Pleadings did not give sufficient notice of intention to rely on foreign law. *Eckles v. Perry-Austen Bowling Prods., Inc.*, 275 Ark. 235, 628 S.W.2d 869 (1982).

Where the parties tried the action on an alleged usurious promissory note with the knowledge that the federal Monetary Control Act was the applicable law, it was within the discretion of the trial court to accept as reasonable the notice of reliance on foreign law given after trial but before judgment. *Overton Constr., Inc. v. First State Bank*, 281 Ark. 69, 662 S.W.2d 470 (1983).

Notice of reliance on foreign law held sufficient. *Arkansas Appliance Distrib. Co. v. Tandy Elecs., Inc.*, 292 Ark. 482, 730 S.W.2d 899 (1987).

Reference to codification of an entire act was sufficient notice that the party would proceed according to all of the act's provisions. *Monark Boat Co. v. Fischer*, 292 Ark. 544, 732 S.W.2d 123 (1987).

**Cited:** *Blosser v. Blosser*, 2 Ark. App. 37, 616 S.W.2d 29 (1981).

## Rule 45. Subpoena.

(a) *Form and Issuance.* A subpoena issued by the clerk shall be under seal, state the name of the court and the title of the action, and command each person to whom it is directed to appear and give testimony at the time and place therein specified. An attorney admitted to practice in this State, as an officer of the court, may also issue and sign a subpoena in any action pending in a court of this State in which the attorney is counsel of record.

(b) *For Production of Documentary Evidence.* (1) Any subpoena issued pursuant to this rule may command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein. The subpoena need not be joined with a subpoena to appear for a deposition, hearing, or trial. If a subpoena does not command an appearance, then it must be served by e-mail, facsimile, or hand delivery on all other parties at least three (3) business days before the subpoena is served



on the person to whom it is directed. The party issuing a subpoena that does not command an appearance must promptly provide a copy to all other parties of all material produced in response to the subpoena.

(2) The court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (i) quash or modify the subpoena if it is unreasonable or oppressive or (ii) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

(c) *Service.* A subpoena for a trial or hearing or for a deposition may be served at any place within this State in the manner prescribed in this subdivision. A subpoena for a trial or hearing or for a deposition may be served by the sheriff of the county in which it is to be served, by his deputy, or by any other person who is not a party and is not less than eighteen (18) years of age. Service shall be made by delivering a copy of the subpoena to the person named therein; provided, however, that a subpoena for a trial or hearing may be served by telephone by a sheriff or his deputy when the trial or hearing is to be held in the county of the witness' residence. A subpoena for a trial or hearing or for a deposition may also be served by an attorney of record for a party by any form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or agent of the addressee.

(d) *Subpoena for Trial or Hearing.* At the request of any party the clerk of the court before which the action is pending shall issue a subpoena for a trial or hearing, or a subpoena for the production at a trial or hearing of documentary evidence, signed and sealed, but otherwise in blank, to the party requesting it, who shall fill it in before service. The subpoena may also be issued by an attorney pursuant to subdivision (a) of this rule. Notice of the subpoena shall be promptly given to all parties in the manner prescribed by Rule 5(b). A witness, regardless of his county of residence, shall be obligated to attend for examination on trial or hearing in a civil action anywhere in this State when properly served with a subpoena at least two (2) days prior to the trial or hearing. The court may grant leave for a subpoena to be issued within two (2) days of the trial or hearing. The subpoena must be accompanied by a tender of a witness fee calculated at the rate of \$30.00 per day for attendance and \$0.25 per mile for travel from the witness' residence to the place of the trial or hearing. In the event of telephone service of a subpoena by a sheriff or his deputy, the party who caused the witness to be subpoenaed shall tender the fee prior to or at the time of the witness' appearance at the trial or hearing. If a continuance is granted and if the witness is provided adequate notice thereof, reservice of the subpoena shall not be necessary. Any person subpoenaed for examination at the trial or hearing shall remain in attendance until excused by the party causing him to be subpoenaed or, after giving testimony, by the court.

(e) *Subpoena for Taking Depositions: Place of Examination.* Upon the filing of a notice of deposition upon oral examination pursuant to Rule 30(b), the clerk of the court in which the action is pending shall, upon the request of the party giving notice, issue a subpoena in accordance with the notice. The subpoena may also be issued by an attorney pursuant to subdivision (a) of this rule. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within

the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of the rule. The witness must be properly served at least five (5) business days prior to the date of the deposition, unless the court grants leave for subpoena to be issued within that period. The subpoena must be accompanied by a tender of a witness fee calculated at the rate of \$30.00 per day for attendance and \$0.25 per mile for travel from the witness' residence to the place of the deposition.

The person to whom the subpoena is directed may, within ten (10) days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than ten (10) days after service, serve upon the attorney causing the subpoena to be issued written objection to inspection or copying of any or all of the designated materials. If objection is made, the party causing the subpoena to be issued shall not be entitled to inspect and copy the materials except pursuant to an order of the court before which the deposition may be used. The party causing the subpoena to be issued may, if objection has been made, move, upon notice to the deponent, for an order at any time before or during the taking of the deposition.

A witness subpoenaed under this subdivision may be required to attend a deposition at any place within 100 miles of where he resides, or is employed, or transacts his business in person, or at such other convenient place as is fixed by an order of court.

(f) *Depositions for Use in Out-of-State Proceedings.* Any party to a proceeding pending in a court of record outside this state may take the deposition of any person who may be found within this state. A party who has filed a notice of deposition upon oral examination in an out-of-state proceeding, which complies with Rule 30(b), may file a certified copy thereof with the circuit clerk of the county in which the deposition is to be taken; whereupon, the clerk shall issue a subpoena in accordance with the notice. A deposition, including any subpoenas issued therefor, shall be subject to these rules as well as to any rule or statute creating a privilege or immunity from discovery. Any objection or motion for protective order with respect to the deposition shall be heard by a circuit judge of the county in which the deposition is to be taken.

(g) *Contempt.* When a witness fails to attend in obedience to a subpoena or intentionally evades the service of a subpoena by concealment or otherwise, the court may issue a warrant for arresting and bringing the witness before the court at a time and place to be fixed in the warrant, to give testimony and answer for contempt. (Amended July 1, 1986, effective September 15, 1986; amended December 21, 1987, effective March 14, 1988; amended November 20, 1989, effective January 1, 1990; amended January 27, 2000; amended January 27, 2000, effective March 23, 2000; amended February 1, 2001; amended May 24, 2001, effective July 1, 2001; amended January 24, 2002; amended June 3, 2010, effective July 1, 2010.)

**Reporter's Notes to Rule 45:** 1. Rule 45 contains numerous changes from FRCP 45. These changes are generally designed to continue certain procedures which were provided under superseded Arkansas law. Section (a) provides the mechanics for the issuance of a subpoena and whereas under FRCP 45 a subpoena is issued only by the court clerk, this section retains the authority of officers

before whom depositions are taken to issue subpoenas for that purpose under Section (d). Superseded Arkansas law was found in *Ark. Stat. Ann.* § 28-501, et seq. (Repl. 1962), the bulk of which is retained under this rule.

2. Section (b) provides for the issuance of a subpoena duces tecum. Superseded *Ark. Stat. Ann.* § 28-357 (Repl. 1962) seemed to suggest that only those items which were admissible



in evidence were subject to being subpoenaed. However, superseded *Ark. Stat. Ann.* § 28-540 (Repl. 1962), which was patterned after FRCP 45(b), appeared to make the subpoena just as broad as that under the Federal Rule. The latter provides for the quashing of a subpoena duces tecum only for certain stated grounds and an objection based solely upon the alleged inadmissibility of the items sought is insufficient. *United States v. 691.81 Acres of Land*, 443 F.2d 461 (C.C.A. 6th, 1971).

3. Section (c) permits any person authorized under Rule 4(c) to serve a summons to also serve a subpoena. Witnesses residing outside the county must receive five days' notice and those within the county three days' notice. Service by telephone is permitted where the witness is to be served in the same county where the trial is to be held. *Ark. Stat. Ann.* § 28-508 (Repl. 1962) is superseded. The rule essentially incorporates provisions of superseded *Ark. Stat. Ann.* §§ 28-510 and 28-514. Those statutes obligated a witness to attend a trial when properly served and tendered expenses and fees, and failure to do so authorized the court to hold the witness in contempt or have the witness arrested and brought before the court for contempt proceedings. Subpoenas to be served within three days of trial must be issued with leave of the court.

4. Section (d) also differs significantly from the Federal Rule concerning subpoenas for deposition purposes. Under the latter, the clerk issues the subpoena after formal notice is filed. Under this rule, following superseded *Ark. Stat. Ann.* § 28-539 (Repl. 1962), the subpoena can be issued by either the court clerk or by an officer authorized to take depositions. The third paragraph of Section (d) is modified from the Federal Rule to provide simply that a witness subpoenaed for purpose of a deposition cannot be required to travel outside the county wherein he resides or transacts his business in order to give the deposition unless ordered to do so by the court.

5. Section (e) permits service of subpoenas throughout the State of Arkansas. It does not, however, attempt to regulate the enforcement of a subpoena which is to be served outside this State. Whether a sister state will honor an Arkansas subpoena depends upon the reciprocity between the two states and ultimately the law of the sister state.

**Addition to Reporter's Notes, 1986 Amendment:** Rule 45(c) is substantially revised. The 1986 amendment changes prior Arkansas practice by permitting any person who is not a party and is not less than 18 years of age to serve a subpoena, thus adopting the federal practice. Moreover, the amended rule permits service of a subpoena

by mail in the same manner as service of process under Rule 4(d)(8). The amended rule thus permits an attorney for any party to serve a subpoena by mail, so long as the requirements of Rule 4(d)(8) with respect to restricted delivery, return receipt, etc. are satisfied. The 1986 amendment also eliminates the distinction between witnesses residing in the county of trial and those residing outside the county. All witnesses must be served at least five days prior to trial, unless the court grants leave to allow service within that period, and all must be paid the same attendance fee and travel expenses. These fees, specified in the amended rule, must be paid at the time of trial, a change from the prior practice of requiring payment or tender of the fees at the time of service. Rule 45(c) also now makes plain that re-service of the subpoena is not necessary if a continuance is granted in the matter and the witness is given sufficient notice prior to his attendance. In that situation, the witness would be compelled to attend trial on the new date, and a new subpoena would not be required. Subsection (d) is also amended to make plain that the five-day minimum for service and the attendance and travel fee requirements apply to subpoenas for taking depositions as well as to subpoenas for appearance at trial. However, there is no change in the requirement that a deposition witness can be deposed only in the county where he resides, is employed, or transacts his business in person, absent a court order.

**Addition to Reporter's Notes, 1988 Amendment:** Rule 45 is amended in an attempt to refine some changes made in subsections (c) and (d) in 1986. First, language in both subsections requiring payment of the witness fee at the time and place of the trial or deposition has been deleted. Under the amended rule, the witness fee must be paid or tendered when served with the subpoena, as was the case prior to the 1986 amendment. Second, language in both subsections basing the witness fee on the witness' "reasonable expenses for the loss of time based on [his] earnings" has been deleted. Accordingly, the witness fee is a flat \$30 per day. The latter change was made because of problems caused by occurrence witnesses who have claimed extremely high fees based on their earnings for a single day. Such highly paid individuals, like all other citizens, have a societal obligation to come forth and give evidence, much as they have an obligation to serve, when called, as jurors. To vary the witness fee to take into account their high salaries would cause obvious difficulties for litigants unable to pay such a fee. Expert witnesses are covered by Rule 26(b)(4)(C).

**Addition to Reporter's Notes, 1989 Amendment:** Rule 45 has undergone several

modifications since it became effective in 1979. Because the 1989 amendment rewrites virtually the entire rule, previous Reporter's Notes are superseded and should be consulted only for historical purposes.

1. Subdivision (a) provides the mechanics for the issuance of a subpoena. Subpoenas may now be issued only by the clerk of court. Authority for the issuance of deposition subpoenas by officers before whom depositions may be taken has been eliminated.

2. Subdivision (b) provides for the issuance of a subpoena duces tecum. Except for minor technical corrections, this provision is unchanged.

3. Subdivision (c) governs service of subpoenas and makes clear that any subpoena, for either trial or deposition, may be served anywhere in the state. Moreover, the subdivision expressly provides that service of a subpoena by mail may be made by an attorney of record for either party. Telephone service of subpoenas is limited to sheriffs and their deputies, who may use this method of service with respect to trial subpoenas directed to witnesses who reside in the county where the trial is to be held. In addition, material from former subdivision (c) governing trial subpoenas has been shifted to subdivision (d). Similarly, provisions regarding contempt have been placed under subdivision (g), which specifically addresses that issue.

4. Subdivision (d) applies to subpoenas for trials or hearings. Most of this material appeared in former subdivision (c). However, the revised rule reduces the period required for service of a subpoena prior to trial without leave of court from five to two days; increases the allowance for witness travel to trial to twenty-five cents per mile; clarifies the authority of the party who subpoenas a witness to excuse the witness prior to testimony by the witness; and eliminates an outdated provision authorizing the taking of depositions of witnesses exempt by law from personal attendance at trial. Pursuant to subdivision (c), a subpoena for a witness to appear at a trial or hearing may be served anywhere in the state.

5. Subdivision (e) governs subpoenas for the taking of depositions, including those for the production of documentary evidence. The 1989 amendment eliminates the authority of an officer authorized to take a deposition to issue subpoenas for depositions. Under the revised procedure, the clerk of court is to issue a subpoena for a deposition upon the request of a party and the filing by that party of a notice of the deposition complying with Rule 30. Consistent with the increase in travel allowance for trial witnesses under subdivision (d), the travel allowance for deposition witnesses is also increased to twenty-five cents per mile. However, although the period of notice to a witness prior to trial has been

reduced to two days under subdivision (d), the period of notice to a deposition witness is five business days. In addition, the geographic limits within which a deposition witness is required to attend a deposition have been expanded from the county of the witness' residence to any place within 100 miles of where the witness resides, is employed, or transacts business in person. Pursuant to subdivision (c), a subpoena for a deposition may be served anywhere in the state.

6. Subdivision (f) establishes a procedure for the taking of depositions within the state for use in proceedings pending in other states. In conjunction with the adoption of this provision, Rule 28(c) has been modified to apply only to proceedings pending in foreign countries.

7. Subdivision (g) governs contempt proceedings. It is a condensed version of language that appeared in former subdivision (c), which seemed to apply only to trial subpoenas. This subdivision replaces a more general contempt provision found in former subdivision (f).

**Addition to Reporter's Notes, 2000 Amendment:** Subdivision (a) has been amended to permit an attorney admitted to practice in Arkansas, as an officer of the court, to issue subpoenas in Arkansas cases in which he or she is counsel of record. Cross-references to subdivision (a) have also been added to subdivisions (d) and (e) of the rule. This authority does not apply to subpoenas pursuant to subdivision (f), which governs depositions for use in out-of-state proceedings; accordingly, a subpoena under subdivision (f) may be issued only by the clerk. The phrase "admitted to practice" in amended subdivision (a) refers not only to attorneys licensed in Arkansas, but also to those admitted pro hac vice.

In 1991, the corresponding federal rule was amended to allow attorneys to issue subpoenas. See Rule 45(a)(3), Fed. R. Civ. P. The federal rule expressly provides for sanctions, including lost earnings and reasonable attorneys' fees, against an attorney "responsible for issuance and service of a subpoena" that "impos[es] an undue burden or expense on the person subject to that subpoena." Rule 45(c)(1), Fed. R. Civ. P. While a similar provision has not been added to the Arkansas rule, the courts have inherent authority to sanction attorneys who abuse their power to issue subpoenas.

**Addition to Reporter's Notes, [February] 2001 Amendment:** Subdivision (b) of the rule has been amended to emphasize that a subpoena duces tecum is permissible only in connection with a deposition, hearing, or trial. This has always been the case under Rule 45, but a clarifying amendment was deemed advisable in light of recent cases in which law-



yers have employed subpoenas to obtain documents from non-parties without a deposition. The Supreme Court has not adopted a provision authorizing a subpoena solely to compel a non-party to produce documents or submit to an inspection. Compare Rules 34(c) & 45(a)(1)(C), Fed. R.Civ. P.

It also appears that some attorneys construed Rule 45 as not only allowing such a subpoena, but permitting one without notice to opposing counsel. Under the amended rule, there is no doubt but that these so-called “stealth subpoenas” are improper and that notice is necessary for any subpoena. If the subpoena is issued in connection with a deposition, subdivisions (e) and (f) expressly require notice of the deposition. Moreover, a new sentence has been added to subdivision (d) requiring that notice of a subpoena for a trial or hearing “be promptly given to all parties in the manner prescribed by Rule 5(b).”

**Addition to Reporter’s Notes, [May] 2001 Amendment:** Subdivision (f) has been amended by deleting the reference to chancery judges. Constitutional Amendment 80 established circuit courts as the “trial courts of original jurisdiction” in the state and abolished the separate chancery and probate courts.

**Addition to Reporter’s Notes, 2002 Amendment:** The third sentence of subdivision (f) has been amended to expressly provide that a deposition taken for use in an out-of-state proceeding is subject to the Rules of Civil Procedure, as well as to any rule or statute “creating a privilege or immunity from discovery.” Previously, this sentence stated only that the Rules applied to subpoenas issued for such depositions. Also, the last sentence of subdivision (f) has been revised to include a specific reference to motions for protective orders made with respect to the deposition pursuant to Rule 26(c). The former version of this sentence mentioned only objections.

The following form for subpoenas is adopted and shall be published in the notes immediately following Rule 45 in the Court Rules volume of the Arkansas Code:

Subpoena Form

Issued by the

COURT

County,

Arkansas

SUBPOENA IN A CIVIL CASE

CASE NUMBER

v.

TO:

YOU ARE COMMANDED to appear in the Court of County, Arkansas, at the place, date, and time specified below to testify in the above case.

Place of Testimony

Courtroom

Date and Time

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify in the taking of a deposition in the above case.

Place of Deposition

Date and Time

YOU ARE COMMANDED, at the time of the trial, hearing or deposition described above, to produce and permit inspection and copying of the following documents or objects (list documents or objects):

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Arkansas Rules of Civil Procedure 30(b)(6).

Issuing Officer Signature

Date

and Title (Indicate if

Attorney for Plaintiff

or Defendant)

Issuing Officer’s Name,

Address, and Phone Number

PROOF OF SERVICE

SERVED Date

Place

Served On (Print Name)

Manner of Service

Served By (Print Name)

Title

DECLARATION OF SERVER

I declare, under penalty of perjury under the laws of the State of Arkansas that the foregoing information contained in the Proof of Service is true and correct.

Executed on \_\_\_\_\_

Date

Signature of Server \_\_\_\_\_

Address of Server \_\_\_\_\_

**NOTICE TO PERSONS SUBJECT TO SUBPOENAS**

Regardless of his or her county of residence, a witness subpoenaed for examination at a trial or hearing must be properly served with a subpoena at least two days prior to the trial or hearing, or within a shorter time if the court so orders. The subpoena must be accompanied by a witness fee calculated at the rate of \$30.00 per day for attendance and \$0.25 per mile for travel from the witness' residence to the place of the trial or hearing. Rule 45(d), Ark. R. Civ. P.

A witness subpoenaed in connection with a deposition must be properly served with a subpoena at least five business days prior to a deposition, or within a shorter time if the court so orders. The witness is required to attend a deposition at any place within 100 miles of where he or she resides, is employed, or transacts business in person, or at such other convenient place set by court order. The subpoena must be accompanied by a witness fee calculated at the rate of \$30.00 per day for attendance and \$0.25 per mile for travel from the witness' residence to the place of the deposition. Rule 45(e), Ark. R. Civ. P.

A subpoena may command the person to whom it is directed to produce for inspection any books, papers, documents, or tangible things designated in the subpoena. The person subpoenaed may ask the court to quash or modify the subpoena if it is unreasonable or oppressive or to require that the person on whose behalf the subpoena is issued pay the reasonable cost of such production. Rule 45(b), Ark. R. Civ. P. If the subpoena is issued in connection with a deposition, the person subpoenaed may object in writing to inspection or copying of any or all of the designated materials or seek a protective order from the court. If a written objection is made within ten days of service of the subpoena or on or before the time specified for compliance if such time is less than ten days, the party causing the subpoena to be issued is not entitled to inspect the materials unless the court so orders. Rule 45(d), Ark. R. Civ. P.

When a witness fails to attend in obedience to a subpoena or intentionally evades the service of a subpoena by concealment or otherwise, the court may issue a warrant for arresting and bringing the witness before the court to give testimony and answer for contempt. Rule 45(g), Ark. R. Civ. P.

**Addition to Reporter's Notes Regarding Subpoena Form (January 2002):** This form was designed for civil cases, including

probate and juvenile matters, and should not be used in criminal proceedings. It is based on the form used in the federal courts. See Form AO 88, Subpoena in a Civil Case (Rev. 1994), reprinted in 1B Federal Procedural Forms §§ 1:1270 (1999). However, it departs from the federal model as necessary to accommodate differences between the Arkansas Rules of Civil Procedure and the federal rules.

Rule 45 does not mention the form, but the Supreme Court's order of adoption describes it as "official." In re Arkansas Rules of Civil Procedure, 340 Ark. 731, 733 (2000). Although use of an exact reproduction of the form is not mandatory, a subpoena must include all information called for by the form. For example, the second page of the form contains a "notice to persons subject to subpoenas" intended to advise those persons of their rights and duties under Rule 45. A subpoena without this information would be subject to challenge. However, so long as the necessary information is included, use of a "home-grown" document should not be fatal.

Additional information may be included if it is not inconsistent with Rule 45 or the form itself. For instance, a subpoena issued by the clerk might contain the name, address and phone number of the attorney who requested its issuance. Other information can be added in certain spaces on the form. The division in which the case is pending may also be included along with the street address in the box labeled "place of testimony."

On the other hand, modification of the form in such a way that distorts the controlling law or misleads the recipient is impermissible. Under Rule 45(b), for example, a subpoena duces tecum directed to a non-party is permissible only in connection with a deposition, hearing, or trial. Consequently, adding to the form a box to be checked and an accompanying statement to the effect that the recipient is commanded to permit inspection of specified documents at counsel's office on a given date, is not permissible. By contrast, the federal form offers this option, which is available under the federal rules. See Rules 34(c) & 45(a)(1)(C), Fed. R. Civ. P.

Unless a statute provides a procedure different from that specified in Rule 45, the rule and the form are applicable in probate and juvenile cases. Certain probate matters - such as will contests and adoptions - are "special proceedings" within the meaning of Rule 81(a) and thus excepted from the Rules of Civil Procedure if a statute sets out a different procedure. E.g., *Brantley v. Davis*, 305 Ark. 68, 805 S.W.2d 75 (1991). Some juvenile matters may also be special proceedings. See *Kelley v. State*, 191 Ark. 848, 88 S.W.2d 65 (1935). If there is no such statute, then the rules apply. *Norton v. Hinson*, 337 Ark. 487, 989 S.W.2d 535 (1999).



There appears to be only one statute that uses the word “subpoena” in connection with probate cases, and it does not conflict with Rule 45. See Ark. Code Ann. § 5-2-317(b)(3). By statute, the Rules of Civil Procedure apply to “all proceedings” in juvenile cases “until rules of procedure for juvenile court are developed and in effect,” except as otherwise provided by the juvenile code. Ark. Code Ann. §§ 9-27-325(f). No such rules have been promulgated, and the only statute dealing with subpoenas in juvenile cases is not inconsistent with Rule 45. See Ark. Code Ann. § 9-27-310(e). Accordingly, the rule and the subpoena form apply in probate and juvenile proceedings.

**Addition to Reporter’s Notes, 2010 Amendment:** Subdivision (b) has been divided into two numbered paragraphs and amended to allow subpoenas solely for the production of books, papers, documents, or tangible things. The official form and notice have been revised to accommodate subpoenas of this type, and a corresponding change has been made in Rule 34.

The amendment eliminates the long-standing requirement under Arkansas law that a subpoena duces tecum had to be joined with a subpoena for a witness to appear at a deposition, trial, or hearing. This requirement did not reflect actual discovery practice, for lawyers routinely cancelled depositions of non-parties who produced requested documents before the deposition date.

In addition, the amendment aligns Rule 45 with its federal counterpart. See Fed. R. Civ. P. 45(a)(1)(C). Unlike the federal rule, however, this rule does not permit a stand-alone subpoena to permit entry on and inspection of land. In that situation, an independent action must be brought against the nonparty to accomplish this discovery. See Ark. R. Civ. P. 34(c).

Revised Rule 45(b) also includes greater protections for other parties than the Federal Rules. A party who subpoenas only documents or things must serve the subpoena on all other parties at least three business days before serving the subpoena on the person in possession of the materials. This requirement will insure pre-production notice to, and an opportunity to object by, all other parties in the case. Moreover, the requesting party must provide a copy to all other parties of all materials—books, papers, documents, or tangible things—produced in response to the subpoena.

Subpoena Form

Issued by the

COURT

County,

Arkansas

SUBPOENA IN A CIVIL CASE

CASE NUMBER

v.

TO:

YOU ARE COMMANDED to appear in the

Court of

County, Arkan-

sas, at the place, date, and time specified

below to testify in the above case.

Place of Testimony

Courtroom

Date and Time

YOU ARE COMMANDED to appear at the

place, date, and time specified below to testify

in the taking of a deposition in the above case.

Place of Deposition

Date and Time

YOU ARE COMMANDED, at the time of

the trial, hearing or deposition described

above, to produce and permit inspection and

copying of the following documents or objects

(list documents or objects):

YOU ARE COMMANDED, no more than

business days after receiving

this subpoena, to produce and permit inspec-

tion and copying of the following documents

or objects (list documents or objects):

Any organization not a party to this suit

that is subpoenaed for the taking of a deposi-

tion shall designate one or more officers, di-

rectors, managing agents, or other persons

who consent to testify on its behalf, and may

set forth, for each person designated, the

matters on which the person will testify. Ar-

kansas Rules of Civil Procedure 30(b)(6).

Issuing Officer Signature

and Title (Indicate if

Attorney for Plaintiff

Date

or Defendant) \_\_\_\_\_

Issuing Officer's Name,  
Address, and Phone Number

## PROOF OF SERVICE

SERVED Date	Place
-------------	-------

Served On (Print Name)

### Manner of Service

Served By (Print Name)

Title

## DECLARATION OF SERVER

I declare, under penalty of perjury under the laws of the State of Arkansas that the foregoing information contained in the Proof of Service is true and correct.

Executed on \_\_\_\_\_  
Date

Signature of Server

Address of Server

## NOTICE TO PERSONS SUBJECT TO SUBPOENAS

Regardless of his or her county of residence, a witness subpoenaed for examination at a trial or hearing must be properly served with a subpoena at least two days prior to the trial or hearing, or within a shorter time if the court so orders. The subpoena must be accompanied by a witness fee calculated at the rate of \$30.00 per day for attendance and \$0.25 per mile for travel from the witness' residence to the place of the trial or hearing. Rule 45(d), Ark. R. Civ. P.

A witness subpoenaed in connection with a deposition must be properly served with a subpoena at least five business days prior to a deposition, or within a shorter time if the court so orders. The witness is required to attend a deposition at any place within 100 miles of where he or she resides, is employed, or transacts business in person, or at such other convenient place set by court order. The subpoena must be accompanied by a witness fee calculated at the rate of \$30.00 per day for attendance and \$0.25 per mile for travel from the witness' residence to the place of the deposition. Rule 45(e), Ark. R. Civ. P.

A subpoena may command the person to whom it is directed to produce for inspection any books, papers, documents, or tangible things designated in the subpoena. The person subpoenaed may ask the court to quash or modify the subpoena if it is unreasonable or oppressive or to require that the person on whose behalf the subpoena is issued pay the reasonable cost of such production. Rule 45(b), Ark. R. Civ. P. The person subpoenaed may also object in writing to inspection or copying of any or all of the designated materials or seek a protective order from the court. If a written objection is made within ten days of service of the subpoena or on or before the time specified for compliance if such time is less than ten days, the party causing the subpoena to be issued is not entitled to inspect the materials unless the court so orders. Rule 45(e), Ark. R. Civ. P.

When a witness fails to attend in obedience to a subpoena or intentionally evades the service of a subpoena by concealment or otherwise, the court may issue a warrant for arresting and bringing the witness before the court to give testimony and answer for contempt. Rule 45(g), Ark. R. Civ. P.

**Addition to Reporter's Notes, 2010 Regarding Subpoena Form** See Rule 45, Addition to Reporter's Notes, 2010 Amendment, to allow subpoenas solely for the production of books, papers, documents, or tangible things.

## RESEARCH REFERENCES

**Ark. L. Notes.** Watkins, Recent Amendments to the Arkansas Rules of Civil and Appellate Procedure, 1988 Ark. L. Notes 47.

**Ark. L. Rev. Comment, To the Spoliator Go the Spoils: Arkansas Rejects Spoliation of Evidence as a Tort Cause of Action**, 61 Ark. L. Rev. 283.

**U. Ark. Little Rock L.J.** Survey — Civil Procedure, 10 U. Ark. Little Rock L.J. 105.

Survey — Civil Procedure, 11 U. Ark. Little Rock L.J. 137.

Sullivan, *The Need for a Business or Payroll Records Affidavit for Use in Child Support Matters*, 11 U. Ark. Little Rock L.J. 651.

Survey, Civil Procedure, 13 U. Ark. Little Rock L.J. 321.

**U. Ark. Little Rock L. Rev. Spoliation of Evidence: Why This Evidentiary Concept Should Not Be Transformed into Separate Causes of Action**, 27 U. Ark. Little Rock L. Rev. 281.



## CASE NOTES

## ANALYSIS

In general.  
 Applicability.  
 Fees.  
 Service.  
 Witnesses.

**In General.**

Motion to quash a subpoena is a "motion under these rules" for purposes of Ark. R. Civ. P. 52 and, therefore, no findings of fact and conclusions of law are required; moreover, the decision to quash a subpoena in a child support case was not overturned because there was no prejudice shown since fathers support obligation would not have been different, even if bank records showing the amount that children received from a trust had been introduced into evidence. *Lee v. Lee*, 95 Ark. App. 69, 233 S.W.3d 698 (2006).

**Applicability.**

This rule only relates to enforcement of subpoenas served inside state. *Thomas v. Pacheco*, 293 Ark. 564, 740 S.W.2d 123 (1987), limited *R.N. v. J.M.*, 347 Ark. 203, 61 S.W.3d 149 (2001).

Subsection (c) of this rule does not provide for subpoena power over out-of-state witnesses testifying in a civil case. *McNees v. Mountain Home*, 993 F.2d 1359 (8th Cir. 1993).

Where plaintiff's counsel sought newspaper photographs of the accident scene, the trial court abused its discretion by refusing to quash the subpoena because it abrogated the newspaper's property rights by requiring the newspaper to create and produce photographic prints for use in a lawsuit to which it was not a party, while prohibiting it from recovering reasonable compensation for the use of its intellectual property; however, as to standing, the newspaper was a non-party, and permissive intervention under Ark. R. Civ. P. 24(b) did not apply, nor did Ark. R. Civ. P. 60(k), because there was not a judgment entered in the case and, while there was a long-standing exception to the general standing rules for one who was pecuniarily affected by a judgment, that exception did not apply

either. *Ark. Democrat-Gazette, Inc. v. Brantley*, 359 Ark. 75, 194 S.W.3d 748 (2004).

Trial court properly dismissed administratrix's tort claim for a third-party's alleged spoliation of the evidence in a wrongful death suit because a remedy had to be sought through a means other than an individual tort claim; criminal sanctions were still available under § 5-53-111, even though a new tort was not recognized, and attorneys who were guilty of spoliation were still subject to discipline. *Downen v. Redd*, 367 Ark. 551, 242 S.W.3d 273 (2006).

**Fees.**

In Arkansas, filing fees and service fees for subpoenas are authorized by statute; the trial court was exactly correct in assessing these costs. *Wood v. Tyler*, 317 Ark. 319, 877 S.W.2d 582 (1994).

**Service.**

Subpoena directing medical doctor to appear at paternity trial and bring mother's medical records was served by defendant, a party to the case, therefore, service was improper. *Barnes v. Barnes*, 311 Ark. 287, 843 S.W.2d 835 (1992).

Where subpoena was not served at least two days prior to trial, service was untimely. *Barnes v. Barnes*, 311 Ark. 287, 843 S.W.2d 835 (1992).

**Witnesses.**

Because this rule does not give the chancery court authority to compel an out-of-state witness to appear to testify, a witness' appearance would be voluntary, and the witness would not be entitled to immunity from arrest under § 16-43-102. *McNees v. Mountain Home*, 993 F.2d 1359 (8th Cir. 1993).

**Cited:** *Williams v. State*, 304 Ark. 279, 801 S.W.2d 296 (1990); *Truck Ctr. of Tulsa, Inc. v. Autrey*, 310 Ark. 260, 836 S.W.2d 359 (1992); *In re Implementation of Amendment 80: Amendments to Rules of Civ. Procedure & Inferior Court Rules*, — Ark. —, — S.W.3d —, 2001 Ark. LEXIS 707 (May 24, 2001); *Lagrone v. State*, 90 Ark. App. 183, 204 S.W.3d 568 (2005).

**Rule 46. Exceptions unnecessary.**

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

**Reporter's Notes to Rule 46:** 1. Rule 46 is identical to FRCP 46 and to superseded *Ark. Stat. Ann.* § 27-1762 (Repl. 1962). This rule

makes no changes in Arkansas practice and procedure.

## CASE NOTES

### ANALYSIS

Appeal from chancery court.

Objections.

Preservation for appeal.

Rehearing on instructions.

Waiver.

### Appeal from Chancery Court.

Appeals from the chancery court are reviewed de novo and there is no requirement of objections to the findings, conclusions and decree of the court to obtain review on appeal; accordingly, failure to object to lack of corroboration in divorce case did not preclude review of that issue on appeal. *Morrow v. Morrow*, 270 Ark. 31, 603 S.W.2d 431 (Ct. App. 1980), overruled in part, *Lamontagne v. Ark. Dep't of Human Servs.*, 2010 Ark. 190, — S.W.3d — (2010).

### Objections.

Unless a party has no opportunity to object to a ruling of the court, an objection must be made at the time of the ruling, and the objecting party must make known to the court the action desired and the grounds of the objection. *Pearrow v. Feagin*, 300 Ark. 274, 778 S.W.2d 941 (1989).

### Preservation for Appeal.

Where in an automobile damage case the defendant brought the subject of insurance to the attention of the jury by asking the plaintiff if he had made a collision claim against his insurance carrier for an unrelated acci-

dent occurring several months after the accident at issue, and the plaintiff's attorney neither requested that the jury be instructed to disregard the question nor asked for a mistrial, the alleged prejudicial error was not preserved for purposes of appeal under this rule by merely making an objection since the attorney did not indicate to the court the action which he desired the court to take. *Faught v. Ligon Specialized Hauler, Inc.*, 273 Ark. 259, 619 S.W.2d 627 (1981).

### Rehearing on Instructions.

On a rehearing concerning instructions presented to a jury, ARCP 51, which is specifically directed toward jury instructions, controls over this rule. *Dodson Creek, Inc. v. Fred Walton Realty Co.*, 2 Ark. App. 128, 620 S.W.2d 947 (1981).

### Waiver.

Where, at a hearing concerning a city's denial of a petition for the creation of a street improvement district, both the trial judge and the city's attorney orally agreed that mandamus was the proper remedy, and the intervening property owner failed to raise an objection, the property owner in effect agreed that mandamus was the proper procedure and he thereby waived his right to make an objection at a later time. *Powell v. Bishop*, 279 Ark. 365, 652 S.W.2d 9 (1983).

**Cited:** *Henry v. Cline*, 275 Ark. 44, 626 S.W.2d 958 (1982); *Howard Bldg. Centre v. Thornton*, 282 Ark. 1, 665 S.W.2d 870 (1984).

## Rule 47. Jurors.

(a) *Examination of Jurors.* The Court shall either permit the parties or their attorneys to conduct the examination of prospective jurors or itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper.

(b) *Alternate Jurors.* The court may direct that not more than two jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the qualifications, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are



to be impanelled. The additional peremptory challenge may be used against an alternate juror only and the other peremptory challenges allowed by law shall not be used against an alternate juror.

**Reporter's Notes to Rule 47:** 1. Section of this rule is identical to FRCP 47(a) and confers upon the trial court broad discretion in the examination of prospective jurors. *Labbee v. Roadway Express, Inc.*, 469 F. 2d 169 (C.C.A. 8th, 1972), *Kiernan v. Van Schaik*, 347 F. 2d 775 (C.C.A. 3rd, 1965). Prior Arkansas law was governed by superseded *Ark. Stat. Ann.* § 39-226 (Repl. 1962), which likewise left the mode and manner of voir dire to the discretion of the trial court. This discretion did not, however, vest the trial court with arbitrary authority to prohibit voir dire by counsel. *Missouri Pacific Transp. Co. v. Johnson*, 197 Ark. 1129, 126 S.W.2d 931 (1939). In drafting this rule, the Committee intended to vest the trial court with sufficient authority to limit voir dire to a reasonable inquiry, but not to prohibit reasonable voir dire by counsel.

2. Section (b) is substantially the same as FRCP 47(b) as it existed prior to the 1966 amendments. Prior thereto, the Federal Rule limited alternate jurors to one or two in number, whereas the present Federal Rule

permits the court to seat as many as six alternates. The Committee doubted the need for more than two alternates in civil cases in this State and in most court facilities there is insufficient room to seat a large number of alternate jurors. Accordingly, the Committee determined that alternate jurors should be limited to two in number.

3. Prior Arkansas law was governed by superseded *Ark. Stat. Ann.* § 39-232 (Repl. 1962), which provided that not more than three alternate jurors could be called and impanelled. This rule continues the provisions of superseded *Ark. Stat. Ann.* § 39-234 (Repl. 1962) wherein it provided that one additional peremptory challenge was allowed when alternate jurors were used, but that such additional challenge could be used only against an alternate juror. Thus the only change in Arkansas law effected by Section (b) is the reduction from three to two in the number of alternate jurors which may be used.

## CASE NOTES

### ANALYSIS

Peremptory challenges.  
Voir dire.

### Peremptory Challenges.

In a tort action arising out of an automobile accident, it was error for the trial court to order a new trial on the ground that after the jury had been sworn, but before commencement of trial, a juror was excused for a family emergency and was replaced by a juror from the panel without giving either party an additional peremptory challenge, where neither party could demonstrate that this irregularity materially affected their substantial rights to a fair trial. *Arkansas Kraft Corp. v. Coble*, 15 Ark. App. 25, 688 S.W.2d 319 (1985).

The right of peremptory challenges is con-

ferred as a means to reject jurors — not to select jurors, and until such time as a party is forced to take an objectionable juror without the privilege of exercising a peremptory challenge, he has shown no prejudice. *Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989).

### Voir Dire.

The trial court is given great discretion with regard to the voir dire of jurors. So long as that discretion is not abused, and voir dire is not prohibited arbitrarily, the trial court's decision on the appropriate extent of voir dire will be upheld. *Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989); *National Bank of Commerce v. Beavers*, 304 Ark. 81, 802 S.W.2d 132 (1990).

## Rule 48. Number of jurors — Verdict.

Where as many as nine out of twelve jurors in a civil case agree upon a verdict, the verdict shall be returned as the verdict of such jury. The parties may, however, stipulate that a jury shall consist of any number less than twelve and that a verdict or finding of a stated majority thereof shall be taken as the verdict or finding of the jury. In any case where a verdict is less than unanimous, all jurors consenting to such verdict shall sign the same. If the verdict is unanimous, then the foreman only shall sign.

**Reporter's Notes to Rule 48:** 1. Rule 48 varies substantially from FRCP 48 and instead follows prior Arkansas law. This rule takes into account Amendment 16 to the Arkansas Constitution which permits nine or more jurors to agree upon a verdict. Under the Federal Rule, a unanimous verdict is required in every case unless the parties have agreed otherwise. *Curry v. Moore-McCormick Lines, Inc.*, 51 F. R. D. 301 (D.C. N.Y., 1970).

2. Rule 48 goes further than prior Arkan-

sas statutory law by permitting the parties to stipulate that fewer than twelve jurors may try a case and that a stated majority thereof may return a verdict. Under actual prior practice in this State, juries with fewer than twelve members have been quite common. This practice has not been officially sanctioned previously, however.

3. This rule continues the requirement that where the verdict is less than unanimous, those consenting must sign the verdict.

## CASE NOTES

### Signature.

Although a special verdict finding appellant liable was not signed by one juror, but the special verdict finding 100% liability on the part of appellant was signed by such juror, this inconsistency did not entitle appellant to

a new trial where appellant had waived its objection. *Carroll Elec. Coop. Corp. v. Carlton*, 319 Ark. 555, 892 S.W.2d 496 (1995), overruled in part *Hartford Fire Ins. Co. v. Sauer*, 358 Ark. 89, 186 S.W.3d 229 (2004).

## Rule 49. Verdicts and interrogatories.

(a) *General Verdicts and General Verdicts with Interrogatories.* The court may require a jury to return only a general verdict which pronounces generally upon all the issues, or the court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

(b) *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event, the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand, the



court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict. (Amended May 16, 1983; amended November 8, 1993, effective January 1, 1994.)

**Reporter's Notes to Rule 49:** 1. Rule 49 is substantially the same as FRCP 49 and to prior Arkansas law as embodied in superseded *Ark. Stat. Ann.* § 27-1741.1, et seq. (Repl. 1962). Implicit in the Federal Rule is the right of the trial court to use a general verdict; however, it is believed that less confusion and uncertainty will result if the use of general verdicts is expressly permitted in this rule. Hence, superseded *Ark. Stat. Ann.* § 27-1741.1 (Repl. 1962), is retained in principle in this rule.

2. Section (b) does not specifically consider the possibility of inconsistent answers to interrogatories submitted to the jury; however, the courts do have the power and authority to rectify inconsistent answers, particularly where the inconsistency is due in part to

incorrect instructions to the jury. *Stephenson v. College Misericordia*, 376 F. Supp. 1324 (D. C. Pa., 1974). The court can ask the jury to reconsider its verdict in an attempt to remove the inconsistency, *Alston v. West*, 340 F.2d 856 (C.C.A. 7th, 1965), or order a new trial. *Wright v. Kroeger Corp.*, 422 F.2d 176 (C.C.A. 5th, 1970).

3. Overall, Rule 49 should have little effect on prior Arkansas practice and procedure as it is essentially the same as the prior law.

**Addition to Reporter's Notes, 1983 Amendment:** Rule 49(a) is amended by adding all of the words after the first comma in the first sentence and by adding the remaining sentences. The effect is to add to the Rule provisions for a general verdict accompanied by answers to jury interrogatories.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey of Legislation, Civil Procedure, 14 U. Ark. Little Rock L.J. 747.

## CASE NOTES

### ANALYSIS

Consistency in interrogatory answers.  
Special interrogatories.  
Special verdicts.

### Consistency in Interrogatory Answers.

Where in a breach of contract action brought by the prospective seller of a radio station, the trial court submitted seven interrogatories to the jury, and the jury answered the first six in favor of the defendant buyers but in its answer to the seventh the jury awarded damages to the plaintiff seller, the trial court did not abuse its discretion in holding that the jury's answers established that the buyers were not liable under the contract, because the jury's consistent answers to the first six interrogatories were in conflict with their answer to the seventh interrogatory. *KLRA, Inc. v. Long*, 6 Ark. App. 125, 639 S.W.2d 60 (1982).

### Special Interrogatories.

Trial court did not abuse its discretion in rejecting defendant's proffered special interrogatories as they did not address ultimate or determinative issue, which was the amount of lost profits plaintiff suffered due to the defec-

tive clear coat finish supplied by defendant. *Neste Polyester, Inc. v. Burnett*, 92 Ark. App. 413, 214 S.W.3d 882 (2005).

Surgeon failed to preserve for appeal his arguments that the trial court submitted an incomplete description of damages in a single interrogatory, violating this rule and that this rule was also violated when the jurors signed a single interrogatory rather than separate interrogatories. Other than to request a general verdict, the surgeon never raised an objection with regard to the verdict forms and he also failed to object on the grounds that the jurors did not sign separate interrogatories. *McCoy v. Montgomery*, 370 Ark. 333, 259 S.W.3d 430 (2007).

### Special Verdicts.

Each interrogatory answered by the jury is a special verdict on that particular fact. *Carroll-Boone Water Dist. v. M. & P. Equip. Co.*, 280 Ark. 560, 661 S.W.2d 345 (1983).

**Cited:** *National Sec. Fire & Cas. Co. v. Williams*, 16 Ark. App. 182, 698 S.W.2d 811 (1985); *Jefferson Hosp. Ass'n v. Garrett*, 304 Ark. 679, 804 S.W.2d 711 (1991); *Campbell v. Entergy Ark., Inc.*, 363 Ark. 132, 211 S.W.3d 500 (2005).

**Rule 50. Motion for directed verdict and for judgment notwithstanding verdict.**

(a) *Motion for Directed Verdict or Dismissal When Made; Effect.* A party may move for a directed verdict at the close of the evidence offered by an opponent and may offer evidence in the event that the motion is not granted, without having reserved the right to do so and to the extent as if the motion had not been made. A party may also move for a directed verdict at the close of all of the evidence. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. In nonjury cases a party may challenge the sufficiency of the evidence at the conclusion of the opponent's evidence by moving either orally or in writing to dismiss the opposing party's claim for relief. The motion may also be made at the close of all of the evidence and in every instance the motion shall state the specific grounds therefor.

(b) *Motion for Judgment Notwithstanding the Verdict.*

(1) Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.

(2) Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party within 10 days after the jury has been discharged may move for judgment in accordance with his motion for directed verdict. A motion made before entry of judgment shall become effective and be treated as filed on the day after the judgment is entered. If the court neither grants nor denies the motion within 30 days of the date on which it is filed or treated as filed, it shall be deemed denied as of the 30th day.

(3) A motion for a new trial may be joined with a motion for judgment notwithstanding the verdict, or a new trial be prayed in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) *Same: Conditional Rulings on Grant of Motion.*

(1) If the motion for judgment notwithstanding the verdict provided for in subdivision (b) of this rule is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.



(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may file a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) *Same: Denial of Motion.* If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial or from directing the trial court to determine whether a new trial shall be granted.

(e) *Appellate Review.* In a jury trial, a party who does not have the burden of proof on a claim or defense must move for a directed verdict based on insufficient evidence at the conclusion of all the evidence to preserve a challenge to the sufficiency of the evidence for appellate review. A party who has the burden of proof on a claim or defense need not make such a motion to challenge on appeal the sufficiency of the evidence supporting a jury verdict adverse to that party. If for any reason the motion is not ruled upon, it is deemed denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence. (Amended May 16, 1983; amended July 9, 1984, effective September 1, 1984; amended December 10, 1990, effective February 1, 1991; amended January 22, 1998; amended January 28, 1999; amended February 10, 2005; amended October 9, 2008, effective January 1, 2009.)

**Reporter's Notes to Rule 50:** 1. With the exception of minor wording changes, Rule 50(a) is essentially the same as FRCP 50(a). The changes from the Federal Rule are patterned after Rules 50(a) of the Rhode Island and Massachusetts Rules of Civil Procedure and are designed to clarify the language of the Federal Rule. Section (a) goes further, however, and incorporates the essential provisions of superseded *Ark. Stat. Ann.* § 27-1729 (Repl. 1962) concerning the mechanics for challenging the sufficiency of the evidence presented. The demurrer to the evidence previously used in equity proceedings is not retained as such under this rule, but the motion to dismiss which is authorized under Section (a) will serve the same purpose.

2. Rule 50(a) does abolish the rule that where both parties move for a directed verdict and no instructions are requested by either party, the parties waive trial by jury. *American Colonial Ins. Co. v. Mabry Co.*, 245 Ark. 288, 432 S.W.2d 15 (1968), *Tucker v. Lisenbee*, 209 Ark. 117, 189 S.W.2d 661 (1945). This section also abolishes the former practice of having the jury foreman sign a verdict form where the court has granted a directed verdict.

3. Section (b) is identical to FRCP 50(b) and effects significant changes in Arkansas law. Superseded *Ark. Stat. Ann.* § 29-111 (Repl. 1962) permitted the court to enter a

judgment N.O.V., but required that a motion therefor had to be filed before the entry of judgment. *Oil Fields Corp. v. Cubage*, 180 Ark. 1018, 24 S.W.2d 328 (1930). Under this rule, such motion can be filed within ten days after the judgment is filed. Also, there was some confusion under prior Arkansas law as to whether a motion for directed verdict was a condition precedent for a later motion for judgment N.O.V. Under this rule, as under the Federal Rule, the motion for a directed verdict is a condition precedent.

4. Sections (c) and (d) are identical to FRCP 50(c) and (d). There were no comparable provisions under prior Arkansas law; however, these sections do not appear to significantly change prior practice and procedure in this State.

**Addition to Reporter's Notes, 1983 Amendment:** Rule 50(e) is amended to omit the reference to the motion for new trial as a means of challenging the sufficiency of the evidence. Motions for directed verdict and judgment notwithstanding the verdict are used to challenge the sufficiency of the evidence.

**Addition to Reporter's Notes, 1984 Amendment:** Rule 50(a) is amended to substitute the words "non-jury" for the word "equity" in the sixth sentence. This makes clear the means of raising the issue of sufficiency of a party's evidence to warrant further

proceedings, regardless of the nature of a non-jury case. For example, the motion should be made by the defendant at the close of the plaintiff's evidence in a bench trial in circuit court.

Rule 50(e) is amended to make it clear that a timely, oral directed verdict or n.o.v. motion satisfies the requirement of the rule and thus precludes waiver of the issues raised by those motions though they may not be in writing or "filed" as was previously required.

**Addition to Reporter's Note, 1990**

**Amendment:** Subdivision (e) of the rule has been amended to eliminate a potential conflict with subdivision (b). Under the latter, a party may not move for judgment n.o.v. unless he has made a motion for directed verdict at the close of all the evidence. However, subdivision (e) provided that a party's failure "to move for a directed verdict at the conclusion of all the evidence, or to move for judgment notwithstanding the verdict" precluded challenging the sufficiency of the evidence on appeal. The use of the disjunctive suggested, contrary to subdivision (b), that a party could preserve a challenge to the sufficiency of the evidence by moving for a judgment n.o.v. even if he had not previously moved for a directed verdict at the close of all the evidence. Accordingly, subdivision (e) has been amended to delete the phrase "or to move for judgment notwithstanding the verdict."

**Addition to Reporter's Notes, 1998**

**Amendment:** A new sentence has been added to subdivision (e) of the rule to make clear that a party's failure to obtain a ruling on his or her motion for directed verdict at the close of all the evidence is not a waiver of the issue of the sufficiency of the evidence for purposes of appellate review. Compare *Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996) (sufficiency of evidence issue was not preserved for appeal in a criminal case where there was not ruling on the defendant's motion for directed verdict at the close of all the evidence). The new sentence provides that the motion is deemed denied if for any reason it is not ruled upon.

**Addition to Reporter's Notes, 1999**

**Amendment:** Subdivision (b) has been di-

vided into three numbered paragraphs. The new second sentence of paragraph (2) makes plain that a pre-judgment motion for JNOV is permissible. This is so under the corresponding federal rule, but prior Arkansas case law suggested that such a motion was ineffective. See *Benedict v. National Bank of Commerce*, 329 Ark. 590, 951 S.W.2d 562 (1997) (motion for new trial). The new third sentence provides that a motion for JNOV not ruled on by the court within 30 days of its filing (or within 30 days of the date it is treated as filed) is "deemed denied as of the 30th day." This provision also appears in Rule 4(b)(1) of the Rules of Appellate Procedure-Civil but was added here as a reminder to counsel.

**Addition to Reporter's Notes, 2005**

**Amendment:** Rule 50(c)(2) has been clarified by substituting the word "file" for the word "serve." Under Rule 59, a motion for a new trial must be made in writing and filed with the clerk. Rule of Civil Procedure 59(b)&(c). This amendment removes the potentially confusing reference to service of the motion and harmonizes this part of Rule 50 with Rule 59.

**Addition to Reporter's Notes, 2008**

**Amendment:** Subdivision (e) has been amended and clarified. In a series of cases, the court of appeals had interpreted former subdivision (e) to require the party with the burden of proof to move for a directed verdict on the party's own claim or defense in order to challenge on appeal the sufficiency of the evidence supporting the fact-finder's decision for the opposing party. *Laird v. Weigh Sys. S. II, Inc.*, 98 Ark. App. 393, 255 S.W. 3d 900 (2007); *King v. Powell*, 85 Ark. App. 212, 148 S.W.3d 792 (2004); *Sw. Bell Tel. Co. v. Garner*, 83 Ark. App. 226, 125 S.W.3d 844 (2003). This interpretation required a motion that would rarely be granted and served no useful purpose. *King*, 85 Ark. App. at 228'29, 148 S.W.3d at 802 (Bird, J., concurring). Revised subdivision (e) makes clear that only the party against whom a claim or defense is asserted must move for a directed verdict to preserve its right to challenge on appeal the sufficiency of the evidence. The amendment overrules the contrary holdings in *Garner*, *King*, and *Laird*.

## RESEARCH REFERENCES

ALR. Prejudicial Effect of Juror Misconduct Arising from Internet Usage. 48 ALR 6th 135.

U. Ark. Little Rock L.J. Heller, Survey of Civil Procedure, 3 U. Ark. Little Rock L.J. 172.

Survey of Arkansas Law: Civil Procedure, 6 U. Ark. Little Rock L.J. 97.

Survey, Civil Procedure, 14 U. Ark. Little Rock L.J. 285.



## CASE NOTES

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**In General.**

In 1988, former ARCrP 36.21(b) (now ARCrP 33.1) was adopted, requiring the defense to move for a directed verdict both at the close of the state's case and at the close of all of the evidence in order to preserve an argument on sufficiency of the evidence on appeal; this procedural step brought the criminal rule more in line with this rule, which similarly requires that the motion be made following the plaintiff's case and after all evidence has been presented. *Reagan v. State*, 318 Ark. 380, 885 S.W.2d 849 (1994).

**Construction.**

Subsection (e) of this rule by use of the disjunctive "or" does not provide for either a motion for a directed verdict at the conclusion of all of the evidence or a motion for judgment notwithstanding the verdict as such an interpretation would be contrary to the clear language of subsection (b) of this rule. *Willson Safety Prods. v. Eschenbrenner*, 302 Ark. 228, 788 S.W.2d 729 (1990).

Former ARCrP 36.21(b) (now ARCrP 33.12) is to be read in alignment with subsection (a) of this rule; if a motion for directed verdict is general and does not specify a basis for the motion, it will be insufficient to preserve a specific argument for appellate review. *Walker v. State*, 318 Ark. 107, 883 S.W.2d 831 (1994).

The motion for a directed verdict is a condition precedent to moving for a judgment notwithstanding the verdict; the motion for judgment notwithstanding the verdict is technically only a renewal of the motion for directed verdict made at the close of the evidence. *Pennington v. Rhodes*, 55 Ark. App. 42, 929 S.W.2d 169 (1996).

The standard for granting a directed verdict is somewhat different from the summary-

judgment standard under ARCP 56(c). *Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998).

**Purpose.**

The intent of subsection (a) of this rule is to require a party testing the sufficiency of the evidence first to submit the question to the trial court, thereby permitting the court to make a ruling at the conclusion of all the evidence but prior to verdict, thus preserving the specific question for appeal. On the other hand, the motion for judgment n.o.v. is permitted by the rule for the express purpose of not only again raising the question of sufficiency of the evidence but also all other questions of law properly preserved during trial, all of which are to be considered by the court in light of the verdict rendered. *Willson Safety Prods. v. Eschenbrenner*, 302 Ark. 228, 788 S.W.2d 729 (1990).

The intent of subsection (a) of this rule is to require a party testing the sufficiency of the evidence to first submit the question to the trial court, thereby permitting that court to rule at the conclusion of all the evidence but prior to verdict, and thus preserving the specific question for appeal. *Pennington v. Rhodes*, 55 Ark. App. 42, 929 S.W.2d 169 (1996).

**Applicability.**

Subsection (e) of this rule does not apply to a nonjury trial. *Igwe v. State*, 312 Ark. 220, 849 S.W.2d 462 (1993).

Trial court properly denied bank's motion for a directed verdict on a contractor's defamation action against the bank as substantial evidence supported the contractor's claims that the bank told a potential client of the contractor's that he was not on the bank's list of approved contractors for a financing loan and the contractor showed damages as a result of the statement. *Superior Fed. Bank v. Mackey*, 84 Ark. App. 1, 129 S.W.3d 324 (2003).

This rule does not apply to civil bench trials; therefore, the failure to renew a motion for a directed verdict in a forfeiture proceeding in a bench trial did not result in a waiver of appellate rights. \$ 15,956 in U. S. Currency *v. State*, 366 Ark. 70, 233 S.W.3d 598 (2006).

**Appellate Review.**

On appeal, the appellate court will uphold the decision of the trial court's denial of a motion for judgment n.o.v. if there is any substantial evidence to support the jury's verdict. *Arkansas Power & Light Co. v. Adcock*, 281 Ark. 104, 661 S.W.2d 392 (1983).

Reviewing a motion for a directed verdict requires that the evidence be examined most favorably to the party against whom the verdict is directed, including all reasonable infer-

ences that could be drawn from the evidence; if any substantial evidence exists tending to establish an issue of fact in favor of that party, it is error for the trial court to take the case from the jury. *Ikani v. Bennett*, 284 Ark. 409, 682 S.W.2d 747 (1985).

In reviewing the denial of a motion for a directed verdict, the appellate court will give the proof its strongest probative force. Such proof, with all reasonable inferences, is examined in the light most favorable to the party against whom the motion is sought, and, if there is any substantial evidence to support the verdict, the appellate court will affirm the trial court. *Grendell v. Kiehl*, 291 Ark. 228, 723 S.W.2d 830 (1987).

Failure to state the specific grounds of a motion for a directed verdict constitutes a waiver of that argument on appeal. *Mine Creek Contractors v. Grandstaff*, 300 Ark. 516, 780 S.W.2d 543 (1989).

The burden to obtain a ruling is on the movant, and questions left unresolved are waived and may not be relied upon on appeal. *Mine Creek Contractors v. Grandstaff*, 300 Ark. 516, 780 S.W.2d 543 (1989).

In a nonjury trial, a party who does not challenge the sufficiency of evidence does not waive the right to do so on appeal. *Jones v. Jones*, 27 Ark. App. 297, 770 S.W.2d 174 (1989).

The standard of review in determining the propriety of refusing a directed verdict is whether the verdict of the jury is supported by substantial evidence, that is, evidence that is sufficient to compel a conclusion one way or the other and that goes beyond suspicion or conjecture. *Barnes, Quinn, Flake & Anderson, Inc. v. Rankins*, 312 Ark. 240, 848 S.W.2d 924 (1993).

Appellate review of a motion for a directed verdict entails determining whether plaintiff's proof was so insubstantial as to require a jury verdict, if entered in his behalf, to be set aside; in reviewing a directed verdict that has been granted, the appellate court will view the evidence that is most favorable to the party against whom the verdict was granted and give it its highest probative value, taking into account all reasonable inferences deducible from it. *Nicholson v. Simmons First Nat'l Corp.*, 312 Ark. 291, 849 S.W.2d 483 (1993).

In order to preserve a sufficiency of the evidence argument for an appellate court's consideration, a motion for directed verdict must have been made at the close of the plaintiffs' case-in-chief, and again at the conclusion of all the evidence under subsections (a) and (e) of this rule; under S. Ct. & Ct. App. Rule 4-2, the appellate brief must contain an abstract of the motions for directed verdict and a recitation of the grounds for such relief. *Stroud Crop, Inc. v. Hagler*, 317 Ark. 139, 875

S.W.2d 851 (1994), overruled in part, 2009 Ark. 332, — S.W.3d —, 2009 Ark. LEXIS 366 (2009).

Absent rare circumstances, the Supreme Court does not affirm the grant of a directed verdict, or a subsequent motion for a judgment notwithstanding the verdict, in favor of the party with the burden of proof in a negligence case. *Potlatch Corp. v. Missouri Pac. R.R.*, 321 Ark. 314, 902 S.W.2d 217 (1995).

Where the issue of due process was not raised at trial by the employer, it could not raise it in a motion for judgment notwithstanding the verdict in an attempt to preserve the issue for appeal. *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 74 S.W.3d 634 (2002).

Appellant's argument that appellee could not recover damages for future lost profits for a distributorship in Oklahoma was not preserved for review because appellant failed to move for a directed verdict on this point during the trial and failed to obtain a ruling on it from the circuit court. *S. Beach Bev. Co. v. Harris Brands, Inc.*, 355 Ark. 347, 138 S.W.3d 102 (2003).

Bank was procedurally barred from arguing on appeal that there was not substantial evidence to support an award of punitive damages to a contractor because the bank made no directed verdict motion to dismiss the contractor's claim for punitive damages, nor did it object to the jury being instructed on punitive damages; however, the bank could appeal the alleged excessiveness of the amount of punitive damages that was awarded. *Superior Fed. Bank v. Mackey*, 84 Ark. App. 1, 129 S.W.3d 324 (2003).

Where it was unclear from the record as to whether defendant had renewed her motion for a directed verdict at the close of evidence, the issue was not preserved for review. \$ 735 in *United States Currency v. State*, 364 Ark. 526, 222 S.W.3d 209 (2006).

Directed verdict, or motion to dismiss under subsection (a) of this rule, after a bench trial was properly granted because mills that purchased gatewood timber from an owner were buyers in the ordinary course of business under §§ 4-9-201(9), 4-9-320, and timber, once cut, became inventory goods under §§ 4-9-501, 4-9-102(48); thus, the mills had no duty to conduct a lien search to find a creditor's perfected security interest in the timber. *Fordyce Bank & Trust Co. v. Bean Timberland, Inc.*, 369 Ark. 90, 251 S.W.3d 267 (2007).

Directed verdict in favor of appellees on appellant's breach of contract action was affirmed, as appellees did not tacitly agree to be liable for appellant's lost profit consequential damages; although appellees knew appellant was in business of selling materials for post-and-beam structures along with drawings, there was no evidence that they tacitly agreed to pay full "Component Package" price if they



used appellant's drawings without authorization. *Deck House, Inc. v. Link*, 98 Ark. App. 17, 249 S.W.3d 817 (2007).

Two individuals entered into a "Pre-Contract Service Agreement" with appellant, which supplied plans and materials for post-and-beam structures, to purchase architectural drawings from appellant, but appellees later built a less expensive house for the individuals that was similar to appellant's plans. A directed verdict in favor of appellees on appellant's claim for tortious interference with a business expectancy was affirmed, as the contingent nature of the dealings of two individuals with appellant made the tort claim untenable as a matter of law. *Deck House, Inc. v. Link*, 98 Ark. App. 17, 249 S.W.3d 817 (2007).

Cross-appeal in a case involving fraudulent transfers was barred from consideration on review because the party asserting such did not move for a directed verdict challenging the sufficiency-of-the-evidence. This rule applied to litigants on both sides of a case. *Laird v. Weigh Sys. South II, Inc.*, 98 Ark. App. 393, 255 S.W.3d 900 (2007).

In a client's appeal of an order awarding judgment to a company on its tortious interference with a contract claim, pursuant to subsection (e) of this rule, any arguments made in the client's motion for judgment notwithstanding the verdict that were not made in its motion for a directed verdict could not be taken up on appeal. *Advanced Envtl. Recycling Techs. v. Advanced Control Solutions, Inc.*, 372 Ark. 286, 275 S.W.3d 162 (2008).

### Directed Verdict.

Where plaintiff in action on promissory note moved for directed verdict and court denied the motion, whereupon defendant also moved for a directed verdict, the trial court erred in taking the case away from the jury and deciding it in favor of plaintiff and such error was a substantive defect so that the case should be reversed irrespective of the fact that counsel for defendant failed to object to the error. *Bussey v. Bank of Malvern*, 270 Ark. 37, 603 S.W.2d 426 (1980).

The abstract was flagrantly deficient with regard to defendant's claim of insubstantial evidence, in that he did not include a motion for directed verdict, a material part of the proceedings with regard to this issue. *Samples v. Samples*, 306 Ark. 184, 810 S.W.2d 951 (1991).

In ruling on a motion for directed verdict the trial court views the evidence most favorably to the non-moving party and gives that evidence its highest probative value, taking into account all reasonable inferences deducible from it. The motion should only be granted where the evidence is so insubstantial as to require that a jury verdict for the

non-moving party be set aside. *Dorton v. Francisco*, 309 Ark. 472, 833 S.W.2d 362 (1992).

A motion for a directed verdict is a challenge to the sufficiency of the evidence, *Gilkey v. State*, 41 Ark. App. 100, 848 S.W.2d 439 (1993).

In a tort action, where there was substantial evidence to support the jury's verdict on the issues of negligence and causation, the trial court committed no error in denying defendant's motion for a directed verdict. *Ouachita Wilderness Inst. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997).

Although the evidence to prove an oral contract to make a will must be clear, cogent, satisfactory and convincing, the standard to be applied to determine a motion under this rule for a directed verdict is whether there was sufficient evidence to present such issue to the jury. *Jones v. Abraham*, 341 Ark. 66, 15 S.W.3d 310 (2000).

Under subsection (a) of this rule, a response to an opposing party's motion for a directed verdict is insufficient for purposes of satisfying this rule, and failure to comply with the requirements of this rule is a sufficient basis for denial of a motion for directed verdict and for affirmance on appeal; therefore, where buyer's arguments were made in response to defense counsel's request for a directed verdict on the contract claim, the issue was not preserved for appellate review. *Thomas v. Olson*, 364 Ark. 444, 220 S.W.3d 627 (2005).

Grocery store should have been granted a directed verdict on patron's negligence claim as the store had no duty to warn patron of any danger associated with handling a fully-loaded shopping cart; there was no duty to warn where the dangerous condition was known or obvious to the invitee. *Kroger Co. v. Smith*, 93 Ark. App. 270, 218 S.W.3d 359 (2005).

Appellants' directed verdict motion on the student's outrage claim arising out of surveillance allegations should have been granted where the record failed to reflect any evidence that the video camera in student's classroom ever recorded any footage at the school; the mere possibility that the school could have taped student did not support a claim for outrage. *Calvary Christian Sch., Inc. v. Huffstuttlar*, 367 Ark. 117, 238 S.W.3d 58 (2006).

Where minor was injured while riding his bicycle on a sidewalk in front of a business, the owner of the business owned no duty to inspect the premises to be certain they were safe and the trial court erred in failing to grant a directed verdict for the business. *Ken's Disc. Bldg. Materials, Inc. v. Meeks*, 95 Ark. App. 37, 233 S.W.3d 176 (2006).

Property owner's argument that there was insufficient evidence for a jury to find that a

property owners association disapproved her request to erect a fence was not preserved for review because the owner failed to move for a directed verdict on the issue at the close of all of the evidence. *Lineberry v. Riley Farms Prop. Owners Ass'n*, 95 Ark. App. 286, 236 S.W.3d 534 (2006).

Memorandum provided that bonus-pool monies were to go to employees who were responsible for the production of accounts and servicing and maintaining them; it was the jurors' prerogative to believe or disbelieve the evidence on this point and the court's task on appeal was only to determine whether the verdict was supported by substantial evidence, and the court did not find that the employer was entitled to a directed verdict on this point. *Aon Risk Servs. v. Meadors*, 100 Ark. App. 272, 267 S.W.3d 603 (2007).

Jury might have found that the employer's acceptance of a lesser commission from the insurer was a bad-faith hindrance of the bonus-pool process that prevented money from being placed in the pool and thus prevented it from being distributed to an employee, and the presence of substantial evidence meant that the court was unable to say that the trial court was required to grant a directed verdict on this point. *Aon Risk Servs. v. Meadors*, 100 Ark. App. 272, 267 S.W.3d 603 (2007).

Court rejected an employer's claim that because the trial court found a memorandum ambiguous in some respects, it was too indefinite to have constituted an offer; the court disagreed that an ambiguous offer was necessarily indefinite, and the court saw no error in the trial court's refusal to grant a directed verdict on that basis. *Aon Risk Servs. v. Meadors*, 100 Ark. App. 272, 267 S.W.3d 603 (2007).

Employer was not required to make a motion for directed verdict at the end of an employee's presentation of evidence to be able to challenge a jury's verdict in a dispute over commissions. *McCourt Mfg. Corp. v. Rycroft*, 2009 Ark. 332, 322 S.W.3d 491 (2009).

Circuit court erred in granting a bank's motion for a directed verdict and in finding that the bank's floor-plan agreement with a company provided for a fixed-interest rate because the language in the interest-rate clause of the parties' agreement was ambiguous, and its meaning presented a factual question for the jury; the bank's evidence that it intended that the rate be fixed and that the interest-rate clause contained "variable" language since the floor-plan agreement was drafted on a form used for both fixed and variable-rate loans, along with the company's evidence, should have been submitted to the fact-finder as criteria for resolving the meaning of the ambiguous interest-rate clause.

*Tri-Eagle Enters. v. Regions Bank*, 2010 Ark. App. 64, — S.W.3d —, 2010 Ark. App. LEXIS 58 (Jan. 20, 2010).

Trial court did not err in granting a mother's motion for a directed verdict and in denying a father's petition to change primary custody because the father did not make a prima facie case of a material change of circumstances. *Lawhead v. Harris*, 2010 Ark. App. 77, — S.W.3d —, 2010 Ark. App. LEXIS 89 (Jan. 27, 2010).

Trial court properly granted a bank a directed verdict on appellee's abuse-of-process claim, as he did not establish an ulterior purpose or an improper act on the part of the bank in suing him to collect its debt. *Nat'l Bank of Ark. v. River Crossing Partners, LLC*, 2011 Ark. 475, — S.W.3d —, 2011 Ark. LEXIS 557 (Nov. 10, 2011).

#### —Denial.

Where a secured creditor sold the collateral and then brought a deficiency action against the accommodation maker for the balance due on the note, the trial court did not err in denying the accommodation maker's motion for a directed verdict, which was based on the ground that the proof adduced was sufficient to allow the court to determine that a usurious rate of interest was sought, for three reasons: (1) the motion was made at the conclusion of the plaintiff's case and not made or renewed after all the evidence had been presented; (2) the accommodation maker failed to state specific grounds for his motion, and (3) there was still an issue of fact for the jury on the proper application of a \$1,000 payment made by the debtor. *Svestka v. First Nat'l Bank*, 269 Ark. 237, 602 S.W.2d 604 (1980).

Motion for judgment on verdict denied. *Bell v. McManus*, 294 Ark. 275, 742 S.W.2d 559 (1988).

If there is substantial evidence to support the jury verdict, the motion for directed verdict should be denied. Substantial evidence is evidence of sufficient force and character that it will compel a conclusion one way or the other, and it must induce the mind to pass beyond mere suspicion or conjecture. *Dorton v. Francisco*, 309 Ark. 472, 833 S.W.2d 362 (1992).

Trial court did not err in denying a corporate owner of a concession trailer's motion for a directed verdict in an action for personal injury damages and loss of consortium brought by a high school custodian and the custodian's spouse; the custodian, who was severely injured by an electrical shock when the custodian raised the windows of the trailer, was a foreseeable plaintiff to whom the owner owed a duty to take ordinary, prudent precautions of protection, which the owner failed to do. *Coca-Cola Bottling Co. v. Gill*, 352 Ark. 240, 100 S.W.3d 715 (2003).



Where a bank engaged in a continuous course of conduct seeking the prosecution of a mortgagor by misrepresenting material facts to the prosecutor regarding assets that were allegedly wrongfully disposed of, with the deliberate intent to injure the mortgagor such that the mortgagor's reputation and business prospects in the community were severely damaged, substantial evidence supported the elements of malicious prosecution, and the bank's motions for directed verdicts were properly denied. *Bank of Eureka Springs v. Evans*, 353 Ark. 438, 109 S.W.3d 672 (2003).

Trial court did not err in refusing to grant attorneys' motions for directed verdict and judgment notwithstanding the verdict where there was no evidence that the jury did not follow the law they were instructed upon; where the jury was instructed on both negligence and breach of contract and awarded damages, but did not specify a basis, without indication of how the jury reached its award of damages and without evidence that the jury members did not follow the trial court's instructions, the appellate court would not reverse. *Hyden v. Highcouch, Inc.*, 353 Ark. 609, 110 S.W.3d 760 (2003).

Appellate court's judgment affirming the trial court's denial of the construction company and its truck driver's motion for directed verdict on the issue of punitive damages was supported by substantial evidence as ample evidence showed that they knew, or should have known, about the dangerous condition of their truck that veered into an oncoming lane of traffic on a highway and struck a vehicle head-on, killing two people and injuring two other people in the vehicle. *D'Arbonne Constr. Co. v. Foster*, 354 Ark. 304, 123 S.W.3d 894 (2003).

Motion for directed verdict at the close of all of the evidence was still a precondition under subsection (b) of this rule for making the motion for judgment notwithstanding the verdict; thus, where the sellers failed to move for a directed verdict at the close of all of the proof, they could not appeal the trial court's denial of their motion for judgment notwithstanding the verdict. *Randles v. Cole*, 80 Ark. App. 334, 96 S.W.3d 768 (2003).

Trial court did not err in declining to direct a verdict in a conversion action where the lessee farmer whose farm equipment was converted testified to specific facts surrounding the lessee's purchase of the equipment, including the down payment and the purchase price and, in any event, the matter was a factual issue and there was sufficient evidence for the question of ownership, and the extent thereof, to go to the jury. *Hudson v. Cook*, 82 Ark. App. 246, 105 S.W.3d 821 (2003).

Where a telephone company failed to move for a directed verdict at the conclusion of all

the evidence in its negligence action against a contractor, it could not challenge the sufficiency of the evidence for the first time on appeal. *Southwestern Bell Tel. Co. v. Garner*, 83 Ark. App. 226, 125 S.W.3d 844 (2003).

In a policy owner's action against insurer and its agent, the denial of the insurer's and agent's motions for a directed verdict on the tort of outrage, based on the rescission of a life insurance policy after policy owner's son was killed, was affirmed on appeal because there was evidence that the enrolling agent misrepresented himself to be the agent's manager when he was really unlicensed in Arkansas as an insurance agent; in addition, neither the application, the insurer's manual, nor the policy defined "dependent" and the insurer relied on the agent's personnel to define the term to the owner. *Cincinnati Life Ins. v. Mickles*, 85 Ark. App. 188, 148 S.W.3d 768 (2004).

Where the express terms of purchase orders sent by a manufacturer to a supplier did not clearly require written confirmation as a prerequisite to the formation of a contract, the purchase order term requiring written confirmation by the supplier did not govern over the parties course of conduct in which the manufacturer had paid invoices despite the lack of written confirmation from the supplier; hence, in the supplier's action to recover for goods sold, the manufacturer's motion for a directed verdict was properly denied. *Bio-Tech Pharmacal, Inc. v. Int'l Bus. Connections, LLC*, 86 Ark. App. 220, 184 S.W.3d 447 (2004).

In a personal injury suit brought by a hotel guest who fell when the toilet lid detached from the toilet assembly, the trial court erred when it denied her motion for a directed verdict on comparative fault; there was no substantial evidence of the guest's negligence and the issue of comparative fault should not have been presented to the jury. *Marx v. Huron Little Rock*, 88 Ark. App. 284, 198 S.W.3d 127 (2004).

Court properly directed a verdict for insurer on a bad faith claim where plaintiff submitted no evidence of any affirmative misconduct on the part of the insurer in handling a settlement; to the contrary, the insurer investigated the claim, reviewed accident reports, and determined that it was in the best interest of its insured to settle. *Switzer v. Shelter Mut. Ins. Co.*, 362 Ark. 419, 208 S.W.3d 792 (2005).

Directed verdict in favor of biological daughter in step-daughters' action to set aside deeds that had been conveyed in favor of the daughter was proper as the daughter did not have the burden of proving her father's mental capacity and freedom from undue influence. *Stanley v. Burchett*, 93 Ark. App. 54, 216 S.W.3d 615 (2005).

**—Jury Trial.**

In a trial by jury, a trial court is not required to grant a directed verdict on its own motion. *Mikel v. Hubbard*, 317 Ark. 125, 876 S.W.2d 558 (1994).

**—Renewal of Motion.**

A civil defendant is not required to restate his grounds for directed verdict where he has made a specific motion at the close of the plaintiff's case, and incorporates the same arguments by the later renewal. *Aronson v. Harriman*, 321 Ark. 359, 901 S.W.2d 832 (1995).

Despite the "in every instance" language in subsection (a) of this rule, as long as a specific basis was articulated for the original directed-verdict motion, a general renewal is sufficient. *Dale v. State*, 55 Ark. App. 184, 935 S.W.2d 274 (1996).

**—Specific Grounds.**

A statement of the specific grounds for a directed verdict is required so that a judgment will not be entered upon a ground that might have been met with proof if the ground had been specified. *Standridge v. City of Hot Springs*, 271 Ark. 754, 610 S.W.2d 574 (1981); *Lytle v. Wal-Mart Stores, Inc.*, 309 Ark. 139, 827 S.W.2d 652 (1992).

Where defendant moved at the end of the case for a directed verdict, but failed to state in the motion the specific grounds relied upon, this failure was sufficient basis under subsection (a) of this rule to deny the motion, since the requirement of stating specific grounds is mandatory. *Dodson Creek, Inc. v. Fred Walton Realty Co.*, 2 Ark. App. 128, 620 S.W.2d 947 (1981).

Failure of a motion for directed verdict to comply with this rule's requirement, that the specific grounds relied on be stated, is a sufficient basis for denial of the motion and for affirmance on appeal; the requirement that the directed verdict motion state the specific grounds therefor is especially necessary when a case involves multiple issues. *Security Pac. Hous. Servs., Inc. v. Friddle*, 315 Ark. 178, 866 S.W.2d 375 (1993).

Although the trial court interrupted defense counsel when he made his initial motion for a directed verdict and was very quick to deny the second one and the motion for judgment notwithstanding the verdict, counsel should nevertheless have asked to put the grounds for those motions on the record. *Yam's, Inc. v. Moore*, 319 Ark. 111, 890 S.W.2d 246 (1994).

Where the residence was constructed in 1987, but appellant's suit was not filed until 1995, in the absence of fraudulent concealment of the alleged deficiencies in construction of their home, appellant's suit was barred as of 1992 by the statute of limitations found in § 16-56-112(a) and the builder was prop-

erly granted a directed verdict. *Curry v. Thornsberry*, 354 Ark. 631, 128 S.W.3d 438 (2003).

Where appellant never articulated that the basis for its motion was the alleged technical failure of appellee's experts to opine with a "reasonable degree of medical certainty" in connection with the element of proximate cause, appellant's failure to specify in what respect the evidence was deficient caused its motion for a directed verdict not to have been specific enough to preserve the issue for appeal. *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231, 148 S.W.3d 754 (2004).

**—Waiver of Error.**

The creation of subsection (a) of this rule, which states that a party may move for a directed verdict at the close of his opponent's evidence without reserving the right to offer evidence if the motion is not granted, does not change the settled rule that failure to renew a motion for a directed verdict following the overruling of a motion for directed verdict after the plaintiff has introduced its evidence but before defendant has introduced its evidence, waives any error. *Sanson v. Pullum*, 273 Ark. 325, 619 S.W.2d 641 (1981).

The adoption of subsection (a) of this rule did not change the settled rule that, by going forward with proof after the motion for a directed verdict is denied, the defendant waives any error in the trial court's failure to direct a verdict at the close of the plaintiff's case. *Higgins v. Hines*, 289 Ark. 281, 711 S.W.2d 783 (1986).

In a wrongful death action brought by the administrator of the deceased patient's estate against a nursing center and its parent company, because the center and the company failed to renew their motion for directed verdict following the conclusion of the administrator's rebuttal, they waived any question pertaining to the sufficiency of the evidence to support the jury's award of punitive damages. *Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003), cert. denied, 540 U.S. 1012, 124 S. Ct. 532, 157 L. Ed. 424 (2003), cert. denied, 540 U.S. 1004, 124 S. Ct. 535, 157 L. Ed. 2d 409 (2003).

**Disposition of Motion.**

Former ARAP 4(c), by its terms, is applicable to specific civil motions including a motion for judgment notwithstanding the verdict under subsection (b) of this rule, a motion to amend findings of fact or to make additional findings of fact under ARCP 52(b), and a motion for a new trial under ARCP 59(b); however, ARAP 4(c) has been applied to criminal matters where the motion made following the judgment of conviction was analogous to a civil motion made under subsection (b) of this rule, ARCP 52(b), or ARCP 59(b). *Fuller v. State*, 316 Ark. 341, 872 S.W.2d 54 (1994),



questioned *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997).

Trial court improperly denied a bank's directed verdict motion against a contractor on the contractor's breach of contract claim because the alleged loan commitment letter by the bank to the contractor did not constitute an enforceable contract as essential terms of the alleged contract were missing from the letter. *Superior Fed. Bank v. Mackey*, 84 Ark. App. 1, 129 S.W.3d 324 (2003).

#### **Error Waived.**

Trial court erred by evaluating the witnesses' credibility prematurely, because the credibility of the builder's witnesses was a matter for the trial court as the finder of fact, not a matter for the trial court in evaluating whether the builder made a prima facie case on its breach of contract claim. However, the builder waived the error because it failed to argue the point until its reply brief. *Rymor Builders, Inc. v. Tanglewood Plumbing Co.*, 100 Ark. App. 141, 265 S.W.3d 151 (2007).

Under subsection (e) of this rule, because appellants failed to renew their motion for a directed verdict at the close of the evidence, they waived any challenge to the sufficiency of the evidence regarding a punitive damages award. *Bronakowski v. Lindhurst*, 2009 Ark. App. 513, 324 S.W.3d 719 (2009).

#### **Judgment Notwithstanding Verdict.**

The trial court may enter judgment notwithstanding the verdict only if there is no substantial evidence to support the jury verdict, and one party is entitled by law to a judgment in his favor; and on appeal the Supreme Court reviews the evidence and all reasonable inferences deducible therefrom in the light most favorable to the party against whom the judgment notwithstanding the verdict was entered. *McCuistion v. City of Siloam Springs*, 268 Ark. 148, 594 S.W.2d 233 (1980).

There was substantial evidence to support the jury's verdict that power company willfully cut timber on plaintiff's land, and the trial court did not err in denying power company's motion for judgment n.o.v. *Arkansas Power & Light Co. v. Adcock*, 281 Ark. 104, 661 S.W.2d 392 (1983).

Motion for JNOV proper where verdict failed to award compensatory damages to support punitive damages which were awarded. *Bell v. McManus*, 294 Ark. 275, 742 S.W.2d 559 (1988).

A trial court may not substitute its view of the evidence for that of the jury and grant a new trial, unless the verdict is clearly against the preponderance of the evidence. *Razorback Cab of Fort Smith, Inc. v. Martin*, 313 Ark. 445, 856 S.W.2d 2 (1993).

Under subsection (b) of this rule, a motion for a directed verdict is a condition precedent to moving for a judgment notwithstanding the

verdict; a motion for judgment notwithstanding the verdict is technically only a renewal of the motion for directed verdict made at the close of the evidence. *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993).

The evidence presented by plaintiff in her effort to assign liability to the manufacturer was not substantial enough to negate the existence of other possibilities of sources of contamination and therefore required the setting aside of the jury's verdict. *Campbell Soup Co. v. Gates*, 319 Ark. 54, 889 S.W.2d 750 (1994).

Since Arkansas does not recognize the principle of additur, a motion for additur does not qualify as a motion for judgment nov or a motion for new trial. *Routh Wrecker Serv., Inc. v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998).

Nowhere in the rule, nor in any rule of appellate procedure, was a party permitted to appeal the denial of a motion for JNOV where there had been no final determination of the merits. *Farm Bureau Mut. Ins. Co. v. Running M Farms, Inc.*, 348 Ark. 313, 72 S.W.3d 502 (2002).

In a slip and fall case, there was no evidence from which the jury could have determined, without speculation and conjecture, how the strapping band came to be on the floor or how long it was there prior to the accident, and the trial court's entry of judgment notwithstanding the verdict for the department store was proper. *Tomlin v. Wal-Mart Stores*, 81 Ark. App. 198, 100 S.W.3d 57 (2003).

In a dispute over uninsured motorist benefits, insurer's motion for judgment notwithstanding the verdict should have been granted because, even though a front-end loader could have been both "special mobile equipment" and an "auto" under an insurance policy, there was no showing that the vehicle was designed primarily for use on public roads. *S. Farm Bureau Cas. Ins. Co. v. Spears*, 360 Ark. 200, 200 S.W.3d 436 (2004).

Trial court erred in granting appellants' motion for judgment notwithstanding the verdict as to a prescriptive easement because they did not move for a directed verdict at the close of all of the evidence on this ground and substantial evidence supported the jury's finding that there was no such easement. *King v. Powell*, 85 Ark. App. 212, 148 S.W.3d 792 (2004).

Where jury returned a verdict in favor of the teacher in her claim of outrage against the principal, trial court's failure to act on the principal's motion for judgment notwithstanding the verdict within 30 days constituted a denial of that motion, and the trial court's subsequent granting of that motion 137 days after entry of judgment was void and of no effect; the civil order entered by the

court the day after the jury returned its verdict constituted the entry of judgment in the case. *White v. Mattingly*, 89 Ark. App. 55, 199 S.W.3d 724 (2004).

Appellate court declined to address the merits of the denial of buyer's motion for judgment notwithstanding the verdict (JNOV) where it had already concluded that buyer's motion for directed verdict was not supported by specific grounds and, thus, the merits of the denial were not preserved for appellate review; buyer's motion for JNOV, which was essentially a renewal of the motion for a directed verdict, was also not preserved for appellate review. *Thomas v. Olson*, 364 Ark. 444, 220 S.W.3d 627 (2005).

Because seller failed to file a timely motion for judgment notwithstanding the verdict and a new trial in purchaser's fraud action against it, the time to file its notice of appeal was not extended under Ark. R. App. P. Civ. 4(b), and the failure to file a notice of appeal within 30 days of the August 3, 2005, judgment required the appellate court to dismiss the appeal because it lacked jurisdiction to consider it. *River Valley Motors, Inc. v. Ramey*, 96 Ark. App. 180, 239 S.W.3d 555 (2006).

Judgment notwithstanding the verdict was properly granted in a malicious prosecution case where the passenger of a truck was arrested when the vehicle bumped a key-card entry gate; even if there was no damage to the gate or a mistake about such, there was still probable cause for an arrest for criminal mischief or attempt under Ark. R. Crim. P. 4.1(c). *Coombs v. Hot Springs Vill. Prop. Owners Ass'n*, 98 Ark. App. 226, 254 S.W.3d 5 (2007).

Motion for judgment notwithstanding the verdict was denied in a case involving fraudulent transfers to a wife, as an insider, by a judgment debtor under § 4-59-204(a)(1) because the debtor and the wife were unable to substantiate the claim that wife purchased the stocks with money won at a horse race or that a transfer was due to the debtor's poor health. *Laird v. Weigh Sys. South II, Inc.*, 98 Ark. App. 393, 255 S.W.3d 900 (2007).

Because the evidence supported a punitive damage award in favor of appellees, the trial court did not err in denying appellants' motion for judgment notwithstanding the verdict. *Bronakowski v. Lindhurst*, 2009 Ark. App. 513, 324 S.W.3d 719 (2009).

Sellers sued a prospective home buyer for breach of contract; as the contract was subject to the buyer's ability to obtain financing, and that condition was not met, the trial court erred in denying his motion for judgment notwithstanding the verdict. That he had provided the sellers with a letter of financing approval was immaterial, because that approval was later revoked due to a material change in his financial circumstances. *Carter*

*v. Cline*, 2011 Ark. 474, — S.W.3d —, 2011 Ark. LEXIS 561 (Nov. 10, 2011).

### **Jurisdiction.**

Where appellee's August 9 motion for j.n.o.v. or a new trial was timely filed within 10 days of the August 5 judgment, but the trial court neither granted nor denied the motion within 30 days of its filing, so that the motion was deemed denied as of the 30th day, September 8, the trial court's failure to act on appellee's motion within 30 days of its filing resulted, by operation of law, in that court's loss of jurisdiction to decide the motion; therefore, the September 23 order purporting to grant appellee's j.n.o.v. motion was void and of no effect. *Farm Bureau Mut. Ins. Co. v. Sudrick*, 49 Ark. App. 84, 896 S.W.2d 452 (1995).

### **Non-Jury Case.**

Proper motion to challenge the sufficiency of an opponent's evidence in a non-jury case is a motion to dismiss. *Rymor Builders, Inc. v. Tanglewood Plumbing Co.*, 100 Ark. App. 141, 265 S.W.3d 151 (2007).

### **Sufficiency of the Evidence.**

In order for an appellant to challenge the sufficiency of the evidence in a jury trial, he must either move for a directed verdict at the conclusion of all the evidence, move for a judgment notwithstanding the verdict, or move for a new trial because of insufficiency of the evidence. The failure to do one of these three requirements precludes raising the issue on appeal. *McFall Chevrolet Co. v. Collins*, 271 Ark. 469, 609 S.W.2d 118 (1980), questioned *B.J. McAdams, Inc. v. Doggett Leasing Co.*, 13 Ark. App. 162, 681 S.W.2d 406 (1984).

Subsection (e) of this rule applies only to jury trials. *Bass v. Koller*, 276 Ark. 93, 632 S.W.2d 410 (1982); *Sipes v. Munro*, 287 Ark. 244, 697 S.W.2d 905 (1985).

In equity cases, a party may challenge the sufficiency of the evidence at the conclusion of the opponent's evidence by moving either orally or in writing to dismiss the opposing party's claim for relief; however, in a nonjury trial, a party who does not challenge the sufficiency of evidence does not waive the right to do so on appeal. *Harpole v. Harpole*, 10 Ark. App. 298, 664 S.W.2d 480 (1984).

Appellant could not question the sufficiency of the evidence to support the verdict where appellant failed to renew its motion for a directed verdict at the conclusion of all the evidence, nor did appellant file a motion for judgment notwithstanding the verdict. *B.J. McAdams, Inc. v. Doggett Leasing Co.*, 13 Ark. App. 162, 681 S.W.2d 406 (1984); *City of Helena v. Chrestman*, 17 Ark. App. 235, 707 S.W.2d 338 (1986).

Since a motion for a new trial may be granted under ARCP 59 where the verdict is



clearly contrary to the preponderance of the evidence, and such a motion does not test the sufficiency of the evidence, the plaintiffs were not precluded by subsection (e) of this rule from moving for a new trial because they had failed to move for directed verdict. *Yeager v. Roberts*, 288 Ark. 156, 702 S.W.2d 793 (1986).

Before a party may question the sufficiency of the evidence in a jury trial, he must comply with subsection (e) of this rule. Where appellant does not properly request the trial court to rule on the sufficiency of the evidence, the reviewing court will not consider the matter on appeal. *Copelin v. Corter*, 291 Ark. 218, 724 S.W.2d 146 (1987); *Laster v. Tilley*, 295 Ark. 488, 749 S.W.2d 326 (1988); *Mitchell v. Goodall*, 297 Ark. 332, 761 S.W.2d 919 (1988).

A party must test the sufficiency of the evidence by motions for directed verdict and judgment notwithstanding the verdict, not by a motion for new trial. *Majewski v. Cantrell*, 293 Ark. 360, 737 S.W.2d 649 (1987).

Subsection (e) of this rule applies to the issue of sufficiency of the evidence in criminal cases except for certain phases of death penalty cases, errors made by the trial judge at a time when there was no opportunity to object, errors so flagrant and highly prejudicial as to require the court to intervene sua sponte and errors relating to the admission or exclusion of evidence which affect substantial rights. *Ballew v. State*, 21 Ark. App. 215, 731 S.W.2d 222 (1987).

In the absence of a proper objection or motion in the trial court, appellate court would not review the sufficiency of the evidence. *Ballew v. State*, 21 Ark. App. 215, 731 S.W.2d 222 (1987).

At the conclusion of all the evidence, a failure to renew the motion for directed verdict attacking the sufficiency of all the evidence constitutes a waiver of the issue. *Willson Safety Prods. v. Eschenbrenner*, 302 Ark. 228, 788 S.W.2d 729 (1990).

Neither a motion for new trial, nor an appeal arguing that the jury's verdict was against the preponderance of the evidence under ARCP 59(a) and (f), tests the sufficiency of the evidence to go to the jury and neither is precluded by subsection (e) of this rule. *Hall v. Grimmer*, 318 Ark. 309, 885 S.W.2d 297 (1994).

Although ARCP 59 specifically states that a motion for a new trial may be granted where the verdict is clearly contrary to a preponderance of the evidence, such a motion does not test the sufficiency of the evidence to go to the jury; a party must test the sufficiency of the evidence by a motion for a directed verdict or judgment notwithstanding the verdict, not by a motion for new trial. *Benton v. Barnett*, 53 Ark. App. 146, 920 S.W.2d 30 (1996).

A party testing the sufficiency of the evidence must move for a directed verdict at the

end of plaintiff's case-in-chief and again at the close of all evidence, and state specific grounds upon which it seeks such relief. *Houston v. Knoedl*, 329 Ark. 91, 947 S.W.2d 745 (1997), overruled in part, 2009 Ark. 332, — S.W.3d —, 2009 Ark. LEXIS 366 (2009).

Finding in favor of the spouse that a pharmacist incorrectly filled the decedent's prescription resulting in his death was proper where the store's point on appeal was a challenge to the sufficiency of the evidence, under subsection (e) of this rule, and not a motion for a new trial, under ARCP 59; because the motion for a new trial was really a challenge to the sufficiency of the evidence supporting the proximate-cause element of the spouse's action for medical injury, it had not been properly preserved. *Wal-Mart Stores, Inc. v. Tucker*, 353 Ark. 730, 120 S.W.3d 61 (2003).

In a trespass suit, the trial court properly denied defendant's motion for directed verdict on the issue of damages; plaintiff produced substantial evidence that her use of her property was recreational and that the trees defendant destroyed had aesthetic value, thus, the cost to replace the trees and not the property's diminution in value was the proper measure of damages. *King v. Powell*, 85 Ark. App. 212, 148 S.W.3d 792 (2004).

Where parents filed suit against an aunt and the aunt's former husband to recover for a burn suffered by the child while in the aunt's care, a directed verdict was improperly granted to the aunt and the husband because the trial court improperly evaluated the claim using the standard of care for a licensee when the proper standard of care was whether the aunt used ordinary care to avoid injury to the child. *Anderson v. Mitts*, 87 Ark. App. 19, 185 S.W.3d 154 (2004).

In a personal injury case, plaintiff's motion for a new trial did not preserve a sufficiency of the evidence argument for appeal because he did not raise the argument in a motion for directed verdict at the close of all the evidence. *Switzer v. Shelter Mut. Ins. Co.*, 362 Ark. 419, 208 S.W.3d 792 (2005).

Circuit court did not err in failing to direct a verdict in favor of insurer on accident victim's claim where neither the driver nor the owner of the vehicle at fault presented proof of insurance such that the evidence presented went beyond mere suspicion and conjecture and was sufficient to support the jury's conclusion that the vehicle was uninsured. *Gailey v. Allstate Ins. Co.*, 362 Ark. 568, 210 S.W.3d 40 (2005).

Insurer's motion for a directed verdict should have been granted where insurer determined that the documentation submitted failed to prove that insured was disabled under the policy, and the insured offered no other evidence that insurer engaged in any

affirmative acts of bad faith. *Unum Life Ins. Co. of Am. v. Edwards*, 362 Ark. 624, 210 S.W.3d 84 (2005).

Where the judge in a bench trial awarded plaintiff damages, defendant was not precluded from raising a sufficiency of the evidence argument on appeal where he did not first file a motion for directed verdict before the trial court. *Jackson v. Pitts*, 93 Ark. App. 466, 220 S.W.3d 265 (2005).

Directed verdicts in favor of the administrative service and consulting service shareholder were affirmed because the daughter did not provide substantial evidence that the administrative service supervised the nursing home employees or had any responsibility for the number of staff on duty during her mother's time there, and the daughter offered no evidence that the shareholder failed to implement proper policies or that he hired an ineffective administrator; however, the daughter did present evidence from which a jury could reasonably conclude that the consulting service was negligent and that its negligence was a proximate cause of the mother's injuries and death. *Scott v. Cent. Ark. Nursing Ctrs., Inc.*, 101 Ark. App. 424, 278 S.W.3d 587 (2008).

Circuit court did not err in denying the medical center's insurer's motions for judgment notwithstanding the verdict and directed verdict as there was sufficient evidence to support the determination that the medical center negligently supervised and retained the offending employee; the negligent supervision or retention of the employee was the proximate cause of the child's injuries, and was foreseeable. *Medical Assur. Co. v. Castro*, 2009 Ark. 93, 302 S.W.3d 592 (2009).

Had appellants properly preserved the issue regarding the denial of their motion for directed verdict for review, sufficient evidence supported the trial court's decision to submit the punitive damages issue to the jury, given that (1) the jury could and did find that appellants intentionally cut trees from appellees' property and caused the clearing of that property in order to obtain a lake view, (2) appellants did so despite being repeatedly warned to stay off the property, and (3) appellants ultimately profited from their wrongful actions. *Bronakowski v. Lindhurst*, 2009 Ark. App. 513, 324 S.W.3d 719 (2009).

Pursuant to subsection (a) of this rule, an attorney and his firm were entitled to a directed verdict in a legal malpractice case based on the creation of an unsuccessful employee stock ownership plan (ESOP) because, without expert testimony, nothing in the evidence established the standard of care or showed that the attorney breached it; the client produced no evidence that a feasibility study had predicted that the ESOP might not

work. *Grassi v. Hyden*, 2010 Ark. App. 203, — S.W.3d —, 2010 Ark. App. LEXIS 186 (Mar. 3, 2010).

### Time for Motion.

The plaintiff's motion for directed was offered at a time other than that contemplated by subsection (a) of this rule where the motion was made at the close of the plaintiff's case. *Scott Truck & Tractor Co. v. Alma Tractor & Equip., Inc.*, 72 Ark. App. 79, 35 S.W.3d 815 (2000).

Although a circuit court's grant of a directed verdict by the Department of Human Services at the close of its case in chief in a dependency-neglect proceeding was improper under subsection (a) of this rule, the appellate court refused to reverse the adjudication order because the parents failed to raise their Rule 50 argument in the trial court. *Reid v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 156, — S.W.3d —, 2010 Ark. App. LEXIS 168 (Feb. 17, 2010).

Motion for a directed verdict was made "at the conclusion of all the evidence" and complied with subsection (e) of this rule as the motion was made after the last witness had testified and before any instructions or arguments were made to the jury. Further, no additional proof was introduced after the movant renewed its directed-verdict motion. *Holiday Inn Franchising v. Hotel Assocs.*, 2011 Ark. App. 147, — S.W.3d —, 2011 Ark. App. LEXIS 167 (Feb. 23, 2011).

### Written Record.

If parties plan to base their arguments on the timeliness of the notice of appeal from the denial of a motion for a judgment n.o.v. or a new trial motion upon a "written record" that a hearing has been set or held, the "written record," a transcript of the hearing or other record of its having been held must be filed and made an official record of the court within 30 days from the making of the motion for judgment n.o.v. or for a new trial. *Brittenum & Assocs. v. Mayall*, 286 Ark. 427, 692 S.W.2d 248 (1985).

**Cited:** *Tucker v. Rasdon*, 272 Ark. 63, 612 S.W.2d 106 (1981); *Dalrymple v. Fields*, 276 Ark. 185, 633 S.W.2d 362 (1982); *In re Amendments to Rules of Civil Procedure*, 279 Ark. 470, 651 S.W.2d 63 (1983); *Graham v. Crandall*, 11 Ark. App. 109, 668 S.W.2d 548 (1984); *Southwestern Bell Tel. Co. v. Mid-State Constr. Co.*, 285 Ark. 413, 688 S.W.2d 278 (1985); *Harris v. Arkansas Book Co.*, 287 Ark. 353, 700 S.W.2d 41 (1985); *Hooper v. Ragar*, 289 Ark. 152, 711 S.W.2d 148 (1986); *Cornett v. Prather*, 290 Ark. 262, 718 S.W.2d 433 (1986); *Cornett v. Prather*, 293 Ark. 108, 732 S.W.2d 469 (1987); *Newberry v. Johnson*, 294 Ark. 455, 743 S.W.2d 811 (1988); *Lancaster v. Schilling Motors, Inc.*, 299 Ark. 365, 772 S.W.2d 349 (1989); *Cozart v. Lewis*, 299 Ark.



500, 774 S.W.2d 127 (1989); *First State Bank & Trust Co. v. Sledge*, 29 Ark. App. 77, 777 S.W.2d 227 (1989); *Central Prod. Credit Assoc. v. Pearson*, 26 Ark. App. 277, 764 S.W.2d 468 (1989); *King v. Little Rock Sch. Dist.*, 301 Ark. 148, 782 S.W.2d 574 (1990); *Shamlin v. Shuffield*, 302 Ark. 164, 787 S.W.2d 687 (1990); *Smith v. State*, 30 Ark. App. 111, 783 S.W.2d 72 (1990); *Andrews v. State*, 305 Ark. 262, 807 S.W.2d 917 (1991); *65th Ctr., Inc. v. Copeland*, 308 Ark. 456, 825 S.W.2d 574 (1992); *American Health Care Providers, Inc. v. O'Brien*, 318 Ark. 438, 886 S.W.2d 588 (1994); *Tucker v. Lake View Sch. Dist.*, 321 Ark. 618, 906 S.W.2d 295 (1995), appeal dismissed 323 Ark. 693, 917 S.W.2d 530 (1996); *Smith v. State*, 49 Ark. App. 73, 896 S.W.2d 450 (1995), appeal denied 320 Ark. 658, 898 S.W.2d 468 (1995); *Stacks v. Jones*, 323 Ark.

643, 916 S.W.2d 120 (1996); *McLaughlin v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996); *Schmidt v. Pearson, Evans, & Chadwick*, 326 Ark. 499, 931 S.W.2d 774 (1996); *Swink v. Griffin*, 333 Ark. 400, 970 S.W.2d 207 (1998); *Dobie v. Rogers*, 339 Ark. 242, 5 S.W.3d 30 (1999); *Potlatch Corp. v. Triplett*, 70 Ark. App. 205, 16 S.W.3d 279 (2000); *Murchison v. Safeco Ins. Co.*, 367 Ark. 166, 238 S.W.3d 11 (2006); *Searcy Farm Supply, LLC v. Merchs. & Planters Bank*, 369 Ark. 487, 256 S.W.3d 496 (2007); *Travis Lumber Co. v. Deichman*, 2009 Ark. 299, 319 S.W.3d 239 (2009); *Mitchell v. Fells*, 2010 Ark. App. 663, — S.W.3d —, 2010 Ark. App. LEXIS 696 (Oct. 6, 2010); *Paschal v. Paschal*, 2011 Ark. App. 515, — S.W.3d —, 2011 Ark. App. LEXIS 541 (2011); *Jewell v. Fletcher*, 2012 Ark. 132, — S.W.3d —, 2012 Ark. LEXIS 153 (Mar. 29, 2012).

### Rule 51. Instructions to jury: objection.

At the close of the evidence or at such earlier time as the court may reasonably direct, any party may submit requested jury instructions to the court. The court shall inform counsel of its proposed action upon the requested instructions and also inform counsel of all other instructions it proposes to submit to the jury. The court shall instruct the jury prior to the arguments of counsel. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of his objection, and no party may assign as error the failure to instruct on any issue unless such party has submitted a proposed instruction on that issue. Opportunity shall be given to make objections to instructions out of the hearing of the jury.

A mere general objection shall not be sufficient to obtain appellate review of the court's action relating to instructions to the jury except as to an instruction directing a verdict or the court's action in declining to do so. (Amended May 24, 2001, effective July 1, 2001.)

**Reporter's Notes to Rule 51:** 1. Rule 51 varies materially from FRCP 51 and instead tracks prior Arkansas law. Article 7, Section 23 of the Arkansas Constitution requires trial judges to declare the law and reduce the charge to writing at the request of either party. There was no specific statutory provision under prior Arkansas law which required that a party's requested jury instructions had to be submitted to the court by a certain time. Many courts adopted local rules specifying such time and this rule will have no effect on such local rules, provided, of course, that the time limit specified therein is reasonable.

2. This rule requires the trial court to inform counsel of the action taken on requested jury instructions and also inform counsel of the instructions which the court intends to submit to the jury. This is to enable counsel to review the instructions to be given and frame

such objections thereto as may be desired. Also, this rule continues the prior Arkansas procedure of having jury instructions given prior to the arguments of counsel as provided in superseded *Ark. Stat. Ann.* § 27-1727 (Repl. 1962).

3. The provisions of this rule concerning objections to instructions are lifted from Rule 13 of the Uniform Rules for Circuit and Chancery Judges [abolished]. Under the Federal Rule, objections may be made at any time prior to the retirement of the jury for deliberations. Under this rule, objections must be made before or at the time the instructions are given.

**Addition to Reporter's Notes, 2001 Amendment:** The word "trial," which modified "court's" the second paragraph, has been deleted in light of Constitutional Amendment 80, which established the circuit courts as the

"trial courts of original jurisdiction" in the state and abolished the separate chancery and probate courts.

## RESEARCH REFERENCES

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## CASE NOTES

### ANALYSIS

Appeals.

Discretion of court.

Due process.

Failure to make proper objection.

General objection.

Objection procedure.

Refusal to give instruction.

Rehearing on instructions.

Timeliness.

### Appeals.

On appeal, the court will not consider arguments on those instructions to which there was no objection or, where necessary, an instruction was not offered. In order to preserve an objection regarding an erroneous instruction of law, the party appealing must make a timely objection by telling the trial judge why the instruction is wrong, and when the point of appeal is that the court failed to give an instruction, the party appealing must submit a proposed instruction on the issue. *Peoples Bank & Trust Co. v. Wallace*, 290 Ark. 589, 721 S.W.2d 659 (1986); *Viking Ins. Co. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992).

Simply giving a set of instructions to the trial judge prior to trial is not sufficient to allow the appellate court to address the propriety of proposed instructions on appeal, as the responsibility of bringing a record up on appeal from which the court can fully review the proceedings rests with appellant. *City of Little Rock v. Weber*, 298 Ark. 382, 767 S.W.2d 529 (1989).

Where appellant was denied a jury instruction, her failure to proffer or abstract the desired instruction as part of her appeal was fatal to her appellate argument. *Kelley v. Medlin*, 309 Ark. 146, 827 S.W.2d 655 (1992).

Jury instruction issues were not preserved for review where it could not be determined from the record whether, or in what form, the proposed jury instructions were proffered. *Fisher v. Valco Farms*, 328 Ark. 741, 945 S.W.2d 369 (1997).

### Discretion of Court.

Where in a personal injury action, the trial court instructed the jury before any evidence was presented that the parent's cause of action for her child's injuries was derivative and subject to the comparative negligence of the

child, the court did not abuse its discretion even though it would have been better practice to instruct the jury after the evidence was closed. *Kirkendoll v. Hogan*, 267 Ark. 1083, 593 S.W.2d 498 (Ct. App. 1980).

### Due Process.

Slight difference between jury instruction given for punitive damages and proffered one did not violate defendant's right to due process, and this was especially so in light of the fact that the trial court had already granted a default as to "liability for actual and punitive" claims. *Viking Ins. Co. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992).

### Failure to Make Proper Objection.

Where counsel made only a general objection to the court's instruction on the measure of damages, saying that "it did not set out the proper measure of damages for the case at bar," such a broad statement did not tell the trial court exactly why the instruction was wrong and therefore was not sufficiently specific to present any question for review. *Chandler v. Kirkpatrick*, 270 Ark. 74, 603 S.W.2d 406 (1980).

Objections to instructions must be specific; a general objection is insufficient. The objection that challenged instructions were "an incorrect statement of the law" raised no point for review. *Carroll-Boone Water Dist. v. M. & P. Equip. Co.*, 280 Ark. 560, 661 S.W.2d 345 (1983).

Where the trial court erroneously instructed the jury as to prior convictions, but defendant failed to object to the jury instruction or to proffer one of his own, his failure to do so precluded consideration of the issue on appeal. *Shockley v. State*, 282 Ark. 281, 668 S.W.2d 22 (1984).

A party's failure to object to an instruction at trial precludes argument on appeal that the instruction was improper. *Wallace v. Dustin*, 284 Ark. 318, 681 S.W.2d 375 (1984).

Failure to object to the giving of an erroneous jury instruction before the case is submitted to the jury is a waiver of any error committed by the court in giving it. *Delta Sch. of Commerce, Inc. v. Wood*, 298 Ark. 195, 766 S.W.2d 424 (1989).

Court of appeals erred in overturning a judgment in favor of appellee in appellant's



personal injury suit because appellant's objection regarding a jury instruction on comparative fault was a general objection, insufficient to preserve appellant's argument for review; appellant did not state the specific grounds for the objection. *Bell v. Misenheimer*, 2009 Ark. 222, 308 S.W.3d 120 (2009).

### General Objection.

A general objection is sufficient against a binding instruction that is inherently erroneous. *Stephens v. West Pontiac-GMC, Inc.*, 7 Ark. App. 275, 647 S.W.2d 492 (1983).

An objection which merely complains that a jury instruction is an incorrect declaration of the law, is a general objection, preserving no point for review. *AAA T.V. & Stereo Rentals, Inc. v. Crawley*, 284 Ark. 83, 679 S.W.2d 190 (1984); *Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985), cert. denied 475 U.S. 1036, 106 S. Ct. 1245, 89 L. Ed. 2d 354 (1986).

Circuit court did err in denying appellant's motion for new trial due to jury misconduct because there was no evidence of juror misconduct upon which to grant a new trial, and if the jury was to be instructed to omit some part of their personal observations and experience from deliberations, the duty was on appellant to request such an instruction; no jury instruction on collateral sources was given in the case, and appellant did not request or proffer such an instruction. *Blake v. Shellstrom*, 2012 Ark. App. 28, — S.W.3d —, 2012 Ark. App. LEXIS 24 (Jan. 4, 2012).

In a case involving breach of fiduciary duty, a failure to make a specific objection to jury instructions resulted in a procedural bar, pursuant to this rule. A general objection did not suffice because the instruction was not binding in nature since it did not direct or require the jury to make any particular finding. *Agracat, Inc. v. AFS-NWA, LLC*, 2012 Ark. App. 372, — S.W.3d —, 2012 Ark. App. LEXIS 489 (May 30, 2012).

### Objection Procedure.

No instruction is required to be proffered in substitution for the instruction to which objection is made. All that is required to preserve an objection for appeal regarding an erroneous instruction of law is to make a timely objection and state valid reasons for the objection. *Tandy Corp. v. Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984), limited *City of Green Forest v. Morse*, 316 Ark. 540, 873 S.W.2d 155 (1994); *Thomas Auto Co. v. Craft*, 297 Ark. 492, 763 S.W.2d 651 (1989).

When a party objects to an erroneous instruction of law which should not be given, all that is required is to timely state valid reasons for the objection. *City of Little Rock v. Weber*, 298 Ark. 382, 767 S.W.2d 529 (1989).

For a party to preserve for appeal any objection to the trial court's failure to give an instruction, that party must make a proffer of

the instruction to the judge and make his specific objections; simply giving a set of instructions to the trial judge prior to trial is not sufficient to allow the appellate court to address the propriety of appellant's proposed instructions. *Precision Steel Whse., Inc. v. Anderson-Martin Mach. Co.*, 313 Ark. 258, 854 S.W.2d 321 (1993).

Insurer's claim that the trial court gave two binding instructions to the jury that in effect directed the jury to rule in the insured's favor was improper because the insurer never presented arguments to the trial court as to why Special Instruction No. 2 as a binding instruction and why § 17-93-301 should have been given to the jury. Thus, the argument was not preserved on appeal. *Allstate Ins. Co. v. Dodson*, 2011 Ark. 19, — S.W.3d —, 2011 Ark. LEXIS 26 (Jan. 27, 2011).

### Refusal to Give Instruction.

Since Arkansas does not have the "same" or "similar" locality rule concerning standards of care for any profession other than medical it was not error for the court to reject the defendant engineer's proffered instruction which included such standard of care. *Carroll-Boone Water Dist. v. M. & P. Equip. Co.*, 280 Ark. 560, 661 S.W.2d 345 (1983).

### Rehearing on Instructions.

On a rehearing concerning instructions presented to a jury, this rule which is specifically directed toward jury instructions controls over ARCP 46. *Dodson Creek, Inc. v. Fred Walton Realty Co.*, 2 Ark. App. 128, 620 S.W.2d 947 (1981).

### Timeliness.

In order to be timely, objections to instructions must be made either before or at the time the jury instructions are given; waiting to object until after the jury has been instructed on the law and has retired is untimely, for it gives the circuit court no opportunity to react to the instructions at issue or to amend them. *MIC v. Barrett*, 313 Ark. 527, 855 S.W.2d 326 (1993).

**Cited:** *Faught v. Ligon Specialized Hauler, Inc.*, 273 Ark. 259, 619 S.W.2d 627 (1981); *CBM of Cent. Ark. v. Bemel*, 274 Ark. 223, 623 S.W.2d 518 (1981); *Orsini v. State*, 281 Ark. 348, 665 S.W.2d 245 (1984), cert. denied 469 U.S. 847, 105 S. Ct. 162, 83 L. Ed. 2d 98 (1984); *Twin City Bank v. Isaacs*, 283 Ark. 127, 672 S.W.2d 651 (1984); *Curtis Communications v. Collar*, 11 Ark. App. 14, 665 S.W.2d 301 (1984); *Johnson v. Truck Ins. Exch.*, 285 Ark. 470, 688 S.W.2d 728 (1985); *Davis v. Arkansas State Hwy. Comm'n*, 290 Ark. 358, 719 S.W.2d 694 (1986); *Hill Constr. Co. v. Bragg*, 291 Ark. 382, 725 S.W.2d 538 (1987); *Sunland Enters., Inc. v. McGuckin*, 295 Ark. 424, 749 S.W.2d 304 (1988); *Weaver v. State*, 296 Ark. 152, 752 S.W.2d 750 (1988); *Lancaster v. Schilling Motors, Inc.*, 299 Ark. 365, 772

S.W.2d 349 (1989); *Mabry v. McAfee*, 301 Ark. 268, 783 S.W.2d 356 (1990); *Acme Brick Co. v. Missouri Pac. R.R.*, 307 Ark. 363, 821 S.W.2d 7 (1991); *Hale v. Ladd*, 308 Ark. 567, 826 S.W.2d 244 (1992); *Reynolds v. Shelter Mut. Ins. Co.*, 313 Ark. 145, 852 S.W.2d 799 (1993); *Security Pac. Hous. Servs., Inc. v. Friddle*, 315 Ark. 178, 866 S.W.2d 375 (1993); *Newton v.*

*Chambliss*, 316 Ark. 334, 871 S.W.2d 587 (1994); *Quinney v. Pittman*, 320 Ark. 177, 895 S.W.2d 538 (1995); *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001); *In re Implementation of Amendment 80: Amendments to Rules of Civ. Procedure & Inferior Court Rules*, — Ark. —, — S.W.3d —, 2001 Ark. LEXIS 707 (May 24, 2001).

## Rule 52. Findings by the court.

(a) *Effect*. If requested by a party at any time prior to entry of judgment, in all contested actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions, the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence), and due regard shall be given to the opportunity of the circuit court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under these rules.

(b) *Amendment*.

(1) Upon motion of a party made not later than 10 days after entry of judgment, the court may amend its findings of fact previously made or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. A motion made before entry of judgment shall become effective and be treated as filed on the day after the judgment is entered. If the court neither grants nor denies the motion within 30 days of the date on which it is filed or treated as filed, it shall be deemed denied as of the 30th day.

(2) When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the circuit court an objection to such findings or has made a motion to amend them or a motion for judgment. (Amended November 20, 1989, effective January 1, 1990; amended January 28, 1999; amended May 24, 2001, effective July 1, 2001; amended January 22, 2004.)

**Reporter's Notes to Rule 52:** 1. Rule 52 is similar to FRCP 52, but it retains prior Arkansas law by which the failure of a party to request special findings of fact by the court amounted to a waiver of that right. *Anderson v. West Bend Co.*, 240 Ark. 519, 400 S.W.2d 495 (1966); *Doup v. Almand*, 212 Ark. 687, 207 S.W.2d 601 (1948).

2. Prior Arkansas law was codified in superseded *Ark. Stat. Ann.* § 27-1744 (Repl. 1962) which required the trial court to state findings of fact separately from conclusions of

law. Where there was any substantial evidence to support the findings of the circuit judge, his decision had to be affirmed on appeal. *Fanning v. Hembree Oil Company*, 245 Ark. 825, 434 S.W.2d 822 (1968). Under this rule, the findings of the trial judge must be affirmed on appeal unless clearly erroneous, which is the same as clearly against the preponderance of the evidence. The rule, however, does not alter the fact that in some cases an issue must be proved by clear and convincing evidence.



3. Section (b) does not appreciably change prior Arkansas law, as it has been commonly understood that courts had the inherent power to amend its findings or make additional findings during term time. See *Vaughn v. Vaughn*, 223 Ark. 934, 270 S.W.2d 915 (1954), although this power was severely restricted after term time to those grounds specified in superseded Ark. Stat. Ann. § 29-506 (Repl. 1962).

4. Under this rule, motions to have the court amend its findings or make additional findings must be filed within ten days after the entry of judgment. This time period cannot be extended by the trial court as provided in Rule 6 herein and in FRCP 6.

**Addition to Reporter's Notes, 1989 Amendment:** Rule 52(a) is amended to make clear that the same standard of appellate review applies, regardless of whether a trial court's findings of fact are based on oral or documentary evidence. The corresponding federal rule was so amended in 1985. Prior to that amendment, some federal courts had held that a more searching appellate review was appropriate when the trial court's findings were based solely on documentary evidence.

**Addition to Reporter's Notes, 1999 Amendment:** Subdivision (b) has been divided into two numbered paragraphs. The new third sentence of paragraph (1) makes plain that a pre-judgment motion to amend findings or to make additional findings is permissible. This is so under the corresponding federal rule, but prior Arkansas case law

suggested that such a motion was not effective. See *Benedict v. National Bank of Commerce*, 329 Ark. 590, 951 S.W.2d 562 (1997) (motion for new trial). The new fourth sentence provides that a motion to amend findings or for additional findings not ruled on by the court within 30 days of its filing (or within 30 days of the date it is treated as filed) is "deemed denied as of the 30th day." This provision also appears in Rule 4(b)(1) of the Rules of Appellate Procedure—Civil but was added here as a reminder to counsel.

**Addition to Reporter's Notes, 2001 Amendment:** The references to "trial court" in subdivisions (a) and (b)(2) have been replaced with "circuit court." Constitutional Amendment 80 established the circuit courts as the "trial courts of original jurisdiction" in the state and abolished the separate probate and chancery courts.

**Addition to Reporter's Notes, 2004 Amendment:** Subdivision (a) has been amended to make plain that a request for findings of fact and conclusions of law may be made "at any time prior to entry of judgment." A companion change in subdivision (b)(1) emphasizes that a motion after entry of judgment pursuant to that provision is for a different purpose, i.e., to amend findings "previously made" or to make additional findings. The effect of these changes is to overrule *Apollo Coating RSC, Inc. v. Brookridge Funding Corp.*, 103 S.W.3d 682 (Ark. App. 2003), which held that a motion for findings and conclusions pursuant to Rule 52(a) could be made after entry of judgment.

## RESEARCH REFERENCES

**Ark. L. Notes.** Watkins, Procedural Issues in an Annexation Case: A Dissenting Opinion of Gay v. City of Springdale, 1986 Ark. L. Notes 55.

**U. Ark. Little Rock L.J.** Survey, Civil Procedure, 13 U. Ark. Little Rock L.J. 321.

**U. Ark. Little Rock L. Rev.** Annual Survey of Case Law: Practice, Procedure, and Courts, 29 U. Ark. Little Rock L. Rev. 905.

## CASE NOTES

### ANALYSIS

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### In General.

If findings under this rule are timely requested, the trial court is required to make specific findings of fact and conclusions of law and to file the same with the clerk of the trial

court so that such findings may be made part of the record. *McWhorter v. McWhorter*, 70 Ark. App. 41, 14 S.W.3d 528 (2000).

Court rejected a taxpayer's argument on appeal that the taxpayer's motion should have been treated by the trial court as being governed by this rule, rather than ARCP 59, because the taxpayer never suggested to the trial court that it should have considered the motion under this rule. *Jones v. Double 'D' Props.*, 352 Ark. 39, 98 S.W.3d 405 (2003).

Where it was clear from the record that the circuit court did an independent review of the evidence, it did not defer to or impermissibly rely on the obiter dictum of the Court of Appeals and thereby fail to satisfy its role as factfinder. *Ward v. Williams*, 354 Ark. 168, 118 S.W.3d 513 (2003).

Trial court's oral and written pronouncements set forth sufficient findings on which to base the appointment of the brother as guardian of the mother and the trial court was not required to make further findings upon the sister's motion. *Kimrough v. Kimrough*, 83 Ark. App. 179, 119 S.W.3d 66 (2003).

Trial judge relied upon the psychologist's report to make judgmental statements and to reach conclusions concerning the mother before the report was admitted into evidence, thus, the trial judge improperly treated the report as evidence before it became part of the official record of the case; accordingly, the trial court committed reversible error in admitting the report. *Rodriguez v. Ark. Dep't of Human Servs.*, 84 Ark. App. 177, 137 S.W.3d 432 (2003).

It was not incumbent upon the son to ask the trial court to consider the relevant statutes that must be satisfied prior to a finding of incapacity of the mother; furthermore, subdivision (b)(2) of this rule provides that, in a bench trial, the sufficiency of the evidence to support the trial court's findings could be raised whether or not any objection was made below. *Cogburn v. Wolfenbarger*, 85 Ark. App. 206, 148 S.W.3d 787 (2004).

In considering plaintiff's motion to amend a judgment in which plaintiff's medical damages were reduced, the circuit court did not err in refusing to consider an affidavit from plaintiff's chiropractor stating that nine months of treatment was reasonable and necessary as the affidavit had not been submitted at trial and, thus, was too late to be considered. *Young v. Barbera*, 366 Ark. 120, 233 S.W.3d 651 (2006).

Appellate court overruled appellant's assertion that the award of costs and attorney's fees to the neighbors' was improper without a record to establish a basis for the award, because appellant could not demonstrate error since she made no attempt to make a record in the case; objections to the circuit court's award of costs and attorney's fees must

be raised in the trial court, perhaps via a motion to amend the judgment pursuant to subsection (b) of this rule. *Turner v. Brandt*, 100 Ark. App. 350, 268 S.W.3d 924 (2007).

### **Applicability.**

The Rules of Civil Procedure do not apply to civil actions brought under the Administrative Procedure Act. *Wright v. Arkansas State Plant Bd.*, 311 Ark. 125, 842 S.W.2d 42 (1992).

A motion for findings of fact following a jury trial does not qualify as a motion under subsection (b) of this rule since the rule applies only to trials where the trial court has made findings of fact. *Routh Wrecker Serv., Inc. v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998).

In accordance with Ark. R. Civ. P. 81, it is precisely because the probate code and the Arkansas Rules of Civil Procedure set forth different time limits on the court's authority to modify or vacate prior orders that § 28-1-115 applies in probate proceedings; therefore, an appeal under § 28-1-116 was timely since this rule was not implicated in an appeal from a denial of reconsideration arising from a denial of intervention in a probate case. *Helena Reg'l Med. Ctr. v. Wilson*, 362 Ark. 117, 207 S.W.3d 541 (2005).

Motion to quash a subpoena is a "motion under these rules" and, therefore, no findings of fact and conclusions of law are required; moreover, the decision to quash a subpoena in a child support case was not overturned because there was no prejudice shown since father's support obligation would not have been different, even if bank records showing the amount that children received from a trust had been introduced into evidence. *Lee v. Lee*, 95 Ark. App. 69, 233 S.W.3d 698 (2006).

Clarification of findings made pursuant to subsection (a) of this rule was required in a suit for money allegedly owed because, in a letter opinion that was not made part of the judgment, the circuit court may have simply reversed the parties' names. The circuit court was entitled to the opportunity to clarify its findings in what was essentially a swearing-match. *T&S Mach. Shop, Inc. v. KD Sales*, 2009 Ark. App. 836, — S.W.3d —, 2009 Ark. App. LEXIS 1048 (2009).

In granting summary judgment under Ark. R. Civ. P. 56 dismissing appellant's civil rights claims for arrest and seizure without probable cause, malicious prosecution, and the tort of outrage, the trial court did not err in denying appellant's request for specific findings of fact and conclusions of law under this rule. This rule was inapplicable to a court's decision pursuant to Rule 56. *Summers v. Byrd*, 2012 Ark. App. 171, — S.W.3d —, 2012 Ark. App. LEXIS 274 (Feb. 22, 2012).



**Absence of Findings.**

Court saw no clear error in the trial court's finding that the water diverted by the landowner was a watercourse and the court was not dissuaded by the trial court's lack of findings regarding the presence of well-defined bed and banks; their absence could be explained by the fact that the water had been diverted and had begun to coalesce along the course once again after a street was constructed. *Bilo v. El Dorado Broad. Co.*, 101 Ark. App. 267, 275 S.W.3d 660 (2008).

Although it may be the better practice for the circuit court to make findings on motions, the circuit court's failure to do so was not error and did not indicate that the circuit court lacked a proper basis for denying the motion to dismiss, because subsection (a) of this rule specifically provided that findings of fact and conclusions of law were unnecessary on decisions of motions under these rules. *Peterson v. Davis*, 2012 Ark. App. 166, — S.W.3d —, 2012 Ark. App. LEXIS 264 (Feb. 22, 2012).

**Amendment of Findings.**

Under a motion to amend the court's findings of fact or to make additional findings under subsection (b) of this rule, or a motion for new trial under ARCP 59(b), the time to appeal runs from the entry of an order on the motion or from the 30th day after the filing of the motion, whichever comes first. *Mitchell v. Mitchell*, 40 Ark. App. 81, 842 S.W.2d 66 (1992).

Creditor's motion under subsection (b) of this rule for clarification that resulted in an order that said, in essence, that the trial court had rejected the creditor's fraudulent conveyance claim, did not extend the time for filing a cross-appeal. Although the creditor's notice of cross-appeal was filed within thirty days of the order of clarification, it was untimely with respect to the initial order, and the creditor's appeal was therefore dismissed. *Howe Now, Inc. v. Fishing Univ.*, 2009 Ark. App. 851, — S.W.3d —, 2009 Ark. App. LEXIS 1002 (2009).

**Amendment of Pleadings.**

Trial court properly considered pleadings amended to conform to the proof. *Hegg v. Dickens*, 270 Ark. 641, 606 S.W.2d 106 (1980).

**Attorney's Fees.**

Motions for attorney's fees are not required to be filed within the ten-day period set out in ARCP 59(b) and subsection (b) of this rule. *Sunbelt Exploration Co. v. Stephens Prod. Co.*, 320 Ark. 298, 896 S.W.2d 867 (1995).

**Costs.**

Objections to the trial court's award of costs must be raised in the trial court by a motion to amend the judgment pursuant to subsection (b) of this rule. *Farm Bureau Mut. Ins. Co. v. David*, 324 Ark. 387, 921 S.W.2d 930 (1996).

**Credibility of Witnesses.**

It is the province of the trier of fact to determine the credibility of the witnesses and resolve any conflicting testimony. *First State Bank v. Phillips*, 13 Ark. App. 157, 681 S.W.2d 408 (1984).

**Discretion of Court.**

It was not incumbent upon the chancellor in a child support proceeding to specify the amount of income imputed to one of the parties, particularly in the absence of a request to do so by the parties. *McJunkins v. Lemons*, 52 Ark. App. 1, 913 S.W.2d 306 (1996).

Since a trial court had previously made findings of fact and conclusions of law in its letter opinion, subsection (b) of this rule controlled and granted the trial court discretion to amend its findings or make additional findings. *Pruitt v. Dickerson Excavation, Inc.*, 2010 Ark. App. 849, — S.W.3d —, 2010 Ark. App. LEXIS 889 (Dec. 15, 2010).

**Disposition of Motion.**

ARAP 4(c), by its terms, is applicable to specific civil motions including a motion for judgment notwithstanding the verdict under ARCP 50(b), a motion to amend findings of fact or to make additional findings of fact under subsection (b) of this rule, and a motion for a new trial under ARCP 59(b); however, ARAP 4(c) has been applied to criminal matters where the motion made following the judgment of conviction was analogous to a civil motion made under ARCP 50(b), this rule, or ARCP 59(b). *Fuller v. State*, 316 Ark. 341, 872 S.W.2d 54 (1994), questioned *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997).

Although a circuit court did not explain its decision in ruling from the bench on the constitutionality of a statutory cap on punitive damages, it was not required to make findings of fact or conclusions of law in ruling on a pretrial motion to declare the statute unconstitutional. *Bayer CropScience LP v. Schafer*, 2011 Ark. 518, — S.W.3d —, 2011 Ark. LEXIS 598 (Dec. 8, 2011).

**Facsimile Transmission.**

A motion for amendment of judgment was not timely filed where it was sent to the court clerk's office by facsimile transmission just before midnight on the last day it could be filed and was received by the clerk on the next day, i.e., one day late. *Osburn v. Busbee*, 339 Ark. 260, 4 S.W.3d 127 (1999).

**Failure to Object.**

Ex-husband's argument about the improper sale of the parties marital home under § 9-12-315(a)(3)(B) was not considered on appeal because he failed to object to such sale, thereby waiving the argument, and it was not a sufficiency of the evidence question under which the court could review the issue without an objection under subdivision (b)(2) of

this rule. *Roberts v. Yanyan Yang*, 102 Ark. App. 384, 285 S.W.3d 689 (2008).

Trial court complied with subsection (a) of this rule in an action by members of a cemetery association against appellants because when the trial court invited appellants to object to the proposed findings of fact and conclusions of law, appellants declined; hence, the trial court did not err by adopting the order prepared by the members' counsel as its own. *Powhatan Cemetery, Inc. v. Colbert*, 104 Ark. App. 290, 292 S.W.3d 302 (2009).

### **Final Judgment.**

Before a judgment can be final it must be final as to one or more of the claims presented in the action, and in order for there to be such a judgment, the action of the court must finally determine a claim; a mere declaration of law does not finally determine any claim. *Boyett v. Boyett*, 269 Ark. 36, 598 S.W.2d 86 (1980).

Where the judgment appealed from ordered the sellers to convey the subject land to the buyer, as he was entitled to specific performance of the underlying oral contract, such was a final order from which an appeal could be taken; the absence of a supersedeas bond and the granting of the land to the buyer as part and parcel to execution on a judgment did not nullify an appeal from that underlying judgment. *Ward v. Williams*, 354 Ark. 168, 118 S.W.3d 513 (2003).

### **Illustrative Cases.**

Where the mother of a child divorced her father after he was incarcerated for sexual assault and possession of child pornography, the trial court did not err by denying the paternal grandparents' petition for visitation pursuant to § 9-13-103 and their motion to modify the judgment pursuant to subsection (b) of this rule. The Court of Appeals of Arkansas upheld the trial court's finding that grandparents lacked the capacity to provide guidance to the child, because of their willingness to allow her to visit her biological father in prison; the grandparents also failed to rebut the presumption that the mother's denial or limitation of visitation was in the best interest of the child. *Painter v. Kerr*, 2009 Ark. App. 580, 336 S.W.3d 425 (2009).

When a patient appealed a trial court's award of attorney's fees and purported to appeal the trial court's deemed denials of the patient's motions for reconsideration and clarification, the deemed denials were not properly before an appellate court because the motions were not deemed denied, under subdivision (b)(1) of this rule, until after the patient filed a notice of appeal. *Henry v. QHG of Springdale, Inc.*, 2010 Ark. App. 604, — S.W.3d —, 2010 Ark. App. LEXIS 639 (Sept. 15, 2010).

Finding in favor of the purchaser and

against the seller in a products-liability action was improper because the circuit court's finding inferring from the evidence that the trailer was not only defective but also unreasonably dangerous was clearly erroneous under subsection (a) of this rule. *Mason v. Mit-cham*, 2011 Ark. App. 189, — S.W.3d —, 2011 Ark. App. LEXIS 201 (Mar. 9, 2011).

### **Matter of Law.**

While appellate court will not set aside a trial court's finding of fact unless it is clearly erroneous, the determination of whether a contract is ambiguous is a matter of law. *Arkansas Burial Ass'n v. Dixon Funeral Home*, 25 Ark. App. 18, 751 S.W.2d 356 (1988).

### **Request for Findings.**

A remark made by a judge who tried a case without a jury could not be construed as his entire findings of fact and conclusions of law when neither party had asked him to set out separate findings and conclusions. *Legate v. Passmore*, 268 Ark. 1161, 599 S.W.2d 151 (Ct. App. 1980).

A request for findings of fact and conclusions of law filed after an order has become final cannot be used as a means of resurrecting a claim already barred by finality. *Majors v. Pulaski County Election Comm'n*, 287 Ark. 208, 697 S.W.2d 535 (1985).

Where the trial court is not required to give detailed reasons for its action, under this rule, the court can be requested to set out facts and conclusions of law which constitute the grounds for its decision. *Miles v. Southern*, 297 Ark. 274, 760 S.W.2d 868 (1988).

Trial court's findings, although they could have been more detailed, adequately covered the issues where the court made nine findings and then clearly stated its orders; it would have been repetitive and nonproductive for the court to address all of the 84 proposed findings set out in appellants' request. *South-east Ark. Landfill, Inc. v. State*, 313 Ark. 669, 858 S.W.2d 665 (1993).

In Title VII claim, where there was nothing in the record to show that plaintiff requested the trial court to make specific findings of fact and conclusions of law either prior to or after entry of the judgment, she waived her right under this rule. *Smith v. Quality Ford, Inc.*, 324 Ark. 272, 920 S.W.2d 497 (1996).

Where the insurer failed to request specific findings in regard to the ARCP 23(b) elements either prior to or after the entry of the order of certification, it waived the issue on appeal. *Mega Life & Health Ins. Co. v. Jacola*, 330 Ark. 261, 954 S.W.2d 898 (1997).

A trial court is required to conduct an analysis of the factors required for certification of a class action under the provisions of Rule 23 and to enter written findings of fact and conclusions of law when requested by a



party to the litigation as provided by this rule. *BPS Inc. v. Richardson*, 341 Ark. 834, 20 S.W.3d 403 (2000).

Trial court's order certifying a suit as a class action was reversed on appeal where the trial court was required but failed to make specific findings and conclusions, even though a request for such findings was timely made; more was required of the trial court than a cursory mention of the six criteria for a class action or bare conclusions that those criteria had been satisfied. *Lenders Title Co. v. Chandler*, 353 Ark. 339, 107 S.W.3d 157 (2003).

Trial court erred in refusing to issue findings of fact and conclusions of law upon receipt of a timely request therefore following a bench trial; recognizing that its holding in *Price v. Garrett*, 79 Ark. App. 84, 84 S.W.3d 63 (2002), contained language that was contradictory to its holding in the present case, the Arkansas Court of Appeals limited the holding in *Price* to the rule that a post-judgment motion for findings of fact and conclusions of law made under subsection (a) of this rule did not extend the time for filing a notice of appeal under ARCP 4, and overruled *Price* to the extent that it conflicted with the present opinion. *Apollo Coating RCS, Inc. v. Brookridge Funding Corp.*, 81 Ark. App. 396, 103 S.W.3d 682 (2003).

Pursuant to subsection (b) of this rule, a telecommunications company could have requested that the trial court make additional findings of fact after the trial court's order merely stated that the company's motion for attorney's fees and costs was denied, following the denial of a city's declaratory judgment action against the company. *City of Fort Smith v. Didicom Towers, Inc.*, 362 Ark. 469, 209 S.W.3d 344 (2005).

In "self-pay" patients' action that alleged a hospital charged them significantly more than it charged patients with private insurance or patients insured under government health plans, such as Medicare, the trial court erred in certifying the case for class-action status because the trial court's order did not provide the parties or the appellate court with an analysis of the requirements of Ark. R. Civ. P. 23 or specific findings of fact or conclusions of law pursuant to this rule. *Baptist Health v. Haynes*, 367 Ark. 382, 240 S.W.3d 576 (2006).

Order denying mother's petition to relocate to Oklahoma with the parties' two children was upheld where the effect of the relocation on the father, who lived approximately 75 minutes away in Arkansas, weighed in favor of rebutting the presumption in favor of relocation; where mother failed to make a request for specific findings from the trial court, she could not argue that the trial court somehow erred in failing to specifically discuss each *Hollandsworth* factor. *Sill v. Sill*, 94 Ark. App. 211, 228 S.W.3d 538 (2006).

In a case alleging an illegal exaction relating to a settlement agreement, an argument that there were no findings of fact made was meritless because a request under this rule was in error; no class certification was required to proceed under Ark. R. Civ. P. 23.2. *Stromwall v. Van Hoose*, 371 Ark. 267, 265 S.W.3d 93 (2007).

#### **Reviewability.**

Reviewing court did not address the argument that the circuit court's order was vague, ambiguous and lacked specific findings, because it had not been preserved for review, because although appellants filed a motion for clarification of the circuit court's findings, which would ordinarily be sufficient to preserve their arguments for appeal, they did so in an untimely fashion. *Middleton v. Lockhart*, 2012 Ark. 131, — S.W.3d —, 2012 Ark. LEXIS 154 (Mar. 29, 2012).

#### **Standard of Appellate Review.**

This rule has altered the standard of review on appeal as to cases tried by a circuit judge, sitting as a jury, on appellate review; the substantial evidence test will not be applicable to cases tried on or after July 1, 1979. *Taylor v. Richardson*, 266 Ark. 447, 585 S.W.2d 934 (1979).

The adoption of this rule did not amount to a partial merger of law and equity; this rule merely established the same standard of "clearly erroneous" for appellate review of findings of fact made by a chancellor and a circuit judge sitting as a jury. *Sharp County v. Northeast Ark. Planning & Consulting Co.*, 269 Ark. 336, 602 S.W.2d 627 (1980), modified on other grounds, 275 Ark. 172, 628 S.W.2d 559 (1982).

After the effective date of this rule, the standard of review on appeal is not whether there is any substantial evidence to support the finding of the court, but whether the judge's findings are clearly erroneous (clearly against the preponderance of the evidence). *Superior Imp. Co. v. Mastic Corp.*, 270 Ark. 471, 604 S.W.2d 950 (1980).

Although prior case law held that in order to reverse findings regarding a case the Supreme Court must find that the decree was clearly against the preponderance of the evidence, this rule has been redefined to mean that the court must affirm unless the findings are clearly erroneous. *Riddell v. City of Brinkley*, 272 Ark. 84, 612 S.W.2d 116 (1981).

Appellant is not obligated to request the trial court to find the facts specially and state its conclusions of law in an action as a prerequisite to review of the findings on appeal. *Gorchik v. Gorchik*, 10 Ark. App. 331, 663 S.W.2d 941 (1984), overruled *Liles v. Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986).

Notwithstanding the language in this rule that makes findings of fact and conclusions of

law unnecessary in decisions on motions, the better practice is for the trial court to give an explanation of its decision on ARCP 11 motions sufficient for the appellate courts to review. *Bratton v. Gunn*, 300 Ark. 140, 777 S.W.2d 219 (1989).

Upon review, the test is not whether the appellate court is convinced that there is clear and convincing evidence to support the findings of the judge, but whether the court can say that the judge was clearly wrong in his findings. *Hoover v. Arkoma Prod. Co.*, 29 Ark. App. 238, 780 S.W.2d 585 (1989).

The supreme court reviews chancery cases *de novo*, and will not reverse a chancellor's findings unless clearly erroneous. *Magnolia Sch. Dist. No. 14 v. Arkansas State Bd. of Educ.*, 303 Ark. 666, 799 S.W.2d 791 (1990); *Lee v. Lee*, 35 Ark. App. 192, 816 S.W.2d 625 (1991).

In reviewing the chancellor's findings, the court will not reverse unless it finds that they are clearly erroneous or clearly against a preponderance of the evidence. *Riddick v. Streett*, 313 Ark. 706, 858 S.W.2d 62 (1993).

Where business served a writ of garnishment on a bank, but the bank had a secured interest in "proceeds" from the customer's accounts receivables, the trial court imposed an erroneous standard of proof when it concluded that the deposits in the customer's account were not "identifiable proceeds"; consequently, the matter was remanded so that the trial court could apply the "lowest-intermediate-balance rule." *Metro. Nat'l Bank v. La Sher Oil Co.*, 81 Ark. App. 269, 101 S.W.3d 252 (2003).

In claimant's negligence action, summary judgment in favor of a hospital and health system was proper as the charitable-immunity doctrine barred recover against the hospital, a charitable facility, the health system's pooled comprehensive liability program did not meet the statutory definition of insurance, and the health system did not meet the statutory definition of an insurer under the Arkansas Insurance Code. *Sowders v. St. Joseph's Mercy Health Ctr.*, 368 Ark. 466, 247 S.W.3d 514 (2007).

Circuit court clearly erred by entering the agreed decree, finding that the parties settled the litigation, because the circuit court made a contract for the parties when they had tried but failed to make one, when the record contained no writings, testimony, or agreements in open court showing that the parties' mutually assented to all material settlement terms in the agreed decree. *Roberts v. Green Bay Packaging, Inc.*, 101 Ark. App. 160, 272 S.W.3d 125 (2008).

Circuit court did not clearly err in finding that no common-law marriage existed between the parties, because the parties lived in Arkansas, which did not recognize common-

law marriages, the wedding ceremony took place in Texas without obtaining a marriage license or certificate, and there was no evidence that the parties lived together in Texas after the ceremony. *Crane v. Taliaferro*, 2009 Ark. App. 336, 308 S.W.3d 648 (2009).

Arkansas appellate courts should review all appeals from bench trials, including declaratory judgment actions, under the clearly erroneous standard of subsection (a) of this rule, overruling *Hoffman v. Gregory*, 361 Ark. 73, 204 S.W.3d 541 (2005). The clearly erroneous standard applied to bench trials and not necessarily to all declaratory judgment actions. *Poff v. Peedin*, 2010 Ark. 136, 366 S.W.3d 347 (2010).

#### —Applied to Various Proceedings.

Clearly erroneous (clearly against the preponderance of the evidence) standard applied to:

—Adoption proceedings. *Chrisos v. Egleston*, 7 Ark. App. 82, 644 S.W.2d 326 (1983); *McKee v. Bates*, 10 Ark. App. 51, 661 S.W.2d 415 (1983); *Shemley v. Montezuma*, 12 Ark. App. 337, 676 S.W.2d 759 (1984).

—Annexation. *Holmes v. City of Little Rock*, 285 Ark. 296, 686 S.W.2d 425 (1985).

—Chancery cases. *Burns v. Lucich*, 6 Ark. App. 37, 638 S.W.2d 263 (1982); *Reeder v. Arkansas La. Gas Co.*, 6 Ark. App. 385, 644 S.W.2d 291 (1982); *Hegg v. Dickens*, 7 Ark. App. 139, 644 S.W.2d 632 (1983); *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984); *Beeson v. Beeson*, 11 Ark. App. 79, 667 S.W.2d 368 (1984); *Horton v. Koner*, 12 Ark. App. 38, 671 S.W.2d 235 (1984); *Pomraning v. Pomraning*, 13 Ark. App. 258, 682 S.W.2d 775 (1985); *Lake v. Lake*, 14 Ark. App. 67, 684 S.W.2d 833 (1985); *Kistler v. Stoddard*, 15 Ark. App. 8, 688 S.W.2d 746 (1985); *Meeks v. Meeks*, 290 Ark. 563, 721 S.W.2d 653 (1986); *Cox v. Cox*, 17 Ark. App. 93, 704 S.W.2d 171 (1986); *Merriman v. Yuttermann*, 291 Ark. 207, 723 S.W.2d 823 (1987); *Plafcan v. Griggs*, 291 Ark. 335, 724 S.W.2d 467 (1987); *Looper v. Madison Guar. Sav. & Loan Ass'n*, 292 Ark. 225, 729 S.W.2d 156 (1987); *Jones v. Ragland*, 293 Ark. 320, 737 S.W.2d 641 (1987); *Milligan v. General Oil Co.*, 293 Ark. 401, 738 S.W.2d 404 (1987); *Freeman v. Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987); *Day v. Day*, 20 Ark. App. 48, 723 S.W.2d 378 (1987); *Riggs v. Sheridan*, 22 Ark. App. 175, 737 S.W.2d 175 (1987); *Akin v. First Nat'l Bank*, 25 Ark. App. 341, 758 S.W.2d 14 (1988); *Conway Corp. v. Construction Eng'rs, Inc.*, 300 Ark. 225, 778 S.W.2d 919 (1989), opinion withdrawn, substituted opinion — Ark. —, 782 S.W.2d 36 (1989), cert. denied 494 U.S. 1080, 110 S. Ct. 1809, 108 L. Ed. 2d 939 (1990); *Lytle v. Lytle*, 301 Ark. 61, 781 S.W.2d 476 (1989); *Wilson v. Wilson*, 301 Ark. 80, 781 S.W.2d 487 (1989); *Hoover v. Arkoma Prod. Co.*, 29 Ark. App. 238, 780 S.W.2d 585 (1989).



—Criminal contempt. *Rowell v. State*, 278 Ark. 217, 644 S.W.2d 596 (1983).

—Injunction. *Bassett v. City of Fayetteville*, 282 Ark. 395, 669 S.W.2d 1 (1984).

—Paternity proceedings. *Ross v. Moore*, 25 Ark. App. 325, 758 S.W.2d 423 (1988).

—Petition for reinstatement to bar. In re Shannon, 274 Ark. 106, 621 S.W.2d 853 (1981).

—Probate cases. *Green v. Holland*, 9 Ark. App. 233, 657 S.W.2d 572 (1983); *Dodson v. Donaldson*, 10 Ark. App. 64, 661 S.W.2d 425 (1983); *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984); In re Tittsworth, 11 Ark. App. 197, 669 S.W.2d 8 (1984); *Birch v. Coleman*, 15 Ark. App. 215, 691 S.W.2d 875 (1985); *Brown v. Bell*, 291 Ark. 116, 722 S.W.2d 592 (1987); *Winters v. Winters*, 24 Ark. App. 29, 747 S.W.2d 583 (1988).

—Teacher dismissal. *Leola Sch. Dist. v. McMahan*, 289 Ark. 496, 712 S.W.2d 903 (1986).

#### —Findings Held Erroneous.

Findings held to be clearly erroneous or against preponderance of evidence. *City of Little Rock v. Breeding*, 273 Ark. 437, 619 S.W.2d 664 (1981); *Union County v. Union County Election Comm'n*, 274 Ark. 286, 623 S.W.2d 827 (1981); *Brown Properties, Inc. v. Looper*, 293 Ark. 133, 732 S.W.2d 471 (1987); *Murray v. Alzheimer-Sherrill Pub. Sch.*, 294 Ark. 403, 743 S.W.2d 789 (1988), questioned *Spainhour v. Dover Pub. Sch. Dist.*, 331 Ark. 53, 958 S.W.2d 528 (1998), questioned *Western Grove Sch. Dist. v. Terry*, 318 Ark. 316, 885 S.W.2d 300 (1994); *Continental Cas. Co. v. Didier*, 301 Ark. 159, 783 S.W.2d 29 (1990); *Ozark Auto Transp., Inc. v. Starkey*, 327 Ark. 227, 937 S.W.2d 175 (1997).

Circuit court clearly erred in its decision that a prosecutor could subpoena an accident report; the accident reconstruction report and testimony of the accident reconstructionist's employee were confidential, privileged communications that could not be subpoenaed. *Holt v. McCastlain*, 357 Ark. 455, 182 S.W.3d 112 (2004).

#### —Findings Held Not Erroneous.

Findings held not to be clearly erroneous or against preponderance of evidence. *Sharp County v. Northeast Ark. Planning & Consulting Co.*, 269 Ark. 336, 602 S.W.2d 627 (1980), modified on other grounds, 275 Ark. 172, 628 S.W.2d 559 (1982); *McIntire v. McIntire*, 270 Ark. 381, 605 S.W.2d 474 (1980); *Etter v. Binz*, — Ark. —, 605 S.W.2d 488 (Ct. App. 1980); *Marshall v. Marshall*, 271 Ark. 116, 607 S.W.2d 90 (Ct. App. 1980); *Folk Constr. Co. v. Sun Pipe Line Co.*, 271 Ark. 836, 611 S.W.2d 198 (1981); *Thomas Jefferson Ins. Co. v. Stuttgart Home Ctr., Inc.*, 4 Ark. App. 75, 627 S.W.2d 571 (1982); *Looper v. Madison Guar. Sav. & Loan Ass'n*, 292 Ark. 225, 729

S.W.2d 156 (1987); *Constant v. Hodges*, 292 Ark. 439, 730 S.W.2d 892 (1987); *Horne Bros. v. Ray Lewis Corp.*, 292 Ark. 477, 731 S.W.2d 190 (1987); *Layman v. Layman*, 292 Ark. 539, 731 S.W.2d 771 (1987); *Bassett v. Hobart Corp.*, 292 Ark. 592, 732 S.W.2d 133 (1987), questioned *Centennial Valley Ranch Management, Inc. v. Agri-Tech Ltd. Partnership*, 38 Ark. App. 177, 832 S.W.2d 259 (1992); *National Lumber Co. v. Advance Dev. Corp.*, 293 Ark. 1, 732 S.W.2d 840 (1987); *Blaylock v. Staley*, 293 Ark. 26, 732 S.W.2d 152 (1987); *Second Baptist Church v. Little Rock Historic Dist. Comm'n*, 293 Ark. 155, 732 S.W.2d 483 (1987); *Adams v. West*, 293 Ark. 192, 736 S.W.2d 4 (1987); *Milligan v. General Oil Co.*, 293 Ark. 401, 738 S.W.2d 404 (1987); *Savage v. McCain*, 21 Ark. App. 50, 728 S.W.2d 203 (1987); *Pulpwood Suppliers, Inc. v. First Nat'l Bank*, 21 Ark. App. 147, 729 S.W.2d 425 (1987); *Belcher v. Bowling*, 22 Ark. App. 248, 738 S.W.2d 804 (1987); *Murray v. Alzheimer-Sherrill Pub. Sch.*, 294 Ark. 403, 743 S.W.2d 789 (1988), questioned *Spainhour v. Dover Pub. Sch. Dist.*, 331 Ark. 53, 958 S.W.2d 528 (1998), questioned *Western Grove Sch. Dist. v. Terry*, 318 Ark. 316, 885 S.W.2d 300 (1994); *Witt v. Graves*, 302 Ark. 160, 787 S.W.2d 681 (1990); *Janssen v. McKimmey*, 305 Ark. 360, 807 S.W.2d 920 (1991); *Tovey v. City of Jacksonville*, 305 Ark. 401, 808 S.W.2d 740 (1991); *Barker v. Nelson*, 306 Ark. 204, 812 S.W.2d 477 (1991); *Stuttgart Elec. Co. v. Riceland Seed Co.*, 33 Ark. App. 108, 802 S.W.2d 484 (1991); *Amalgamated Clothing & Textile Workers Int'l Union v. Earle Indus., Inc.*, 318 Ark. 524, 886 S.W.2d 594 (1994).

Findings held not clearly against a preponderance of the evidence. *Cheshire v. Walt Bennett Ford, Inc.*, 31 Ark. App. 90, 788 S.W.2d 490 (1990), questioned *City Nat'l Bank v. Unique Structures*, 49 F.3d 1330 (8th Cir. Ark. 1995); *Stacy v. Williams*, 38 Ark. App. 192, 834 S.W.2d 156 (1992).

In annexation case concerning unincorporated property within the city limits, where the trial court heard testimony and viewed exhibits regarding the use of the farm property and determined that the best use of the property would be industrial and recreational, not agricultural, the trial court's findings were not clearly erroneous. *Chandler v. City of Little Rock*, 351 Ark. 172, 89 S.W.3d 913 (2002).

Trial court's decision not to include a father's gambling losses in the calculation of child support was not clearly erroneous because the father was unable to substantiate his losses by keeping a diary, as required by Internal Revenue Service rules; moreover, the father's ATM withdrawal slips were not records of regularly conducted business activity under ARE 803(6). *McWhorter v. McWhorter*,

351 Ark. 622, 97 S.W.3d 408 (2003), cert. denied 540 U.S. 904, 124 S. Ct. 261, 157 L. Ed. 2d 189 (2003).

Because trial court's finding that two mortgagors suffered actual monetary damages as a result of a mortgagee's failure to cancel a mortgage was not clearly erroneous, a penalty was properly awarded; however, the court did not have the authority to cancel the mortgage where debt was still owed, and the record did not show that the court intended to cancel the mortgage in lieu of awarding damages. *NationsBanc Mortg. Corp. v. Hopkins*, 82 Ark. App. 91, 114 S.W.3d 757 (2003).

According to the court's standard of review under subsection (a) of this rule, the trial court did not err in finding that a former attorney for a city, taxpayers, and citizens was operating with the ambit of the attorney's authority when the attorney entered into a stipulation of facts because the mayor and city council, absent one member, were present at the meeting when the stipulations were discussed and no complaints or disagreements were voiced at that time. *City of Rockport v. City of Malvern*, 356 Ark. 393, 155 S.W.3d 9 (2004).

In a bench trial to quiet title arising from the alleged forgery of deeds, the standard of review on appeal was not whether there was substantial evidence to support the finding of the court, but whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence; the trial judge made a factual finding that both quitclaim and warranty deeds were forgeries and that finding was entitled to substantial deference from the Arkansas Supreme Court. *Flagstar Bank v. Gibbins*, 367 Ark. 225, 238 S.W.3d 912 (2006).

In a father's petition to change custody, a trial court did not clearly err in denying the petition because the trial court had superior position, ability, and opportunity to observe the parties, which carried a greater weight. *Williams v. Williams*, 2009 Ark. App. 484, — S.W.3d —, 2009 Ark. App. LEXIS 511 (2009).

#### Time of Motion.

Even when an appealable order has been entered and a notice of appeal has been filed within 30 days thereafter, the filing of a motion provided for in ARAP 4(b) will extend the time for filing the notice of appeal, and the notice of appeal filed before the time is extended will be ineffective. *Mitchell v. Mitchell*, 40 Ark. App. 81, 842 S.W.2d 66 (1992).

Court properly denied appellees' motion to dismiss appellant's challenge to an order holding him in contempt for failing to provide financial information where appellant filed his motion under this rule within 10 days of the entry of judgment on January 18, 2005; because appellant filed a motion to amend under this rule, the time for filing a notice of

appeal was extended under Ark. R. Civ. P. 4(b). *Stilley v. Fort Smith Sch. Dist.*, 367 Ark. 193, 238 S.W.3d 902 (2006).

Where Arkansas Department of Human Services' motion for findings of fact and conclusions of law was filed before the entry of the adjudication order, it fell within subsection (a) of this rule, and the time within which to appeal the adjudication order expired prior to the filing of a notice of appeal. *Ark. Dep't of Human Servs. v. Dix*, 94 Ark. App. 139, 227 S.W.3d 456 (2006).

**Cited:** *Greenwood v. Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979); *Ratliff v. Thompson*, 267 Ark. 349, 590 S.W.2d 291 (1979); *Southern Title Ins. Co. v. Oller*, 268 Ark. 300, 595 S.W.2d 681 (1980); *Shannon v. Anderson*, 269 Ark. 55, 598 S.W.2d 97 (1980); *Alley v. Rodgers*, 269 Ark. 262, 599 S.W.2d 739 (1980); *Argonaut Ins. Co. v. M & P Equip. Co.*, 269 Ark. 302, 601 S.W.2d 824 (1980); *Farm Bureau Mut. Ins. Co. v. Milburn*, 269 Ark. 384, 601 S.W.2d 841 (1980); *North v. Philliber*, 269 Ark. 403, 602 S.W.2d 643 (1980); *Stocker v. Hall*, 269 Ark. 468, 602 S.W.2d 662 (1980); *Countryside Cas. Co. v. Grant*, 269 Ark. 526, 601 S.W.2d 875 (1980); *City of Whitehall v. Southern Mechanical Contracting, Inc.*, 269 Ark. 563, 599 S.W.2d 430 (1980); *Peacock v. Bryant*, 269 Ark. 658, 600 S.W.2d 413 (1980); *Grubb v. Cloven*, 269 Ark. 846, 601 S.W.2d 244 (1980); *Gilstrap v. Jackson*, 269 Ark. 876, 601 S.W.2d 270 (1980); *Kelley v. Mid Continent Leasing Co.*, 269 Ark. 912, 601 S.W.2d 257 (1980); *VanHook v. VanHook*, 270 Ark. 27, 603 S.W.2d 434 (1980); *Bank of Quitman v. Phillips*, 270 Ark. 53, 603 S.W.2d 450 (1980); *Odell Webb Bldrs., Inc. v. Avington*, 270 Ark. 68, 603 S.W.2d 440 (1980); *Warren v. Warren*, 270 Ark. 163, 603 S.W.2d 472 (1980); *Morris v. Wynia*, 270 Ark. 260, 603 S.W.2d 482 (1980); *Watkins v. Dudgeon*, 270 Ark. 516, 606 S.W.2d 78 (1980); *Hall v. Clayton*, 270 Ark. 626, 606 S.W.2d 102 (1980); *Argonaut Ins. Co. v. Hooper*, 270 Ark. 661, 606 S.W.2d 116 (1980); *City of Little Rock v. Infant-Toddler Montessori Sch., Inc.*, 270 Ark. 697, 606 S.W.2d 743 (1980); *City of Little Rock v. Breeding*, 270 Ark. 752, 606 S.W.2d 120 (1980), recalled 608 S.W.2d 7 (Ark. 1980); *Vance v. Butler*, 270 Ark. 770, 606 S.W.2d 153 (1980); *Shinn v. First Nat'l Bank*, 270 Ark. 774, 606 S.W.2d 154 (1980); *Hair v. Hair*, 270 Ark. 948, 607 S.W.2d 72 (1980), aff'd in part and rev'd in part 613 S.W.2d 376 (Ark. 1981); *Hendrix v. Republic Nat'l Life Ins. Co.*, 270 Ark. 955, 606 S.W.2d 601 (1980); *Palmer v. City of Conway*, 271 Ark. 127, 607 S.W.2d 87 (1980); *Kreutzer v. Clark*, 271 Ark. 243, 607 S.W.2d 670 (1980); *Plant v. Plant*, 271 Ark. 369, 609 S.W.2d 93 (1980); *Hendrix v. Sidney M. Thom & Co.*, 271 Ark. 378, 609 S.W.2d 98 (1980); *Gautrau v. Long*, 271 Ark. 394, 609 S.W.2d 107 (1980); *Pruitt v. Pruitt*, 271 Ark. 404, 609 S.W.2d 84 (1980);



Duncan v. Foster, 271 Ark. 591, 609 S.W.2d 62 (1980); Avington v. Newborn, 271 Ark. 648, 609 S.W.2d 678 (1980); Worthen Bank & Trust Co. v. Walker, 270 Ark. 868, 606 S.W.2d 382 (1980); Kern v. Sells Enters., Inc., 271 Ark. 904, 612 S.W.2d 94 (1981); Barker v. Barker, 271 Ark. 956, 611 S.W.2d 787 (1981); Commercial Union Ins. Co. v. Sanders, 272 Ark. 25, 611 S.W.2d 754 (1981); Adams v. Dopieralla, 272 Ark. 30, 611 S.W.2d 750 (1981); Lowery v. Jones, 272 Ark. 55, 611 S.W.2d 759 (1981); Harrell Motors, Inc. v. Flanery, 272 Ark. 105, 612 S.W.2d 727 (1981); Southern Equip. & Tractor Co. v. K & K Mines, Inc., 272 Ark. 278, 613 S.W.2d 596 (1981); Brown v. Summerlin Assocs., 272 Ark. 298, 614 S.W.2d 227 (1981); Festinger v. Kantor, 272 Ark. 411, 616 S.W.2d 455 (1981); Tucker v. Stacy, 272 Ark. 475, 616 S.W.2d 473 (1981); Henson v. Money, 273 Ark. 203, 617 S.W.2d 367 (1981); Huffman v. Dawkins, 273 Ark. 520, 622 S.W.2d 159 (1981); Warren v. Warren, 273 Ark. 528, 623 S.W.2d 813 (1981); Bachman v. Bachman, 274 Ark. 23, 621 S.W.2d 701 (1981); Walt Bennett Ford, Inc. v. Pulaski County Special Sch. Dist., 274 Ark. 208, 624 S.W.2d 426 (1981); Tedder v. Blackmon's Auctions, Inc., 274 Ark. 241, 623 S.W.2d 516 (1981); Wright v. Langdon, 274 Ark. 258, 623 S.W.2d 823 (1981); Allred v. Little Rock Sch. Dist., 274 Ark. 414, 625 S.W.2d 487 (1981); Mayhew v. Loveless, 1 Ark. App. 69, 613 S.W.2d 118 (1981); Henson v. Money, 1 Ark. App. 97, 613 S.W.2d 123 (1981), aff'd 617 S.W.2d 367 (Ark. 1981); Haberman v. Van Zandvoord, 1 Ark. App. 203, 614 S.W.2d 242 (1981); Sanders v. Sanders, 1 Ark. App. 216, 615 S.W.2d 375 (1981); Barron v. Barron, 1 Ark. App. 323, 615 S.W.2d 394 (1981); Humann v. Renko, 2 Ark. App. 32, 616 S.W.2d 26 (1981); DaCosse v. Ahrens, 2 Ark. App. 61, 616 S.W.2d 777 (1981); Hunt v. McIlroy Bank & Trust, 2 Ark. App. 87, 616 S.W.2d 759 (1981); First Nat'l Bank v. Nash, 2 Ark. App. 135, 617 S.W.2d 24 (1981); Black v. Westwood Properties, Inc., 2 Ark. App. 164, 618 S.W.2d 169 (1981); Dicus v. Allen, 2 Ark. App. 204, 619 S.W.2d 306 (1981); Ballard v. Carroll, 2 Ark. App. 283, 621 S.W.2d 484 (1981); Maxwell v. Sutton, 2 Ark. App. 359, 621 S.W.2d 239 (1981); Coleman v. MFA Mut. Ins. Co., 3 Ark. App. 7, 621 S.W.2d 872 (1981); 555, Inc. v. Barlow, 3 Ark. App. 139, 623 S.W.2d 843 (1981); Calhoun v. Calhoun, 3 Ark. App. 270, 625 S.W.2d 545 (1981); Langston v. Langston, 3 Ark. App. 286, 625 S.W.2d 554 (1981); Rocka v. Gipson, 3 Ark. App. 293, 625 S.W.2d 558 (1981); Russell v. Russell, 275 Ark. 193, 628 S.W.2d 315 (1982); Ballentine v. Ballentine, 275 Ark. 212, 628 S.W.2d 327 (1982); Garrison Motor Freight, Inc. v. Hammons, 275 Ark. 232, 628 S.W.2d 567 (1982); McMurtray v. McMurtray, 275 Ark. 303, 629 S.W.2d 285 (1982); Alexander v. First Nat'l Bank, 275

Ark. 439, 631 S.W.2d 278 (1982); Stewart Elec. Co. v. Meyer Sys. Corp., 276 Ark. 71, 632 S.W.2d 422 (1982); Hvasta v. McGough, 276 Ark. 168, 633 S.W.2d 31 (1982); May v. Barg, 276 Ark. 199, 633 S.W.2d 376 (1982); Worch v. Kelly, 276 Ark. 262, 633 S.W.2d 697 (1982); Cooley v. First Nat'l Bank, 276 Ark. 387, 635 S.W.2d 250 (1982); Madison Bank & Trust v. First Nat'l Bank, 276 Ark. 405, 635 S.W.2d 268 (1982), limited Stubblefield v. Siloam Springs Newspapers, Inc., 590 F. Supp. 1032 (W.D. Ark. 1984); Ragland v. Commercial Nat'l Bank, 276 Ark. 418, 635 S.W.2d 258 (1982); Bowen v. Danna, 276 Ark. 528, 637 S.W.2d 560 (1982); National Investors Fire & Cas. Ins. Co. v. Chandler, 4 Ark. App. 116, 628 S.W.2d 593 (1982); Clark v. Clark, 4 Ark. App. 153, 632 S.W.2d 432 (1982); Hayse v. Hayse, 4 Ark. App. 160B, 630 S.W.2d 48 (1982), questioned Nall v. Duff, 805 S.W.2d 63 (Ark. 1991), questioned Lofton v. Lofton, 745 S.W.2d 635 (1988); Everett v. Parts, Inc., 4 Ark. App. 213, 628 S.W.2d 875 (1982); Stout v. Stout, 4 Ark. App. 266, 630 S.W.2d 53 (1982); Chrestman v. Chrestman, 4 Ark. App. 281, 630 S.W.2d 60 (1982); Chrestman v. Chrestman, 4 Ark. App. 281, 630 S.W.2d 60 (1982); Henley's Whsle. Meats, Inc. v. Walt Bennett Ford, Inc., 4 Ark. App. 362, 631 S.W.2d 316 (1982); Hatfield v. Arkansas W. Gas Co., 5 Ark. App. 26, 632 S.W.2d 238 (1982); Saltzman-Guenthner Clinic, Ltd. v. Burnett, 5 Ark. App. 56, 632 S.W.2d 441 (1982); Askins v. Askins, 5 Ark. App. 64, 632 S.W.2d 249 (1982); Back v. Union Life Ins. Co., 5 Ark. App. 176, 634 S.W.2d 150 (1982); Thomas v. International Harvester Credit Corp., 5 Ark. App. 244, 636 S.W.2d 296 (1982); Horn v. Imperial Cas. & Indem. Co., 5 Ark. App. 277, 636 S.W.2d 302 (1982); Stracener v. Stracener, 6 Ark. App. 1, 636 S.W.2d 877 (1982); Monroe v. Dallas, 6 Ark. App. 10, 636 S.W.2d 881 (1982); Martin v. Martin, 6 Ark. App. 18, 637 S.W.2d 612 (1982); Loveless v. May, 278 Ark. 127, 644 S.W.2d 261 (1983); Potter v. Potter, 280 Ark. 38, 655 S.W.2d 382 (1983), questioned Meeks v. Meeks, 721 S.W.2d 653 (Ark. 1986), questioned Liles v. Liles, 711 S.W.2d 447 (Ark. 1986), questioned Dillard v. Dillard, 772 S.W.2d 355 (1989); Toney v. Haskins, 7 Ark. App. 98, 644 S.W.2d 622 (1983); Taylor v. Hill, 10 Ark. App. 45, 661 S.W.2d 412 (1983); Baldwin-United Corp. v. Garner, 283 Ark. 385, 678 S.W.2d 754 (1984), cert. denied 471 U.S. 1111, 105 S. Ct. 2345 (1985); McDermott v. Strauss, 283 Ark. 444, 678 S.W.2d 334 (1984); Mendel v. Garner, 283 Ark. 473, 678 S.W.2d 759 (1984); Johnson v. Wylie, 284 Ark. 38, 679 S.W.2d 198 (1984); Jackson v. Farm & Com. Properties, 284 Ark. 130, 680 S.W.2d 105 (1984); Vasquez v. Justice, 11 Ark. App. 29, 665 S.W.2d 896 (1984); Wing v. Wing, 12 Ark. App. 84, 671 S.W.2d 204 (1984); Williams v. Williams, 12 Ark. App. 89, 671 S.W.2d 201

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(2004); *Farm Credit Midsouth, PCA v. Reece Contr., Inc.*, 359 Ark. 267, 196 S.W.3d 488 (2004); *Office of Child Support Enforcement v. Reagan*, 89 Ark. App. 262, 202 S.W.3d 10 (2005); *Evans v. Tillery*, 361 Ark. 63, 204 S.W.3d 547 (2005); *Smith v. AJ&K Operating Co.*, 365 Ark. 229, 227 S.W.3d 899 (2006); *Murchison v. Safeco Ins. Co.*, 367 Ark. 166, 238 S.W.3d 11 (2006); *State v. Hatchie Coon Hunting & Fishing Club, Inc.*, 98 Ark. App. 206, 254 S.W.3d 11 (2007); *Royal Oaks Vista L.L.C. v. Maddox*, 372 Ark. 119, 271 S.W.3d 479 (2008); *Smith v. Estate of Howell*, 372 Ark. 186, 272 S.W.3d 106 (2008); *PH, LLC v. City of Conway*, 2009 Ark. 504, 34 S.W.3d 660 (2009); *Swaim v. State*, 2009 Ark. App. 557, — S.W.3d —, 2009 Ark. App. LEXIS 698 (2009); *Burdine v. Ark. Dep't of Fin. & Admin.*, 2010 Ark. 455, — S.W.3d —, 2010 Ark. LEXIS 550 (Nov. 18, 2010); *Erickson v. Erickson*, 2010 Ark. App. 302, — S.W.3d —, 2010 Ark. App. LEXIS 300 (Apr. 7, 2010); *Screeton v. ASCO Vending, Inc.*, 2010 Ark. App. 230, — S.W.3d —, 2010 Ark. App. LEXIS 236 (Mar. 10, 2010); *Henry v. QHG of Springdale, Inc.*, 2010 Ark. App. 847, — S.W.3d —, 2010 Ark. App. LEXIS 904 (Dec. 15, 2010); *Kirkland v. Sandlin*, 2011 Ark. 209, — S.W.3d —, 2011 Ark. LEXIS 200 (May 12, 2011); *Morningstar v. Bush*, 2011 Ark. 350, — S.W.3d —, 2011 Ark. LEXIS 440 (Sept. 15, 2011); *Curry v. Pope County Equalization Bd.*, 2011 Ark. 408, — S.W.3d —, 2011 Ark. LEXIS 507 (Oct. 6, 2011); *Nichols v. Culottes Bay Navigation Rights Comm., LLC*, 2011 Ark. App. 730, — S.W.3d —, 2011 Ark. App. LEXIS 784 (Nov. 30, 2011); *Chastain v. Chastain*, 2012 Ark. App. 73, — S.W.3d —, 2012 Ark. App. LEXIS 160 (Jan. 18, 2012); *Jewell v. Fletcher*, 2012 Ark. 132, — S.W.3d —, 2012 Ark. LEXIS 153 (Mar. 29, 2012).

### Rule 53. Masters.

(a) *Appointment and Compensation.* Subject to the limitations contained herein, each court in which an action is pending may appoint a special master therein. As used in this rule, the word “master” includes a referee, an auditor, an examiner, a commissioner and an assessor. The compensation to be allowed a master shall be fixed by the court and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but, when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) *Reference.* A reference to a master shall be the exception and not the rule. Reference shall be made in only those cases where there is no right to trial by jury or where such right has been waived. Except in matters of account and difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.



(c) *Powers.* The order of reference to a master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. The master shall cause a record to be made of the evidence offered and excluded.

(d) *Proceedings.*

(1) *Meetings.* When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof, unless the order of reference otherwise provides, the master shall set a time and place for the first meeting of the parties or their attorneys to be held within the time specified by the court or otherwise within a reasonable time after receipt of the order of reference. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) *Witnesses.* The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear to give evidence, he may be punished as for a contempt and be subject to the consequences, penalties and remedies provided in Rules 37 and 45.

(3) *Statement of Accounts.* When matters of accounting are in issue before the master, he may prescribe the form in which the account shall be submitted and in any proper case may receive or require in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) *Report.*

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference, and, if required to make findings of fact and conclusions of law, he shall set them forth in his report. He shall file the report with the clerk of the court and unless directed by the order of reference shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *Effect.* The court shall accept the master's findings of fact unless clearly erroneous. Within 20 days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(c). The court after hearing may adopt the report or modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(4) *Draft Report.* Before filing his report, a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

**Reporter's Notes to Rule 53:** 1. Rule 53 represents a merger of various provisions from FRCP 53 and prior Arkansas law. This rule does, however, contain several changes from federal and Arkansas law. The latter was codified as superseded *Ark. Stat. Ann.* § 27-1801, et seq. (Repl. 1962), and permitted a reference to a master only in courts of equity. Under FRCP 53, both legal and equitable issues may be referred to a master regardless of whether a jury is involved. *In Re Peterson*, 253 U.S. 300, 40 S. Ct. 543 (1920). Under Rule 53, masters may be used in law courts, but only in cases where a jury trial has been waived.

2. Under this rule and under FRCP 53, the use of masters is the exception and should be used only in rare cases. *Arthur Murray, Inc. v. Oliver*, 364 F. 2d 28 (C.C.A. 8th, 1966), *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F. 2d 809 (C.C.A. 7th, 1942). Masters have been used sparingly in Arkansas although equity courts have had the discretionary power to appoint masters in complex accounting matters. *State ex rel. Purcell v. Nelson*, 246 Ark. 210, 438 S.W.2d 33 (1969).

3. Section (c) is substantially the same as FRCP 53(c) and defines the powers possessed by a master. These powers may be restricted by the referring court, but generally the master has the right to conduct hearings as if he were the judge sitting on the case. A record of the proceedings before the master is required under this section whereas the Federal Rule does not require that a record be made unless requested by a party. Superseded *Ark. Stat. Ann.* § 27-1806 (Repl. 1962) made a record mandatory and this requirement is brought forward in this rule.

4. Section (d) follows the Federal Rule regarding the conduct of the proceedings with the exception of the time limit contained therein. Under the latter, a meeting with the parties on their attorneys must be held within

twenty days after the receipt of the referral by the master. Under this rule, the court may specify a time for such meeting and if none is specified, it must be held within a reasonable period of time following the referral.

5. Omitted from Section (e) of Rule 53 is FRCP 53(e)(3). Since masters are limited to non-jury situations under this rule, the federal provision is inapplicable. Otherwise, Section (e) is substantially the same as its federal counterpart. Under (e)(2), the findings of a master are binding upon the court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support it, the court, on the entire evidence is left with the definite and firm conviction that a mistake has been made by the master. *McGraw Edison Co. v. Central Transformer Corp.*, 196 F. Supp. 664 (D.C. Ark., 1961); *United States v. 620.98 Acres of Land*, 255 F. Supp. 427 (D.D. Ark., 1966). The substantial evidence rule is not the test. *WRB Corp. v. Geer*, 313 F. 2d 750 (C.C.A. 5th, 1963). Under prior Arkansas law, equity courts were not required to accept the master's report. *Griffin v. Isgrig*, 227 Ark. 931, 302 S.W.2d 777 (1957); *Ferguson v. Rogers*, 129 Ark. 197, 195 S.W. 22 (1917). Thus, this rule modifies prior Arkansas law by making the master's report mandatory unless it is clearly erroneous. Also, under this rule, a party has twenty days within which to make objection to the report which is an increase over the ten days allowed under FRCP 53.

6. Sections (e)(3) and (e)(4) are identical to Sections (e)(4) and (e)(5) of the Federal Rule. Superseded *Ark. Stat. Ann.* § 27-1813 (Repl. 1962) provided that a reference to a master by consent of the parties did not make the findings any more conclusive. Under this rule, however, where the parties stipulate as to the binding effect of the master's findings, only questions of law may thereafter be considered.



## RESEARCH REFERENCES

**Ark. L. Notes.** Gitelman and Watkins, No Requiem for Ricarte: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

**U. Ark. Little Rock L.J.** Stafford, Separation of Powers and Arkansas Administrative Agencies. Distinguishing Judicial Power and Legislative Power, 7 U. Ark. Little Rock L.J. 279.

Note, Constitutional Law — Religious Freedom — Forced Disclosure of Church Records Pursuant to State NonProfit Corporation Statute Prohibited, 12 U. Ark. Little Rock L.J. 75.

Note, Civil Procedure — Arkansas Rule of Civil Procedure 53(b) — An End to the Use of Special Referees in Arkansas, 12 U. Ark. Little Rock L.J. 577.

## CASE NOTES

## ANALYSIS

Acceptance of findings.

Illustrative case.

Reference to master.

—Exceptional conditions.

Report.

**Acceptance of Findings.**

A notice of appeal from the Special Master's report and a motion to strike the notice of appeal were treated as an objection to the Special Master's report under subdivision (e)(2) of this rule. *Osborne v. Power*, 320 Ark. 466, 896 S.W.2d 905 (1995).

To the extent that the court adopts the master's findings, they are considered the findings of the court. *Beasley v. Archer*, 22 Ark. App. 284, 739 S.W.2d 695 (1987).

Court properly refused to adopt special master's report. *Beasley v. Archer*, 22 Ark. App. 284, 739 S.W.2d 695 (1987).

**Illustrative Case.**

Master appointed and directed to conduct proceedings in accordance with S. Ct. & Ct. App. R. 6-5(a) and this rule in a case involving a proposed constitutional amendment. *Holt v. Priest*, 326 Ark. 277, 930 S.W.2d 359 (1996).

**Reference to Master.**

Legislation authorizing circuit and probate judges to appoint masters or referees to hear juvenile cases with circuit and probate judges, and purporting to vest those masters or referees with all the powers and authority of the judges, violated Ark. Const., Art. 7, § 34, and subsection (b) of this rule. *Hutton v. Savage*, 298 Ark. 256, 769 S.W.2d 394 (1989).

A crowded or congested docket has never been determined a valid purpose for the appointment of a master under this rule; nor is a master appropriate because he is more familiar with the case or because the judge is unavailable. *Arkansas Dep't of Human Servs. v. Templeton*, 298 Ark. 390, 769 S.W.2d 404 (1989).

**—Exceptional Conditions.**

A simple statement of unavailability or conflict by the trial judge is not a showing of exceptional conditions pursuant to subsection

(b) of this rule. *Arkansas Dep't of Human Servs. v. Templeton*, 298 Ark. 390, 769 S.W.2d 404 (1989).

**Report.**

Exceptions to the report of a master made for the first time on appeal will not be considered. *Layman v. Layman*, 300 Ark. 583, 780 S.W.2d 560 (1989).

In considering whether Christmas light displays on and about parties home violated an injunction declaring their displays a nuisance, the question was whether the new display constituted a massive Christmas display calculated to attract an unusually large number of visitors to the neighborhood. This question was not addressed by the master. *Osborne v. Power*, 322 Ark. 229, 908 S.W.2d 340 (1995).

**Cited:** *Moore v. Owens*, 268 Ark. 324, 597 S.W.2d 65 (1980); *Coyne v. Coyne*, 9 Ark. App. 80, 654 S.W.2d 584 (1983); *Patterson Dental Co. v. Brazil*, 14 Ark. App. 291, 688 S.W.2d 310 (1985); *Supreme Court Comm. on Professional Conduct v. Muhammed*, 291 Ark. 225, 723 S.W.2d 828 (1987); *Gipson v. Brown*, 295 Ark. 371, 749 S.W.2d 297 (1988); *Conway Corp. v. Construction Engr's, Inc.*, 300 Ark. 225, 778 S.W.2d 919 (1989), opinion withdrawn, substituted opinion — Ark. —, 782 S.W.2d 36 (1989), cert. denied 494 U.S. 1080, 110 S. Ct. 1809, 108 L. Ed. 2d 939 (1990); *Harvey v. Clinton*, 308 Ark. 319, 822 S.W.2d 393 (1992); *Casteel v. McCuen*, 310 Ark. 400, 835 S.W.2d 885 (1992); *Porter v. McCuen*, 310 Ark. 403, 835 S.W.2d 886 (1992); *Casteel v. McCuen*, 310 Ark. 568, 838 S.W.2d 364 (1992); *Osborne v. Power*, 319 Ark. 239, 890 S.W.2d 577 (1995), cert. denied 515 U.S. 1143, 115 S. Ct. 2580, 132 L. Ed. 2d 829 (1995); *Scott v. Priest*, 326 Ark. 69, 928 S.W.2d 337 (1996), dismissed 326 Ark. 466, 932 S.W.2d 751 (1996); *Roberts v. Priest*, 334 Ark. 503, 975 S.W.2d 850 (1998); *Horton v. Ferrell*, 335 Ark. 366, 981 S.W.2d 88 (1998); *Lake View Sch. Dist. No. 25 v. Huckabee*, 370 Ark. 139, 257 S.W.3d 879 (2007).

## ARTICLE VII. JUDGMENT

### Rule 54. Judgment; costs.

(a) *Definition; Form.* “Judgment” as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) *Judgment Upon Multiple Claims or Involving Multiple Parties.*

(1) *Certification of Final Judgment.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination, supported by specific factual findings, that there is no just reason for delay and upon an express direction for the entry of judgment. In the event the court so finds, it shall execute the following certificate, which shall appear immediately after the court’s signature on the judgment, and which shall set forth the factual findings upon which the determination to enter the judgment as final is based:

#### Rule 54(b) Certificate

With respect to the issues determined by the above judgment, the court finds:

[Set forth specific factual findings.]

Upon the basis of the foregoing factual findings, the court hereby certifies, in accordance with Rule 54(b)(1), Ark. R. Civ. P., that it has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the judgment shall be a final judgment for all purposes.

Certified this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Judge

(2) *Lack of Certification.* Absent the executed certificate required by paragraph (1) of this subdivision, any judgment, order, or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the judgment, order, or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all of the parties.

(3) *Review of Finality.* The finality of a judgment, order, or other form of decision containing the certificate required by paragraph (1) of this subdivision may be reviewed only pursuant to a timely notice of appeal filed in accordance with Rule 4, Ark. R. App. P.—Civ.

(4) *Retention of Jurisdiction.* An appeal of a judgment, order, or other form of decision containing the certificate required by paragraph (1) of this subdivision shall not affect the trial court’s jurisdiction over other claims or parties.

(5) *Named but Unserved Defendant.* Any claim against a named but unserved defendant, including a “John Doe” defendant, is dismissed by the circuit court’s final judgment or decree.

(c) *Demand for Judgment.* A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.



Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) *Costs.*

(1) Costs shall be allowed to the prevailing party if the court so directs, unless a statute or rule makes an award mandatory.

(2) Costs taxable under this rule are limited to the following: filing fees and other fees charged by the clerk; fees for service of process and subpoenas; fees for the publication of warning orders and other notices; fees for interpreters appointed under Rule 43; witness fees and mileage allowances as provided in Rule 45; fees of a master appointed pursuant to Rule 53; fees of experts appointed by the court pursuant to Rule 706 of the Arkansas Rules of Evidence; fees of translators appointed by the court pursuant to Rule 1009 of the Arkansas Rules of Evidence; and expenses, excluding attorney's fees, specifically authorized by statute to be taxed as costs.

(e) *Attorneys' Fees.* (1) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(2) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute or rule entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion, shall also disclose the terms of any agreement with respect to fees to be paid for the services for which the claim is made.

(3) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(c) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law, and a judgment shall be set forth in a separate document as provided in Rule 58.

(4) The court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of subdivision (b) thereof.

(5) The provisions of subparagraphs (1) through (4) do not apply to claims for fees and expenses as sanctions for violations of these rules. (Amended September 28, 1992, effective January 1, 1993; amended December 5, 1994, effective January 15, 1995; amended November 18, 1996, effective March 1, 1997; amended January 28, 1999; amended February 1, 2001; amended October 9, 2008, effective January 1, 2009.)

**Reporter's Notes to Rule 54:** 1. With exception of the changes in Section (c), Rule 54 is otherwise identical to FRCP 54.

2. Under FRCP 54(b), the practice is to wait until all claims have been finally determined before entering judgment on any particular claim. The purpose is to prevent piecemeal appeals while portions of the litigation remain unresolved. There may be situations,

however, where a particular claim should be finally determined before the entire case is concluded. Accordingly, the trial court may direct the entry of a final judgment on fewer than all claims involved upon the express determination that there is no good reason for delay. Thus, a party will always know whether a judgment in a Rule 54(b) situation is ripe for appeal. Unless this determination

has been made by the trial court, there can be no appeal. *RePass v. Vreeland*, 357 F. 2d 801 (C.C.A. 3rd, 1966); *Oak Construction Co. v. Huron Cement Co.*, 475 F. 2d 1220 (C.C.A. 6th, 1973).

3. Section (c) formulates the standard that except for default judgments, the form of relief and nature of the order are to be determined by what the facts establish as opposed to what counsel has pleaded. *South Falls Corp. v. Rochelle*, 329 F. 2d 611 (C.C.A. 5th, 1964); *Molnar v. Gulfcoast Transit Co.*, 371 F. 2d 639 (C.C.A. 5th, 1967). With reference to default judgments, however, the first sentence of Section (c) expressly provides that relief may not be different in kind or amount from that prayed for by the claimant.

4. Section (d) contains the only changes from FRCP 54. It removes the power contained in the Federal Rule for the clerk to tax costs and leaves such power with the trial judge as under prior Arkansas law. Unless otherwise ordered by the trial judge, costs are taxed against the losing party as was the case under superseded *Ark. Stat. Ann.* §§ 27-2308, 27-2310 and 27-2312 (Repl. 1962).

**Addition to Reporter's Notes, 1992 Amendment:** The first sentence of Rule 54(b) is amended to expressly state the trial court's obligation to make findings of fact with respect to the required determination that there is "no just reason for delay" for the entry of judgment. The amendment reflects the Supreme Court's holding to that effect in *Franklin v. Osca, Inc.*, 308 Ark. 409, 825 S.W.2d 812 (1992) (trial court "must factually set forth reasons ... explaining why a hardship or injustice would result if an appeal is not permitted").

**Addition to Reporter's Notes, 1994 Amendment:** Subdivision (d) of the rule is rewritten for purposes of clarity. No substantive change is intended. The original version of the rule was awkward and led to confusion. See, e.g., *Wood v. Tyler*, 317 Ark. 319, 877 S.W.2d 582 (1994).

**Addition to Reporter's Notes, 1997 Amendment:** New subdivision (e) establishes a procedure for presenting claims for attorney's fees, a frequently recurring form of litigation not initially contemplated by the rules. It is based on federal Rule 54(d)(2), as amended in 1993.

Paragraph (1) makes plain that the subdivision does not apply to attorneys' fees recoverable as an element of damages, as when sought under the terms of a contract. Such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury. Paragraph (2) provides a deadline for motions for attorneys' fees — 14 days after final judgment unless the court or a statute specifies some other time. Prior law did not prescribe any specific time limit on

claims for attorneys' fees. See *Marsh & McLennan v. Herget*, 321 Ark. 180, 900 S.W.2d 195 (1995).

One purpose of this provision is to assure that the opposing party is informed of the claim before the time for appeal has elapsed. Prompt filing affords an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind. It also enables the court in appropriate cases to make its ruling on a fee request in time for any appellate review of a dispute over fees to proceed at the same time as review on the merits.

Filing a motion for fees under subdivision (e) does not affect the finality or appealability of a judgment. If an appeal on the merits of the case is taken, the court may rule on the claim for fees, defer its ruling on the motion, or deny the motion without prejudice and direct under paragraph (2) a new period for filing after the appeal has been resolved. A notice of appeal does not extend the time for filing a fee claim based on the initial judgment, but the court may effectively extend the period by permitting claims to be filed after resolution of the appeal. A new period for filing will automatically begin if a new judgment is entered following a reversal or remand by the appellate court or the granting of a motion under Rule 59.

The new subdivision does not require that the motion for attorneys' fees be supported at the time of filing with the evidentiary material bearing on the fees. This material must be submitted in due course, according to such schedule as the court may direct in light of the circumstances of the case. What is required is the filing of a motion sufficient to alert the adversary and the court that there is a claim for fees and the amount of such fees or a fair estimate.

If directed by the court, the moving party is required to disclose any fee agreement, including those between attorney and client, between attorneys sharing a fee to be awarded, and between adversaries made in partial settlement of a dispute where the settlement must be implemented by court action, as required by Rule 23 and similar provisions. This subdivision does not affect the practice in class action cases whereby claims for fees are presented in advance of hearings to consider approval of the proposed settlement, since the court is permitted to require submissions of fee claims in advance of the entry of judgment.

Paragraph (3) assures the parties of an opportunity to make an appropriate presentation with respect to issues involving the evaluation of legal services. In some cases, an evidentiary hearing may be needed, but this is not required in every case. The amount of time to be allowed for the preparation of



submissions both in support of and in opposition to awards should be tailored to the particular case. The court is expressly authorized to make a determination of the liability for fees before receiving submissions by the parties bearing on the amount of an award. This option may be appropriate in actions in which the liability issue is doubtful and the evaluation issues are numerous and complex.

The court may order disclosure of additional information, such as that bearing on prevailing local rates or on the appropriateness of particular services for which compensation is sought. On rare occasion, the court may determine that discovery would be useful to the parties. Fee awards should be made in the form of a separate judgment under Rule 58 since such awards are subject to appellate review. To facilitate such review, paragraph (3) requires the court to set forth its findings of fact and conclusions of law. It is anticipated that this explanation will be quite brief in most cases.

Paragraph (4) authorizes the court to refer issues regarding the amount of a fee to a master under Rule 53. This authorization eliminates any controversy as to whether such references are permitted under Rule 53(b) as “matters of account and difficult computation of damages.” Paragraph (5) excludes from this rule the award of fees as sanctions for violations of these rules.

#### **Addition to Reporter’s Notes, 1999**

**Amendment:** A new paragraph has been added to subdivision (d) defining the term “costs.” A definition was deemed advisable in light of continuing confusion as to expenses that can be taxed as costs. *See, e.g., Wood v. Tyler*, 317 Ark. 319, 877 S.W.2d 582 (1994); *Sutton v. Ryder Truck Rental, Inc.*, 305 Ark. 231, 807 S.W.2d 905 (1991).

#### **Addition to Reporter’s Notes, 2001**

**Amendment:** Rule 54(b) has caused problems for lawyers and judges alike. See generally *Watkins, The Mysteries of Rule 54(b)*, 1996 Ark. L. Notes 117. Although subdivision (b) has not been radically altered, the revisions are intended to emphasize the steps that must be taken to secure immediate ap-

pellate review. The subdivision has been divided into four numbered paragraphs, and the most significant change is the trial court’s certificate required by paragraph (1). By virtue of paragraph (2), the absence of the certificate means that a final portion of a case involving multiple parties or claims is not immediately appealable. Except for requiring a certificate and setting out its form, paragraph (1) differs little from the first sentence of the prior version of subdivision (b). Similarly, paragraph (2) largely tracks the second sentence but has been amended to refer to the certificate. Paragraphs (3) and (4) are new but do not work any change in the law.

#### **Addition to Reporter’s Notes, 2008**

**Amendment:** Subdivision (b) has been amended by adding a new paragraph (5), which addresses the “named but not served defendant” problem. Cases asserting claims against multiple defendants are commonplace. In some of those cases, a defendant is never served but nonetheless remains listed as a party and is never dismissed even though the circuit court has resolved all the claims against all the other parties. This situation creates problems on appeal. It wastes litigants’ time and money and scarce judicial resources when, after the case has been appealed and briefed, the appellate court discovers a forgotten defendant whose presence destroys the finality of the judgment being appealed. *E.g., Grooms v. Myers*, 308 Ark. 324, 823 S.W.2d 901 (1992). This problem often arises with “John Doe” defendants. *E.g., Downing v. Lawrence Hall Nursing Ctr.*, 368 Ark. 51, 243 S.W.3d 263 (2006). New paragraph (5) solves this problem by mandating that any claim against a named but unserved defendant (including any John Doe) is dismissed by the circuit court’s final judgment or decree.

Paragraph (d)(2) has also been amended. The change reflects that Rule of Evidence 1009, also adopted in 2008, authorizes the circuit court to appoint a qualified translator and requires the court to tax the reasonable value of the appointed translator’s services as costs.

## RESEARCH REFERENCES

**ALR.** Recovery of Computer-Assisted Research Costs as Part of or in Addition to Attorney’s Fees Under State Law. 33 ALR 6th 305.

**Ark. L. Notes.** *Watkins, Procedural Rules You Won’t Find in the Rules of Civil Procedure*, 1992 Ark. L. Notes 53. *Watkins, The Mysteries of Rule 54(b)*, 1996 Ark. L. Notes 117.

**Ark. L. Rev.** Recent Developments — 1997 Amendments to the Arkansas Rules of Civil

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Legislative Survey, Civil Procedure, 16 U.  
Ark. Little Rock L.J. 85.

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**Construction.**

The specific provision for appeal when an answer is stricken under ARAP 2(a)4., must control over the general provisions contained in ARAP 2(a)1. and subsection (b) of this rule. *Arnold Fireworks Display, Inc. v. Schmidt*, 307 Ark. 316, 820 S.W.2d 444 (1991).

ARAP 2(a)(6), providing for appeals from injunctions, represents an exception to subsection (b) of this rule, which requires that all claims relating to all parties be disposed of prefatory to appeal; the specific authority for an appeal from an injunction should control over the absence of finality in the court's order. *East Poinsett County Sch. Dist. No. 14 v. Massey*, 317 Ark. 219, 876 S.W.2d 573 (1994).

Pursuant to ARAP 2(a)(3), a party may appeal from an order which grants or refuses a new trial; however, when the cause of action involves multiple parties and multiple claims, the finality of the trial court's judgment is

determined by subsection (b) of this rule. *GMAC v. Eubanks*, 318 Ark. 640, 887 S.W.2d 292 (1994).

RAP-Civ 2(a)4, allowing an appeal from an order striking an answer, or any part of an answer, or any pleading in an action, controls over subsection (b) of this rule, restricting appeals to final orders. *Allen v. Greenland*, 347 Ark. 465, 65 S.W.3d 424 (2002).

Subdivision (b)(5) of this rule is procedural and remedial and certainly does not disturb vested rights or create new obligations, and the new rule merely attempts to avoid the problems on appeal created by a certain situation; therefore, the Arkansas Supreme Court would apply the new rule retroactively and allow it to serve its intended purpose, allowing the estate administrator's appeal to continue despite the lack of a final order as to several defendants. *Jackson v. Sparks Reg'l Med. Ctr.*, 375 Ark. 533, 294 S.W.3d 1 (2009).

Requirement in subdivision (e)(2) of this rule that a motion for attorney fees contain the specific rule or statute providing for attorney fees is the essence of the thing to be done by the rule. *Roop v. Cook*, 2009 Ark. App. 540, 334 S.W.3d 412 (2009).

**Purpose.**

This rule is not intended to create an avenue for two stages of review simply by citing subsection (b) of this rule; it is intended to permit review before the entire case is concluded, but only in those exceptional situations where a compelling, discernible hardship will be alleviated by an appeal at an intermediate stage. *Coleman's Serv. Ctr., Inc. v. Southern Inns Mgt., Inc.*, 44 Ark. App. 45, 866 S.W.2d 427 (1993).

The purpose of subsection (b) of this rule is to prevent piecemeal appeals while portions of the litigation remain unresolved. *Maroney v. City of Malvern*, 317 Ark. 177, 876 S.W.2d 585 (1994).

The fundamental policy of subsection (b) of this rule is to avoid piecemeal appeals; absent the requisite facts, findings, and certification by the trial court, the supreme court will not engage in a review of appellant's claims against some defendants when additional review of appellant's claims against the remaining defendants could possibly be required in the future. *Cortese v. Atlantic Richfield*, 317 Ark. 207, 876 S.W.2d 581 (1994), appeal dismissed 320 Ark. 639, 898 S.W.2d 467 (1995).

The fundamental policy behind subsection (b) of this rule is to avoid piecemeal appeals. *Cortese v. Atlantic Richfield*, 320 Ark. 639, 898 S.W.2d 467 (1995).



**Applicability.**

A decree that orders a judicial sale of property and places the court's directive into execution is a final order and appealable under ARAP 2(a)(1); when there is such an order, a certification under subsection (b) of this rule is not necessary. *Scherz v. Mundaca Inv. Corp.*, 318 Ark. 595, 886 S.W.2d 631 (1994).

Subsection (b) of this rule did not apply to allow plaintiff to appeal trial court's denial of her motion to prosecute her lawsuit under a pseudonym where the order involved a ruling on a preliminary legal issue and did not dispose of one of several claims or one of several parties. *Doe v. Union Pac. R.R.*, 323 Ark. 237, 914 S.W.2d 312 (1996).

In members' breach of contract action against a country club, the trial court did not abuse its discretion in awarding attorney fees to the members; further, an award of fees under § 16-22-308 obviated the need for a motion to be filed requesting the fees under this rule. *Millwood-RAB Mktg., Inc. v. Blackburn*, 95 Ark. App. 253, 236 S.W.3d 551 (2006).

In an underlying suit, a property owner alleged that all of his real property was sold over his objection; a circuit court judgment was later voided ab initio by another circuit court, which maintained that it had exclusive jurisdiction due to the dissolution of a business entity that was allegedly involved in the sale of the property. The property owner's request for writ of certiorari or writ of prohibition was denied because he still had an adequate remedy at law—the appeal of the second circuit court's order; although the property owner needed to comply with subsection (b) of this rule. *Sims v. Circuit Court*, 368 Ark. 498, 247 S.W.3d 493 (2007).

**Appealable Order.**

Reviewing court was without jurisdiction to review the appeal because the notice of appeal was not properly and timely filed within thirty (30) days of the "order appealed from," and a review of case law revealed no instance where a reviewing court had ever dismissed a case for a lack of a final order without the notice of appeal and record having been timely filed; whether an order had properly been appealed pursuant to subsection (b) of this rule was a jurisdictional question, which the reviewing court could address sua sponte, however, such a determination for Ark. R. App. P. Civ. 2 purposes was always secondary to whether a timely notice of appeal and record had been filed. *Sloan v. Ark. Rural Med. Prac. Loan & Scholarship Bd.*, 369 Ark. 442, 255 S.W.3d 834 (2007).

Appeals from a circuit court's order construing a decedent's will in the widow's favor were timely, under § 28-1-116(a) and (g), because (1) any attempt to appeal from the partial summary judgment would have been a nullity

because the partial summary judgment lacked finality because it was obviously partial and other issues remained, and the partial summary judgment did not contain a certification under subsection (b) of this rule allowing for an immediate appeal; (2) the partial summary judgment became final on July 31, 2006, when judgment was entered disposing of the remaining claims; (3) motions for new trial were filed and, under Ark. R. App. P. Civ. 4(b), such motions extended the time for all parties to file their notice of appeal; and (4) the older children filed their notice of appeal on September 18, 2006. *Taylor v. Woods*, 102 Ark. App. 92, 282 S.W.3d 285 (2008).

Reviewing court dismissed an employee's appeal of an order granting a motion for a directed verdict filed by an employer's client in a negligence action because there could be issues concerning the intervention by an employer's insurer that remained outstanding and could be subject to appeal; the employee failed to show that the jurisdictional requirements of subdivision (b) of this rule were met. *Schubert v. Target Stores, Inc.*, 2009 Ark. 89, 302 S.W.3d 33 (2009).

Judgment in favor of a seller in its foreclosure action against purchasers, which also granted the purchasers' motion for nonsuit of their compulsory counterclaims, was not a final, appealable order because the purchasers were not barred from bringing their claims again; therefore, the purchasers' appeal of the judgment was dismissed without prejudice because the record did not contain an order granting certification under this rule. *Martin v. Kat's Bar & Grill, LLC*, 2009 Ark. App. 737, — S.W.3d —, 2009 Ark. App. LEXIS 897 (2009).

Partial summary judgment was not a final appealable judgment under this rule because one party's counterclaims arose out of the same transaction or occurrence as the other party's breach-of-contract claim, on which summary judgment was granted, and thus were compulsory counterclaims. *Killian v. Gibson*, 2011 Ark. App. 245, — S.W.3d —, 2011 Ark. App. LEXIS 247 (Mar. 30, 2011).

Pursuant to subsection (b) of this rule, there was a final, appealable order in a case between insureds and an insurer, disputing the failure of the insurer to pay under a policy, as the rights of the parties were definitively adjudicated in the language of the trial court's summary judgment order. *Farm Bureau Mut. Ins. Co. of Ark., Inc. v. Guyer*, 2011 Ark. App. 710, — S.W.3d —, 2011 Ark. App. LEXIS 759 (Nov. 16, 2011).

Dismissal of the Department of Human Services' appeal from an order directing it to provide assistance to a pregnant teenager in the form of paying for school uniforms and maternity clothing was appropriate because

there was a lack of a final, appeal order. The trial court's certificate under subsection (b) of this rule was inadequate because it merely tracked part of the language of the sample certificate found within the rule and did not provide a factual basis for the court's determination that there was no just reason for delay of the entry of a final judgment. *Ark. Dep't of Human Servs. v. A.M.*, 2012 Ark. App. 72, — S.W.3d —, 2012 Ark. App. LEXIS 153 (Jan. 18, 2012).

Pursuant to the operation of subdivision (b)(5) of this rule, any claims against a police department were dismissed by the entry of the circuit court's order, and language in the order regarding keeping the case file open as to the police department was without effect. The order of the circuit court was a final, appealable order. *Daugherty v. Sipes*, 2012 Ark. App. 233, — S.W.3d —, 2012 Ark. App. LEXIS 339 (Apr. 4, 2012).

Dismissal of a school district's appeal from a circuit court order granting a motion to dismiss was required because the order was not a final, appealable order. In addition, there was no certificate under subsection (b) of this rule in the record, and it was clear from the record that the requirements of subsection (b) had not been met. *Deer/Mt. Judea Sch. Dist. v. Beebe*, 2012 Ark. 93, — S.W.3d —, 2012 Ark. LEXIS 113 (Mar. 1, 2012).

Appeal of an order dismissing a breach of contract and fraud action was dismissed without prejudice because the record did not reflect that one party had ever been dismissed from the case; the trial court had not attached a certificate under subsection (b) of this rule to its order. *Hotfoot Logistics, LLC v. Shipping Point Mktg.*, 2012 Ark. 76, — S.W.3d —, 2012 Ark. LEXIS 87 (Feb. 23, 2012).

Insured's cross-appeal regarding the denial of its motion for attorney fees was dismissed without prejudice because a certificate under subsection (b) of this rule issued by the trial court did not certify the issue regarding attorney fees. *Scottsdale Ins. Co. v. Morrow Land Valley Co., LLC*, 2012 Ark. 247, — S.W.3d —, 2012 Ark. LEXIS 273 (May 31, 2012).

Reviewing court lacked jurisdiction to consider the appeal, because the order appealed was not a final order, when it contemplated further action, and the order did not satisfy subsection (b) of this rule, when the order did not contain specific factual findings of any danger of hardship or injustice that could be alleviated by an immediate appeal. *Robinson v. Villines*, 2012 Ark. 211, — S.W.3d —, 2012 Ark. LEXIS 236 (May 17, 2012).

#### **Bankruptcy Stay Lifted.**

An order granting summary judgment to one of two defendants was not a final appealable order and an appeal would be piecemeal and violate of the principles that subsection (b) of this rule is intended to protect where the

claims against the remaining defendant were no longer afforded the protection of a bankruptcy stay as the bankruptcy case had been dismissed. *Bank of Ark. v. First Union Nat'l Bank*, 342 Ark. 705, 30 S.W.3d 110 (2000).

#### **Burden of proof.**

It is the duty of the appellant to produce a record on appeal showing that the jurisdictional requirements of subsection (b) of this rule have been met. *Cortese v. Atlantic Richfield*, 320 Ark. 639, 898 S.W.2d 467 (1995).

#### **Certificate.**

Because the record did not include a certificate under subdivision (b)(2) of this rule, it was likely that there was not yet a final order and that the appellate court had no jurisdiction to hear the appeal. Pursuant to Ark. R. App. P. Civ. 6(c), the appellate court remanded the case for supplementation of the record and rebriefing. *Edgin v. Cent. United Life Ins. Co.*, 2012 Ark. App. 216, — S.W.3d —, 2012 Ark. App. LEXIS 313 (Mar. 14, 2012).

#### **Child Support Payments.**

Accumulated or past-due child support payments do not constitute a judgment. *Brun v. Rembert*, 227 Ark. 241, 297 S.W.2d 940 (1957).

#### **Claim for Relief.**

Motion requesting sanctions under ARCP 11 is collateral to the merits of the underlying action and does not constitute a "claim for relief" as that term is used in subsection (b) of this rule. *Spring Creek Living Ctr. Ltd. Partnership v. Sarrett*, 318 Ark. 173, 883 S.W.2d 820 (1994).

In a breach of contract action, the buyers of a mobile home did not comply with subdivision (e)(2) of this rule when seeking attorney fees because they did not specifically mention in their motion the statute entitling them to the award; hence, a court could not reach the merits of their claim on appeal. *Roop v. Cook*, 2009 Ark. App. 540, 334 S.W.3d 412 (2009).

#### **Compliance.**

The failure to comply with subsection (b) of this rule is a jurisdictional issue that the Supreme Court is obligated to raise on its own. *Richardson v. Rodgers*, 329 Ark. 402, 947 S.W.2d 778 (1997).

Trial court erred when it certified an appeal as to fewer than all of the claims where the court's certificate did not conform to the requirements of subsection (b) of this rule in that it did not specify that the likely danger of hardship or injustice could only be alleviated by an immediate appeal. *Rutledge v. Christ* is the Answer Fellowship, Inc., 82 Ark. App. 221, 105 S.W.3d 816 (2003).

#### **Costs.**

The trial court did not err in taxing the costs of a will contest against the losing party,



in the absence of a specific statute or rule which requires that a court direct that the costs of an unsuccessful contest of a will be borne by the estate since this rule, which applies to probate proceedings through ARCP 1, expressly provides that costs shall be allowed as a matter of course to the other party unless the court otherwise directs. *Gautney v. Rapley*, 2 Ark. App. 116, 617 S.W.2d 377 (1981).

If no offer of judgment is made, or if one is made and the judgment exceeds the offer, costs are paid under subsection (d) of this rule, which gives the trial judge discretion in awarding authorized costs. *Darragh Poultry & Livestock Equip. Co. v. Piney Creek Sales, Inc.*, 294 Ark. 427, 743 S.W.2d 804 (1988).

Where the only documentary proof of the court reporter fee was its inclusion on an unnotarized itemization of expenses attached as "Exhibit A" on appellee's post-trial brief for attorney fees and expenses, such unsubstantiated proof was deficient for purposes of an award of costs under subsection (d) of this rule. *Truck Ctr. of Tulsa, Inc. v. Autrey*, 310 Ark. 260, 836 S.W.2d 359 (1992).

Taxable costs must be recognized by rule or by statute. *Wood v. Tyler*, 317 Ark. 319, 877 S.W.2d 582 (1994).

Expert witness fees and deposition expenses are not authorized by statute or by rule. *Wood v. Tyler*, 317 Ark. 319, 877 S.W.2d 582 (1994).

Subsection (d) of this rule does permit the court to "otherwise direct" payment of costs, because this authority relates to the ability of the court to disallow costs authorized by rule or statute; it does not authorize the court to assess costs outside the ambit of costs expressly contemplated by rule or by statute. *Wood v. Tyler*, 317 Ark. 319, 877 S.W.2d 582 (1994).

Subsection (d) of this rule gives the trial judge discretion in awarding authorized costs. *Zhan v. Sherman*, 323 Ark. 172, 913 S.W.2d 776 (1996).

Where the lease provided that the prevailing party in any suit brought in connection with the leased property was entitled to "all costs ... including reasonable attorney's fees," subdivision (d)(2) of this rule had no application to the issue; thus, the prevailing party was entitled to recover the full amount of their deposition costs, despite the fact that the trial court found these costs to be excessive. *Phi Kappa Tau Hous. Corp. v. Wengert*, 350 Ark. 335, 86 S.W.3d 856 (2002).

The provisions of subsection (d) of this rule relating to the recovery of costs by the prevailing party in a lawsuit are not mutually exclusive with the provisions of ARCP 68, which allow a defendant to recover his post-offer costs if the defendant makes a settlement offer that is rejected and the plaintiff

receives an award at trial that is less than the amount of the offer; therefore, while the trial court did not err in granting a request for post-offer costs by a defendant in a personal injury action whose pretrial offer was rejected, the plaintiff was also entitled to recover her pre-offer costs because the jury found for the plaintiff. *Bell v. Bershears*, 351 Ark. 260, 92 S.W.3d 32 (2002).

In a customer's action against a truck manufacturer under the Arkansas New Motor Vehicle Quality Assurance Act, the trial court did not err in interpreting § 4-90-415(c) to allow for the recovery of copy costs and mileage expenses; even if it was assumed that costs were limited to those items set forth in subsection (d) of this rule, § 4-90-415(c) also allowed a consumer who prevailed to recover "expenses," including attorney fees. *DaimlerChrysler Corp. v. Smelser*, 375 Ark. 216, 289 S.W.3d 466 (2008).

Debtor's costs related to hiring an analyst, service by a sheriff, a deposition charge, and transportation to the court were reasonable and allowable under subsection (d) of this rule and Fed. R. Bankr. P. 7054. *First State Bank of Crossett v. Fowler*, 427 B.R. 1 (W.D. Ark. 2010).

Appellant who was found liable for conversion was incorrect in asserting that there was no authority permitting recovery of costs in a tort case because the costs awarded were for appellee's filing fees and were expressly allowed under subdivision (d)(2) of this rule. *Volgelgesang v. Vogelgesang*, 2010 Ark. App. 178, — S.W.3d —, 2010 Ark. App. LEXIS 210 (Feb. 24, 2010).

In an action by home buyers against the sellers for recovery of the earnest money, in which the sellers asserted a counterclaim for damages for breach of contract, which resulted in a decision that the sellers were not entitled to damages but were entitled to keep the earnest money, neither party was the prevailing party for purposes of awarding attorney's fees under § 16-22-308 or the terms of the parties' real estate contract, or for costs under subdivision (d)(2) of this rule. *Brackelsberg v. Heflin*, 2011 Ark. App. 678, — S.W.3d —, 2011 Ark. App. LEXIS 719 (Nov. 9, 2011).

In a divorce case, a trial court erred by awarding a former wife her travel expenses because they were not authorized by subsection (d) of this rule; moreover, § 9-19-305(c) had no application as it concerned the registration of child-custody determinations. *Clowers v. Stickel*, — Ark. App. —, — S.W.3d —, 2012 Ark. App. LEXIS 466 (May 16, 2012).

#### —Attorneys' Fees.

Since the right to recover attorneys' fees from one's opponent in litigation as a part of the costs thereof does not exist at common law, such an item of expense is not allowable

in the absence of a statute or rule of the court, or some agreement expressly authorizing the taxing of attorneys' fees in addition to the ordinary statutory court costs. *Lewallen v. Bethune*, 267 Ark. 976, 593 S.W.2d 64 (1980), overruled *Elliott v. Boone County Indep. Living*, 56 Ark. App. 113, 939 S.W.2d 844 (1997).

The term "costs" or "expenses" as used, even in a statute, is not understood ordinarily to include attorneys' fees. *Lewallen v. Bethune*, 267 Ark. 976, 593 S.W.2d 64 (1980), overruled *Elliott v. Boone County Indep. Living*, 56 Ark. App. 113, 939 S.W.2d 844 (1997); *Elliott v. Boone County Indep. Living, Inc.*, 56 Ark. App. 113, 939 S.W.2d 844 (1997).

The unliquidated award of attorney's fees pursuant to § 16-22-309 is not a final order. *Stewart Title Guar. Co. v. Cassill*, 41 Ark. App. 22, 847 S.W.2d 465 (1993).

Subdivision (e)(1) of this rule does not require a written motion. *State Auto Property & Cas. Ins. Co. v. Swaim*, 338 Ark. 49, 991 S.W.2d 555 (1999).

Although a motion for attorney's fees was timely filed, the failure of the motion to recite the specific statute or rule entitling the movant to the claimed fees was fatal to the motion. *Crawford & Lewis v. Boatmen's Trust Co.*, 338 Ark. 679, 1 S.W.3d 417 (1999).

Husband was not entitled to receive attorney's fees in dissolution modification action where he did not timely request fees, nor cite to any authority for the granting of fees. *Norman v. Norman*, 347 Ark. 682, 66 S.W.3d 635 (2002).

Trial court did not abuse its discretion in denying consumer's motion for attorney's fees where the trial court denied the request in the same order in which it granted the bank's motion for new trial and, while the trial court did not explicitly state why it had chosen to deny the motion, it was clear that the trial court's decision was based on the fact that, once it had determined that a new trial was in order, the consumer was no longer the prevailing party and, therefore, no longer entitled to attorney's fees. *Phelan v. Discover Bank*, 361 Ark. 138, 205 S.W.3d 145 (2005).

In a motion to modify a divorce decree, where trial court's order denying ex-husband relief was filed on November 4, 2003, but ex-wife's motion for attorney's fees was not filed until December 2, 2003, wife's motion was untimely under subsection (e) of this rule; thus, the trial court erred in awarding the wife's attorney's fees. *Morehouse v. Lawson*, 90 Ark. App. 379, 206 S.W.3d 295 (2005).

In an action brought under 42 U.S.C.S. § 1983, the state argued that a taxpayer's request for attorney's fees pursuant to 42 U.S.C.S. § 1988 was untimely; however, a final judgment triggering subsection (e) of this rule did not occur until the circuit court issued its order that denied the Commissioner

of State Lands' request to reopen the question of liability, ordered that the taxpayer be given his house back, denied the taxpayer his requested attorney's fees, and ordered the clerk to close the case. Only upon the final resolution of the respective parties' rights was a motion for attorney's fees appropriate. *Jones v. Flowers*, 373 Ark. 213, 283 S.W.3d 551 (2008).

While a circuit court erred in fragmenting a jury verdict, and awarding the borrowers attorney fees outside the time limits of subdivision (e)(2) of this rule, and post-judgment interest in excess of that authorized by Ark. Const. Art. 19, § 13, their amended complaint was properly dismissed as untimely under Ark. R. Civ. P. 15(a). *Mfrs. & Traders Trust Co. v. Nickelson*, 2011 Ark. App. 557, — S.W.3d —, 2011 Ark. App. LEXIS 589 (Sept. 21, 2011).

In a boundary dispute between adjoining property owners involving an alleged "spite" fence, the circuit court did not err in failing to award attorney fees to appellees where appellees did not file a motion seeking attorney fees pursuant to subdivision (e)(1) of this rule, and where there was not an affidavit nor other information before the circuit court indicating the number of hours counsel spent on the case. Appellees thus failed to bring up a record sufficient to demonstrate that the circuit court was in error. *Jenkins v. Fogerty*, 2011 Ark. App. 720, — S.W.3d —, 2011 Ark. App. LEXIS 769 (Nov. 30, 2011).

### Counterclaim.

Although the circuit court entered a judgment for plaintiff, this decree was not appealable until the order dismissing defendant's personal counterclaim was entered as the earlier judgment was not did not adjudicate all of the claims of the parties. *Jordan v. Thomas*, 332 Ark. 268, 964 S.W.2d 399 (1998).

In a case involving the judicial dissolution of a law firm, an appeal summarily denying several creditors' claims was dismissed without prejudice since there was no final appealable judgment under Ark. R. App. P. Civ. 2(a)(1) and this rule where a counterclaim filed by a law firm's shareholder was not decided. *Sims v. Fletcher*, 368 Ark. 178, 243 S.W.3d 863 (2006).

### Directed Verdict.

Trial court erred in directing a verdict against a successful bidder on its bid-rigging claims against former employees, regarding the bidder's purchase of the employees' former employer, because the bidder presented sufficient evidence of proximate cause, in that it would not have bid on or purchased the business if it had known the employees were planning to leave the business and pirate the customer accounts, and of damages, which the bidder calculated as 50 percent of the



purchase price. *Phillippy v. ANB Fin. Servs., LLC*, 2011 Ark. App. 639, — S.W.3d —, 2011 Ark. App. LEXIS 665 (Oct. 26, 2011).

#### **Final Judgment.**

A judgment is final and appealable if the issue between the parties has been passed upon by the court and the merits of the cause finally determined. *Melton v. St. Louis, I.M. & S. Ry.*, 99 Ark. 433, 139 S.W. 289 (1911).

When the decision has been reached, announced by the Court, and a sufficient docket memorandum entered to show a final settlement of the case, it is a final judgment although it has not been spread in full upon the record. *McConnell v. Bourland*, 175 Ark. 253, 299 S.W. 44 (1927).

An entry which contained a finding as to the contractual relationship between the parties was not a judgment within the meaning of this section. *Thomas v. McElroy*, 243 Ark. 465, 420 S.W.2d 530 (1967).

A jury verdict finding against the defendant on his counterclaim and disagreeing as to the issues formed by plaintiff's complaint and the defendant's general denial thereto was not "a final determination of the rights of the parties" in the action. *Martin v. Romes*, 249 Ark. 927, 462 S.W.2d 460 (1971).

The plaintiffs' appeal would be dismissed since there was no final order from which to appeal as the order at issue did not mention either counterclaims made by the defendants or one claim made by one of the plaintiffs. *Stockton v. Sentry Ins.*, 332 Ark. 417, 965 S.W.2d 762 (1998).

A summary judgment order was not a final, appealable order where the order did not dispose of the complaint against one of the defendants. *Hodges v. Huckabee*, 333 Ark. 247, 968 S.W.2d 619 (1998).

The court would dismiss without prejudice the appeal of a teacher from the grant of summary judgment against her in her action seeking reinstatement and renewal of her contract with a school district since there was no final, appealable order where the court did not rule on the teacher's complaint for back pay. *Henderson v. Little Rock Sch. Dist.*, 333 Ark. 448, 969 S.W.2d 662 (1998).

Subsection (b) of this rule does not obviate the requirement of finality, but instead merely provides that a judgment that is final as to less than all of the litigants or the claims is subject to appeal in accordance with the conditions recited in this rule. *Haase v. Starnes*, 337 Ark. 193, 987 S.W.2d 704 (1999).

In an action seeking an equitable one-half interest in certain real property and requesting an order directing partition of the real property and a division of proceeds between the parties, a decree finding that the real property was the property of a partnership between the parties and finding that the plaintiff was entitled to a credit should the

property ever be sold was not a final appealable order as it failed to grant or deny the requested relief of partition and there was no attempt to comply with subsection (b) of this rule. *Rigsby v. Rigsby*, 340 Ark. 544, 11 S.W.3d 551 (2000).

The landholders sought to quiet title as against all the world and not merely the state, therefore, the U.S. should have been joined as a necessary party; because judgment was entered for one or more but fewer than all the claims or parties, judgment was not final and no appeal could be taken. *Eason v. Flannigan*, 349 Ark. 1, 75 S.W.3d 702 (2002).

Order appellants appealed from was not final because it did not resolve an outstanding counterclaim; thus, the order was not a final, appealable order, and the appeal had to be dismissed. *Dodge v. Lee*, 350 Ark. 480, 88 S.W.3d 843 (2002).

Plan of distribution to pay back illegally exacted funds to certain taxpayers entered by the trial court was not a final, appealable order for the purposes of appellate jurisdiction and the circuit court had not certified the plan for appeal pursuant to subsection (b) of this rule; therefore, the appeal was ordered dismissed. *Fisher v. Chavers*, 351 Ark. 318, 92 S.W.3d 30 (2002).

In a child custody modification action, although the trial court's nunc pro tunc order did not fix the amount of the mother's child support payments, but instead directed the mother to produce pay stubs so that the amount could be determined in the future, the trial court's order changed custody from joint custody in both parents to sole custody in the father and was final for purposes of an appeal under Ark. R. App. P. Civ. 2(d). *Lewellyn v. Lewellyn*, 351 Ark. 346, 93 S.W.3d 681 (2002).

Appellate court lacked jurisdiction to hear an injured glass worker's appeal of a summary judgment in favor of a florist on premises liability where the trial court order did not constitute a final judgment against John Doe defendants or intervenors; thus, there was not a final order as to all parties or a certification under subsection (b) of this rule that would justify an immediate appeal. *Van DeVeer v. George's Flower's, Inc.*, 76 Ark. App. 408, 65 S.W.3d 488 (2002).

In a class action proceeding, where the bank was arguing on appeal that the partial summary-judgment order entered in the circuit court was final even though no damages had been awarded, and at the same time arguing in the circuit court that no final order had been entered, even though the bank eventually conceded that the partial summary-judgment order was not final, the bank failed to show good cause against the entry of sanctions. *United States Bank, N.A. v. Milburn*, 352 Ark. 144, 100 S.W.3d 674 (2003).

Appellate court dismissed an appeal from

an order of summary judgment because the order did not dispose of claims against 10 John Doe defendants and had not been certified as final pursuant to this rule; absent a final appealable order, the appellate court lacked jurisdiction to consider the appeal. *Moses v. Hanna's Candle Co.*, 353 Ark. 101, 110 S.W.3d 725 (2003).

Appeal and cross appeal from the divorce decree entered by the trial court was dismissed for lack of appellate jurisdiction because there was no final appealable order, as required by Ark. R. App. P. Civ. 2(a)(1) and this rule, where the trial court held in abeyance its final decision regarding the division of the parties' home and personal property. *Farrell v. Farrell*, 359 Ark. 1, 193 S.W.3d 734 (2004).

An appeal from the circuit court's order of December 31, 2003, was subject to dismissal as the order was not a final order because the unjust-enrichment claim was still pending and the order contained no certification pursuant to subsection (b) of this rule. *Servewell Plumbing, LLC v. Summit Contrs., Inc.*, 360 Ark. 521, 202 S.W.3d 525 (2005).

Circuit court's order granting distributor's motion to dismiss did not resolve several of the claims alleged by the corporation or distributor in its complaint as it merely disposed of any claim, whether federal or otherwise, related to the alleged illegal tying arrangement; further, the corporation failed to request certification and, in the absence of such a determination, the order was not a final appealable order. *Carquest of Hot Springs, Inc. v. Gen. Parts, Inc.*, 361 Ark. 25, 204 S.W.3d 53 (2005).

Where the trial court's March 4, 2004, order was not a final order because the health care company's counterclaim was still pending, the health care company's subsequent notice of appeal was a nullity. *NCS Healthcare of Ark., Inc. v. W.P. Malone, Inc.*, 362 Ark. 169, 207 S.W.3d 552 (2005).

Trial court retained jurisdiction of company's claims against appellees after it denied company's motion for a final order pursuant to subsection (b) of this rule because, where some of the claims were resolved by nonsuit and some by summary judgment, there were no final appealable orders under Ark. R. App. P. Civ. 2(a) granting the appellate court jurisdiction. *Mountain Pure LLC v. Affiliated Foods Southwest, Inc.*, 366 Ark. 62, 233 S.W.3d 609 (2006).

Appeal in a contract dispute was dismissed because a counterclaim was not considered by a trial court; therefore, there was not a final judgment under Ark. R. App. P. Civ. 2(a)(1) and subsection (b) of this rule. *Hanners v. Giant Oil Co. of Ark., Inc.*, 369 Ark. 226, 253 S.W.3d 424 (2007).

A mother's appeal from an order in a depen-

dency-neglect case granting permanent custody of her children to their father was an appeal from a final, appealable order under Ark. R. App. P. Civ. 2(d) because Rule 2(d) applied to permanent custody orders in dependency-neglect cases, and, thus, there was no direct conflict with Ark. Sup. Ct. & Ct. App. R. 6-9, as (1) Rule 6-9 did not state that permanent custody orders were not final, appealable orders or that a certificate under subsection (b) of this rule was necessary for a permanent custody order relative to one child to be appealable, (2) Rule 2(d) specifically stated that custody orders were final, appealable orders; and (3) a certificate under subsection (b) of this rule was not required under Rule 6-9 for an appeal of the order regarding the two children in question. *West v. Ark. Dep't of Human Servs.*, 373 Ark. 100, 281 S.W.3d 733 (2008).

In a bank's foreclosure action, the homeowner's appeal was dismissed as the circuit court's order was not a final, appealable order under Ark. R. Civ. P. 41(a) where the written order did not reflect the circuit court's disposition of the homeowner's voluntarily nonsuited counterclaims against the bank. Further, the homeowner nonsuited her compulsory counterclaims against the bank, but both parties remained in the case until the bank's claims were decided. *Bevans v. Deutsche Bank Nat'l Trust Co.*, 373 Ark. 105, 281 S.W.3d 740 (2008).

Arkansas Supreme Court could not reach the merits of appellants' arguments because the judgment was not final and appealable, and there was neither a final judgment as to all the parties and claims, nor was there a under subsection (b) of this rule; the judgment only dismissed certain claims and the other claims the administratrix alleged in her complaints had yet to be adjudicated or properly dismissed with respect to all named appellants. *Beverly Enters. v. Keaton*, 2009 Ark. 431, — S.W.3d —, 2009 Ark. LEXIS 593 (2009).

Where a decedent sustained injuries leading to her death as a result of inadequate care rendered by the nursing home at which she was a resident, where her estate filed suit against the nursing home as well as its corporate owner and the chief executive officer (CEO), and where the trial court granted the CEO's motion to dismiss under Ark. R. Civ. P. 12(b)(6) for failure to state sufficient facts to establish his individual liability, the trial court did not err in certifying the order of dismissal as a final and appealable order because all claims against the CEO had been dismissed, the remaining defendants' liability would be determined on legal theories separate and distinct from the dismissed defendant, and judicial economy would be served by an immediate appeal because, if appellate



review was delayed, reversal of the dismissal would likely require duplicative depositions and a largely duplicative second trial with possible inconsistent verdicts. *Bayird v. Floyd*, 2009 Ark. 455, 344 S.W.3d 80 (2009).

Order denying a husband's motion for declaratory judgment and his motion for reconsideration of his discovery requests for the medical records of his wife was not a final, appealable order under subsection (b) of this rule and Ark. R. App. P. Civ. 2(a)(1); the appeal was dismissed without prejudice. *Hardy v. Hardy*, 2010 Ark. 41, — S.W.3d —, 2010 Ark. LEXIS 51 (Jan. 28, 2010).

Shareholder's appeal of an order reaffirming the grant of summary judgment in favor of a corporation was dismissed because the order was not final pursuant to subsection (b) of this rule; the order did not mention, much less adjudicate, the corporation's counterclaim, and the voluntary nonsuit of the counterclaim did not operate to make the original order granting the corporation summary judgment final and appealable because the counterclaim could be refiled. *Crockett v. C.A.G. Invs., Inc.*, 2010 Ark. 90, 361 S.W.3d 262 (2010).

Where there was no order in the record in a medical malpractice case disposing of a physician's crossclaim against a hospital, a reviewing court was without jurisdiction under Ark. R. App. P. Civ. 2(a)(1) and had to dismiss the appeal without prejudice so that the trial court could enter a final order under subsection (b) of this rule as to the pending crossclaim. *Ketan Bulsara v. Watkins*, 2010 Ark. 453, — S.W.3d —, 2010 Ark. LEXIS 555 (Nov. 18, 2010).

Biological father's appeal from a trial court's order that denied his motion to dismiss an annulment between a husband and a wife based on lack of subject matter jurisdiction to award custody and visitation rights was not a final order under Ark. R. App. P. Civ. 2, nor was it properly certified under subsection (b) of this rule. Thus, his appeal was dismissed. *Rees v. McLaughlin*, 2010 Ark. App. 617, — S.W.3d —, 2010 Ark. App. LEXIS 651 (Sept. 22, 2010).

Home seller's appeal of an order awarding judgment to a buyer on a claim of breach of the implied warranty of habitability was dismissed for lack of jurisdiction under Ark. R. App. P. Civ. 2(a)(1) because the record did not reflect a certificate under subsection (b) of this rule; it was not apparent that there was a final order disposing of the buyer's claim against the seller. *Progressive Southeast Ark. Hous. Dev. Corp. v. Abraham*, 2010 Ark. App. 760, — S.W.3d —, 2010 Ark. App. LEXIS 798 (Nov. 10, 2010).

Because the circuit court had not yet adjudicated all of the claims in the action or the rights and liabilities of all of the parties, and

because no certificate had been executed under subsection (b) of this rule to permit an immediate appeal, the appellate court lacked jurisdiction to hear the case. *Trakru v. Mathews*, 2011 Ark. App. 750, — S.W.3d —, 2011 Ark. App. LEXIS 806 (Dec. 7, 2011).

In a case seeking the enforcement of a settlement agreement, an appeal was dismissed because there was no final disposition as to a bank's claims against two parties; moreover, there was no certification under subsection (b) of this rule. *Labry v. Metro. Nat'l Bank*, 2012 Ark. App. 189, — S.W.3d —, 2012 Ark. App. LEXIS 281 (Feb. 29, 2012).

Judgment and orders being challenged were not final, because the company's claims against the former associate were never adjudicated, and the judgment appealed from lacked finality since it did not address the company's claims for equitable relief, i.e., accounting and imposition of a constructive trust or equitable lien. *Jenkins v. APS Ins., LLC*, 2012 Ark. App. 368, — S.W.3d —, 2012 Ark. App. LEXIS 486 (May 30, 2012).

#### **Interlocutory Appeal.**

Because the specific provision authorizing an appeal under RAP-Civ 2(a)(6) controls over the general provisions in RAP-Civ 2(a)(1) and subsection (b) of this rule without regard to the provisions of subsection (b), the purchaser's appeal of a mandatory injunction issued against the purchaser enjoining him from maintaining property or possessory rights was properly appealed despite not being a final order. *Crain v. Burns*, 82 Ark. App. 88, 112 S.W.3d 371 (2003).

#### **Interlocutory Decisions.**

Appellant's notice of appeal from a trial court's final judgment was not ineffective to appeal the trial court's earlier dismissal of a funeral services company from his lawsuit as, until the entire case was disposed of, there was no final order to appeal pursuant to Ark. R. App. P. Civ. 2(a)(11) and subsection (b) of this rule. An appeal from a final order also brought up for review any intermediate order involving the merits and necessarily affecting the judgment, pursuant to Ark. R. App. P. Civ. 2(b) and 3(a). *King v. French*, 2011 Ark. App. 257, — S.W.3d —, 2011 Ark. App. LEXIS 271 (Apr. 6, 2011).

#### **—Allowed.**

When a foreclosure decree's directives have been placed into execution, an appeal may be filed from that final decree without a determination under subsection (b) of this rule. *Watanabe v. Webb*, 320 Ark. 375, 896 S.W.2d 597 (1995), appeal dismissed 321 Ark. 569, 905 S.W.2d 70 (1995).

#### **—Dismissed.**

Appeal from summary judgment dismissed because not all of the claims against all of the

parties had been resolved and there had been no certification pursuant to subsection (b) of this rule that there was no need for delay in deciding the case. *Ashmore v. Paccar, Inc.*, 315 Ark. 490, 868 S.W.2d 80 (1994).

Where the court did not decide all of the claims, and did not make the required certification under subsection (b) of this rule justifying an immediate appeal, the order was not appealable. *Freeman v. Colonia Ins. Co.*, 319 Ark. 211, 890 S.W.2d 270 (1995).

Where order establishing arrearage did not finally resolve the amount of the arrearage husband owed or end the litigation concerning the claim for arrearage, the action was not terminated, and the supreme court lacked jurisdiction to hear an appeal. *Office of Child Support Enforcement v. Oliver*, 324 Ark. 447, 921 S.W.2d 602 (1996).

Appeal of a case involving an intervenor dismissed where appellant failed to include in the record an order adjudication the rights of all parties; the appellant failed to meet its burden of showing that the jurisdictional requirements of subsection (b) of this rule have been met. *Richardson v. Rodgers*, 329 Ark. 402, 947 S.W.2d 778 (1997).

Where the trial court did not give a directive that a final judgment be entered but only granted partial summary judgment, the judgment lacked finality and thus was not appealable. *French v. Brooks Sports Ctr., Inc.*, 57 Ark. App. 30, 940 S.W.2d 507 (1997).

An interlocutory order in a divorce action which held in abeyance any determination on alimony or division of the husband's military retirement was not appealable where the chancellor made no determination that there was no just reason for delay. *Morton v. Morton*, 61 Ark. App. 161, 965 S.W.2d 809 (1998).

Interlocutory appeal of a default judgment would not lie when seed company failed to answer farmers' and farming companies' complaint; seed company could not assert arbitration without having filed a timely answer, as arbitration was a defense. *Tri-State Delta Chems., Inc. v. Crow*, 347 Ark. 255, 61 S.W.3d 172 (2001).

Court did not have jurisdiction to address the appeal of a partial summary judgment motion because there were issues remaining to be resolved in the underlying action and the trial court did not certify its order for review pursuant to this rule. *Brasfield v. Murray*, 96 Ark. App. 207, 239 S.W.3d 551 (2006).

Because the proper order from which to file an appeal in a partition action was the order confirming the sale of the property, and the circuit court had not entered a certification pursuant to subdivision (b)(1) of this rule, dismissal of an appeal from an order of parti-

tion was proper. *Trafford v. Lilley*, 2010 Ark. App. 158, — S.W.3d —, 2010 Ark. App. LEXIS 157 (Feb. 17, 2010).

In a suit for unlawful detainer and writ of possession, appellant buyer's appeal was not addressed on the merits because neither the writ of possession or the damages order issued by the circuit court adjudicated the buyer's compulsory counterclaim, and the counterclaim remained unresolved; the circuit court did not certify either the writ or the damages order pursuant to subsection (b) of this rule. *Daniels v. Davis*, 2010 Ark. App. 260, — S.W.3d —, 2010 Ark. App. LEXIS 249 (Mar. 17, 2010).

#### —Jurisdiction.

A certification pursuant to subsection (b) of this rule does not fall within any of the interlocutory appeal categories in S. Ct. & Ct. App. Rule 1-2(a)(12); hence, an independent basis for jurisdiction in the supreme court under the supreme court rule is lacking. *Davis v. Wausau Ins. Cos.*, 315 Ark. 330, 867 S.W.2d 444 (1993).

#### —Scope.

When the trial court permits an interlocutory appeal under subsection (b) of this rule, the issues raised must be reasonably related to the order or orders appealed from; an order under subsection (b) of this rule may not be used as a vehicle to bring up for review matters which are still pending before the trial court. *Coleman's Serv. Ctr., Inc. v. Southern Inns Mgt., Inc.*, 44 Ark. App. 45, 866 S.W.2d 427 (1993).

Where the issues appellant raised on an interlocutory appeal under subsection (b) of this rule were totally unrelated to the interlocutory order that it was permitted to appeal, and all of the issues raised related to the primary cause of action, the suit for unlawful detainer under § 18-60-307, which was still pending in the circuit court, the issues raised were not within the scope of the appeal. *Coleman's Serv. Ctr., Inc. v. Southern Inns Mgt., Inc.*, 44 Ark. App. 45, 866 S.W.2d 427 (1993).

#### —Specific Factual Findings.

Where the judgment granting the motion for interlocutory appeal does not include specific findings of any danger of hardship or injustice which could be alleviated by an immediate appeal, nor detail facts which establish that such a hardship or injustice is likely, the judgment is not in compliance with subsection (b) of this rule, and the appeal may be dismissed without prejudice to refile it at a later date. *Davis v. Wausau Ins. Cos.*, 315 Ark. 330, 867 S.W.2d 444 (1993).

Where trial court order failed to set forth the requisite express determination, supported by specific factual findings, that there was no just reason to delay the entry of a final



judgment, the supreme court would dismiss the appeal for noncompliance with subsection (b) of this rule. *Stratton v. Arkansas State Hwy. Comm'n*, 323 Ark. 740, 917 S.W.2d 538 (1996).

### Judgment.

An order of remand, from the Workers Compensation Commission to the administrative law judge, which neither awards nor denies workers' compensation, is a decision on an incidental matter that is not reviewable because of its lack of finality. *Rogers v. Wood Mfg.*, 46 Ark. App. 43, 877 S.W.2d 94 (1994).

Civil order entered the day after a jury verdict which (1) contained a caption with the designation of the court, the names of the parties, and the case number, (2) stated that the cause came on for a jury trial and that the parties appeared with counsel, (3) noted that a jury was selected, evidence received, and a verdict rendered in the amount of \$5,000 compensatory and \$5,000 punitive, (4) was signed by the trial judge, file-marked by the clerk, and contained in a handwritten notation the date of the jury's verdict, contained the substantive aspects of a judgment and differed from an ordinary, typewritten judgment in form only. *White v. Mattingly*, 89 Ark. App. 55, 199 S.W.3d 724 (2004).

### Multiple Claims or Parties.

Despite an oral pronouncement, because there was no written judgment regarding a default judgment entered in a foreclosure action, the case was dismissed without prejudice under subsection (b) of this rule; the record was void of any proof that one alleged interest holder was served, so it was impossible to tell if a default judgment was appropriate. *Nat'l Home Ctrs., Inc. v. Coleman*, 370 Ark. 119, 257 S.W.3d 862 (2007).

In a land use dispute, the trial court granted a directed verdict in favor of the owners of a bed and breakfast inn and dismissed the trustee's adverse possession claim against them; because the trial court did not resolve a third-party action and the trial court's certification under subsection (b) of this rule was deficient, the order was not final. The certification under subsection (b) merely stated the conclusion that there was no just reason for delay of the entry of a final judgment, based upon the finding that appellees were entitled to a directed verdict; this was not specific enough. *Follett v. Fitzsimmons*, 100 Ark. App. 347, 268 S.W.3d 902 (2007).

Estate's appeal was dismissed without prejudice for failure to comply with subsection (b) of this rule; the circuit court's order did not include specific findings of any danger of hardship or injustice that could be alleviated by an immediate appeal, nor did it detail facts that established such a hardship or injustice.

*Kowalski v. Rose Drugs of Dardanelle, Inc.*, 2009 Ark. 524, 357 S.W.3d 432 (2009).

Dismissal of the appeal from a finding in favor of a parent and his son in their action after the son was injured in an all-terrain vehicle accident was proper because there were parties who were orally dismissed from the case without entry of subsequent written orders of dismissal; thus, the supreme court lacked jurisdiction. No written orders of dismissal were entered of record, and because the oral dismissals were not effective until reduced to writing, the order currently appealed, which did not include a certificate under subsection (b) of this rule, was not a final order. *Carr v. Nance*, 2010 Ark. 25, — S.W.3d —, 2010 Ark. LEXIS 37 (Jan. 21, 2010).

### —In General.

Before entering final judgment on one or more but fewer than all claims or parties, court must make express determination that there is danger of hardship or injustice which immediate appeal would alleviate. *Sherman v. G & H Transp., Inc.*, 287 Ark. 25, 695 S.W.2d 832 (1985); *Murry v. State Farm Mut. Auto. Ins. Co.*, 291 Ark. 445, 725 S.W.2d 571 (1987); *Arkholia Sand & Gravel Co. v. Hutchinson*, 291 Ark. 570, 726 S.W.2d 674 (1987); *Pitts v. Sipes*, 293 Ark. 340, 737 S.W.2d 647 (1987); *First Fed. Sav. & Loan Ass'n v. Drake*, 298 Ark. 287, 766 S.W.2d 617 (1989); *Bolts v. Deltic Farm & Timber Co.*, 298 Ark. 464, 768 S.W.2d 532 (1989); *Franklin v. Osca, Inc.*, 308 Ark. 409, 825 S.W.2d 812 (1992); *Wallner v. McDonald*, 308 Ark. 590, 825 S.W.2d 265 (1992).

The fundamental policy of subsection (b) of this rule is to avoid piecemeal appeals. *Sherman v. G & H Transp., Inc.*, 287 Ark. 25, 695 S.W.2d 832 (1985); *Murry v. State Farm Mut. Auto. Ins. Co.*, 291 Ark. 445, 725 S.W.2d 571 (1987); *Pitts v. Sipes*, 293 Ark. 340, 737 S.W.2d 647 (1987).

The discretionary power vested in the trial court to grant an immediate appeal under subsection (b) of this rule is to be exercised infrequently, and only in harsh cases. *Sherman v. G & H Transp., Inc.*, 287 Ark. 25, 695 S.W.2d 832 (1985); *Murry v. State Farm Mut. Auto. Ins. Co.*, 291 Ark. 445, 725 S.W.2d 571 (1987); *Pitts v. Sipes*, 293 Ark. 340, 737 S.W.2d 647 (1987).

Compliance with subsection (b) of this rule is a jurisdictional requirement which the court is obligated to raise even though the parties do not. *Tackett v. Robbs*, 293 Ark. 171, 735 S.W.2d 700 (1987); *St. Paul Fire & Marine Ins. Co. v. First Com. Bank*, 304 Ark. 298, 801 S.W.2d 652 (1991); *Stratton v. Arkansas State Hwy. Comm'n*, 323 Ark. 740, 917 S.W.2d 538 (1996).

Where the order appealed from does not comply with the requirements of this rule, it

is not an appealable one, and the court is obliged to raise the point because it is a jurisdictional requirement. *Bradley v. French*, 297 Ark. 567, 764 S.W.2d 605 (1989), appeal dismissed 300 Ark. 64, 776 S.W.2d 355 (1989).

The failure to comply with subsection (b) of this rule presents a jurisdictional issue in an appellate court which it will raise on its own and, absent compliance, will dismiss the appeal for lack of a final order. *Middleton v. Stilwell*, 301 Ark. 110, 782 S.W.2d 44 (1990); *Parks v. Hillhaven Nursing Home*, 309 Ark. 106, 827 S.W.2d 148 (1992).

Subsection (b) of this rule does not provide a mechanism for appeal from bifurcated trials of liability/damages issues. *John Cheeseman Trucking, Inc. v. Dougan*, 305 Ark. 49, 805 S.W.2d 69 (1991).

Where the order entered by the trial court merely recited the language of subsection (b) of this rule without stating any facts to support a conclusion of possible danger of hardship or injustice which would be alleviated by an immediate appeal of the punitive damages issue, the order was not a final order pursuant to subsection (b). *Austin v. First Nat'l Bank*, 305 Ark. 456, 808 S.W.2d 773 (1991).

Merely tracking the language of subsection (b) of this rule will not suffice; the record must show facts to support the conclusion that there is likelihood of hardship or injustice which would be alleviated by an immediate appeal rather than at the conclusion of the case. *Fisher v. Citizens Bank*, 307 Ark. 258, 819 S.W.2d 8 (1991).

This rule requires in a case where there are multiple parties that a single judgment embody the ruling of the court with respect to all parties, unless the court expressly directs the entry of a partial judgment. *Fitzhugh v. Committee on Professional Conduct*, 308 Ark. 313, 823 S.W.2d 896 (1992).

A judgment which adjudicates fewer than all of the claims of all of the parties does not terminate the action. *State Farm Mut. Auto. Ins. Co. v. Thomas*, 312 Ark. 429, 850 S.W.2d 4 (1993).

A party who has several claims against multiple parties may take a voluntary nonsuit against the claims of one party and appeal an adverse judgment as to the remaining parties' claims. *Driggers v. Locke*, 323 Ark. 63, 913 S.W.2d 269 (1996).

Appeal dismissed for failure to comply with subsection (b) of this rule. *Kinthead v. Spillers*, 327 Ark. 552, 940 S.W.2d 437 (1997); *Bank of Ark. v. First Union Nat'l Bank*, 342 Ark. 705, 30 S.W.3d 110 (2000).

Where the trial court entered a final order disposing of each and every claim against each and every party to the litigation, subsection (b) of this rule did not require that the appeal be dismissed; any claims that were asserted against the two identified John Does

were considered abandoned, and no issues remained to be decided. *D'Arbonne Constr. Co. v. Foster*, 348 Ark. 375, 72 S.W.3d 862 (2002).

Arkansas law prohibits a plaintiff from circumventing this rule by non-suiting certain claims. *Mountain Pure, LLC v. Turner Holdings, LLC*, 439 F.3d 920 (8th Cir. 2006).

In an action by the parents of a deceased minor for wrongful death and survival, where the circuit court dismissed the wrongful death claim as time-barred but had not disposed of the survival action, the Supreme Court of Arkansas had no jurisdiction to hear an appeal as there was no certification from the circuit court. *Myers v. McAdams*, 366 Ark. 435, 236 S.W.3d 504 (2006).

Claim for conversion against mortgagors, a husband and wife, filed by the purchaser of property that was sold at a foreclosure sale was still pending against wife where the trial court only entered judgment against husband; hence, the judgment was not appealable as it did not dispose of all pending claims and the trial court did not comply with this rule. *Seay v. C.A.R. Transp. Brokerage Co.*, 366 Ark. 527, 237 S.W.3d 48 (2006).

Failure to comply with this rule and to adjudicate all claims against all parties is jurisdictional and renders the matter not final for purposes of appeal. *Seay v. C.A.R. Transp. Brokerage Co.*, 366 Ark. 527, 237 S.W.3d 48 (2006).

In a wrongful-death case, an appeal was dismissed because there was no final order under Ark. R. App. P. Civ. 2(a)(1) and subsection (b) of this rule where there was no disposition regarding several John Doe parties named in the case. *Downing ex rel. Estate of Harris v. Lawrence Hall Nursing Ctr.*, 368 Ark. 51, 243 S.W.3d 263 (2006).

Pursuant to Ark. R. App. P. Civ. 2(a)(1), an appeal could be taken only from a final judgment or decree entered by the trial court, pursuant to subsection (b) of this rule, due to the lack of a final order, the insurer's appeal was dismissed as the trial court never ruled upon appellees' counterclaim. *S. Farm Bureau Cas. Ins. Co. v. Easter*, 369 Ark. 101, 251 S.W.3d 251 (2007).

Appellate court lacked subject-matter jurisdiction in a candidate's appeal because the trial court's order did not comply with subsection (b) of this rule; the order was not final because the claims against the governor were dismissed, and the claims against the mayor were transferred. Further, the trial court's certificate did not comply with subsection (b)'s requirement as it did not state the specific factual findings to support a determination that there was no just reason for delay. *Zollicoffer v. Beebe*, 2010 Ark. 329, — S.W.3d —, 2010 Ark. LEXIS 422 (Sept. 16, 2010).

Supreme court dismissed for lack of juris-



diction the appeal of a limited liability company and a debtor from a judgment entered in favor of a bank on its petition for foreclosure because there was no final appealable order since there was a counterclaim that had not been resolved; the LLC and debtor were granted a voluntary nonsuit as to two of their three counter claims, negligence and interference with business expectancies, and the voluntary nonsuit did not operate to make the circuit court's order final and appealable because the counterclaims could be refiled. *Grand Valley Ridge, LLC v. Metro. Nat'l Bank*, 2010 Ark. 402, — S.W.3d —, 2010 Ark. LEXIS 502 (Oct. 28, 2010).

Trial court did not abuse its discretion in certifying the judgment as final under subsection (b) of this rule, as it found that this would avoid unreasonable delay of the final resolution of home sellers' claims against the prospective buyer, and the record supported its conclusions that all of the parties' claims had been resolved and that the outcome of a subsequent trial between the buyer and his real estate agent and brokerage would have no effect on the sellers' judgment against the buyer. *Carter v. Cline*, 2011 Ark. 474, — S.W.3d —, 2011 Ark. LEXIS 561 (Nov. 10, 2011).

#### —Appealable Orders.

In absence of express direction for entry of judgment and express determination that there was no just reason for delay, order to dismiss one or more but fewer than all parties was not final and appealable. *Clark v. Fitzgerald*, 270 Ark. 240, 605 S.W.2d 1 (1980); *Odom v. First Nat'l Bank*, 5 Ark. App. 35, 631 S.W.2d 846 (1982); *Vermeer Mfg. Co. v. Vandiver*, 279 Ark. 218, 650 S.W.2d 244 (1983); *Arkholia Sand & Gravel Co. v. Hutchinson*, 289 Ark. 313, 711 S.W.2d 474 (1986); *City of Marianna v. Arkansas Mun. League*, 289 Ark. 473, 712 S.W.2d 305 (1986); *Tackett v. Robbs*, 293 Ark. 171, 735 S.W.2d 700 (1987); *Bullock v. Shelter Mut. Ins. Co.*, 21 Ark. App. 160, 729 S.W.2d 436 (1987); *Rusin v. Midwest Enamelers, Inc.*, 21 Ark. App. 226, 731 S.W.2d 226 (1987); *Wylie v. Tull*, 295 Ark. 481, 749 S.W.2d 325 (1988); *St. Paul Fire & Marine Ins. Co. v. First Com. Bank*, 304 Ark. 298, 801 S.W.2d 652 (1991); *Budget Tire & Supply Co. v. First Nat'l Bank*, 51 Ark. App. 188, 912 S.W.2d 938 (1995).

Where the trial court did not dismiss the parties from the court, nor discharge them from the action, nor conclude their rights to the subject matter in controversy, but did make findings of fact and conclusions of law which narrowed the issues raised by the amended complaint, and continued the case for a jury trial, such procedure was contemplated by ARCP 56(d) and was not the equivalent of a final determination of the case so as

to constitute an appealable order. *Heffner v. Harrod*, 278 Ark. 188, 644 S.W.2d 579 (1983).

The granting of partial summary judgment on fewer than all claims or parties was not an appealable order. *Tulio v. Arkansas Blue Cross & Blue Shield, Inc.*, 283 Ark. 278, 675 S.W.2d 369 (1984); *City of Marianna v. Arkansas Mun. League*, 289 Ark. 473, 712 S.W.2d 305 (1986); *Howard v. Wood Mfg. Co.*, 291 Ark. 1, 722 S.W.2d 265 (1987); *Pitts v. Sipes*, 293 Ark. 340, 737 S.W.2d 647 (1987).

Where an order dismissed a complaint against one of two defendants and dismissed portion of the complaint, leaving remaining claims intact, the order disposed neither of all the parties nor all the claims, and inasmuch as the order did not comply with this rule, no final judgment had been entered and no appeal could be taken at that stage of the proceedings. *3-W Lumber Co. v. Housing Auth.*, 287 Ark. 70, 696 S.W.2d 725 (1985); *King v. Little Rock Sch. Dist.*, 296 Ark. 552, 758 S.W.2d 708 (1988).

Ruling on applicability of statute was not on a separable branch of the litigation and was not final or appealable. *Budd v. Davis*, 289 Ark. 373, 711 S.W.2d 478 (1986).

Where trial court dismissed party from the suit as immune under Arkansas law, the order entered was not an appealable order, for subsection (b) of this rule governs, and its requirements were not met. *Burnley v. Mutual of Omaha*, 291 Ark. 185, 723 S.W.2d 363 (1987).

Appeals are not permitted in cases where defendants are dismissed and other defendants remain unless there is compliance with subsection (b) of this rule. *Kilcrease v. Butler*, 291 Ark. 275, 724 S.W.2d 169 (1987); *Tackett v. Robbs*, 293 Ark. 171, 735 S.W.2d 700 (1987).

Order granting joint motion to dismiss all but one defendant was not an appealable order. *Rone v. Little*, 293 Ark. 242, 737 S.W.2d 152 (1987).

Where there was no final judgment as to one or more but fewer than all of the claims or parties and, by the express terms of the order appealed from, the matters of appropriate damages, attorney fees, and costs were yet to be determined by the trial court, the case was not ripe for appeal. *Bryan Farms, Inc. v. State*, 295 Ark. 180, 747 S.W.2d 115 (1988).

Where trial court bifurcated the issues before it and reserved determination of the issue of damages for a later date, its decree was not a final judgment or decree under ARAP 2 and subsection (b) of this rule. *Mueller v. Killam*, 295 Ark. 270, 748 S.W.2d 141 (1988).

Although the appellants could have asked for certification under subsection (b) of this rule in order to appeal from the intermediate orders, they had no duty to do so as the underlying policy of subsection (b) is to avoid

piecemeal appeals, not encourage them. *McCrary v. Johnson*, 296 Ark. 231, 755 S.W.2d 566 (1988).

Where trial court granted a party's motion for summary judgment and dismissed it from the suit, but other defendants remained in the suit, according to subsection (b) of this rule, this order was not an appealable one. *King v. Little Rock Sch. Dist.*, 296 Ark. 552, 758 S.W.2d 708 (1988).

In order to be final and appealable under ARAP 2 and subsection (b) of this rule, a trial court's order must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in the controversy. *Wilburn v. Keenan Cos.*, 297 Ark. 74, 759 S.W.2d 554 (1988).

Where interpleader was not filed as an original, independent action and the appellants injected themselves into an existing lawsuit, as a result, the order dismissing them left other claims and parties remaining in the case and was not a final order. *Otter Creek Mall v. Quinn Cos.*, 297 Ark. 136, 759 S.W.2d 810 (1988).

The question of a final order is a jurisdictional requirement which the appellate court can raise on its own in order to avoid piecemeal litigation. *Central Prod. Credit Assoc. v. Pearson*, 26 Ark. App. 277, 764 S.W.2d 468 (1989).

Although there can be no precise standard for determining when the trial court should issue the direction that the judgment be considered final as to one of several claims or claimants when others are left for trial, such an order should issue only in exigent cases. *Central Prod. Credit Assoc. v. Pearson*, 26 Ark. App. 277, 764 S.W.2d 468 (1989).

Where order dismissing appellant neither reflected that any determination was made concerning just reason for delay nor expressly directed the entry of judgment, it was not an appealable order. *Black v. Crawley*, 304 Ark. 716, 804 S.W.2d 366 (1991).

An order which merely determines liability and defers a determination as to damages is not final. *John Cheeseman Trucking, Inc. v. Dougan*, 305 Ark. 49, 805 S.W.2d 69 (1991).

The final rulings on those issues common to the class were not rendered nonappealable when coupled with the ruling awarding attorney's fees in an unliquidated amount, and a requirement that the defendants submit a plan for providing notice to the class of their rights to a refund and establishing the procedures for such refunds, for such was a collateral ministerial order. *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991), cert. denied 509 U.S. 921, 113 S. Ct. 3034, 125 L. Ed 2d 721 (1993), overruled Department of Fin. & Admin. v. Staton, 325 Ark. 341, 942 S.W.2d 804 (1996).

Where the order appealed from was styled

as all six original plaintiffs against both original defendants, but entered judgment against one defendant in favor of only two plaintiffs, but not the instant plaintiff, the order appealed from did not conclude the instant plaintiff's rights in the action as there was never any evidence of his claim or damages presented to the trial court. *Quality Ford, Inc. v. Faust*, 307 Ark. 371, 820 S.W.2d 61 (1991); *Smith v. Leonard*, 310 Ark. 782, 840 S.W.2d 167 (1992).

Where two of the three defendants were granted motions for judgments on the pleadings, plaintiff's appeal was dismissed because the third separate defendant remained, thus the trial court did not grant a final judgment. *Poston v. Fears*, 309 Ark. 413, 828 S.W.2d 845 (1992).

It is not enough to dismiss some of the parties; the trial court's order must cover all the parties and all the claims in order to be an appealable order. *South County, Inc. v. First W. Loan Co.*, 311 Ark. 501, 845 S.W.2d 3 (1993).

Appeal was dismissed where the summary judgment from which one party sought to appeal was not a final order as to all of the parties, and the trial court did not find a likelihood of hardship or injustice which would be alleviated by an immediate appeal. *Pardon v. Southern Farm Bureau Cas. Ins. Co.*, 312 Ark. 198, 848 S.W.2d 412 (1993).

For an order to be final and appealable, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *State Farm Mut. Auto. Ins. Co. v. Thomas*, 312 Ark. 429, 850 S.W.2d 4 (1993).

It is not enough to dismiss some of the parties; the order must cover all parties and all claims in order to be appealable. *State Farm Mut. Auto. Ins. Co. v. Thomas*, 312 Ark. 429, 850 S.W.2d 4 (1993).

The burden is on the appellant to bring a record that shows that all claims in a matter have been brought to conclusion, and that the circuit court's judgment was final. *State Farm Mut. Auto. Ins. Co. v. Thomas*, 312 Ark. 429, 850 S.W.2d 4 (1993).

An appeal from an order granting a motion to dismiss one claim of a multi-party, multi-claim lawsuit is permissible under subsection (b) of this rule when the trial court directs the entry of a final judgment as to one or more of the claims or parties and makes express findings that there is no just reason to delay the appeal. *Wormald United States, Inc. v. Cedar Chem. Corp.*, 316 Ark. 434, 873 S.W.2d 152 (1994).

Where the chancellor failed to appropriately treat two counterclaims, as well as a cross-complaint, the appeal was dismissed as not final, pursuant to ARAP 2(a) and subsec-



tion (b) of this rule. *Maroney v. City of Malvern*, 317 Ark. 177, 876 S.W.2d 585 (1994).

An order which granted summary judgment to less than all the defendants, without making an express determination there was no just reason for delay and directing the entry of a final judgment, the order was not a final order according to subsection (b) of this rule. *Cortese v. Atlantic Richfield*, 317 Ark. 207, 876 S.W.2d 581 (1994), appeal dismissed 320 Ark. 639, 898 S.W.2d 467 (1995).

The decree foreclosing a mortgage and a later decree confirming the foreclosure sale are both final and appealable orders. *Scherz v. Mundaca Inv. Corp.*, 318 Ark. 595, 886 S.W.2d 631 (1994).

An order is not appealable when it fails to mention an intervenor's claim and contains no recitation of facts which would allow a piecemeal appeal under subsection (b) of this rule. *Richardson v. Rodgers*, 329 Ark. 402, 947 S.W.2d 778 (1997).

The court would dismiss an appeal of the grant of summary judgment in a wrongful death and survival action since the order did not apply to or determine claims against 2 John Doe defendants and, therefore, there was no final, appealable order. *Shackelford v. Arkansas Power & Light Co.*, 334 Ark. 634, 976 S.W.2d 950 (1998).

The court would dismiss an appeal since there was no final order where the court below did not address one count of the complaint. *Hambay v. Williams*, 335 Ark. 352, 980 S.W.2d 263 (1998).

An order for costs is not what is contemplated by subsection (b) of this rule and is not an appealable order. *Warren v. Kelso*, 339 Ark. 70, 3 S.W.3d 302 (1999).

There was no final appealable order in a paternity proceeding where the court dismissed the paternity action, but failed to address the putative father's cross-claims for fraud and outrage and also failed to issue a certification under this rule. *Office of Child Support Enforcement v. Willis*, 341 Ark. 378, 17 S.W.3d 85 (2000).

The order of dismissal entered by the trial court was a final appealable order because the dismissal of the widower's wrongful death claim for lack of standing concluded all claims against all parties and the amended complaint could not relate back to the original complaint for statute of limitations purposes because the original complaint was a nullity. *McKibben v. Mullis*, 79 Ark. App. 382, 90 S.W.3d 442 (2002).

Appeal was properly dismissed without prejudice as the trial court's order awarding attorney's fees was not an appealable order pursuant to subsection (b) of this rule; the order failed to resolve the bank's claim for attorney's fees and provided contingencies

based upon action taken by the appellate court or by the families. *Coleman v. Regions Bank*, 364 Ark. 85, 216 S.W.3d 579 (2005).

In an insurance coverage dispute involving multiple defendants, the court lacked jurisdiction over the appeal of the order granting partial summary judgment in favor of five defendants as an order that did not adjudicate the liabilities of all parties was not a final, appealable order. *Ver Weire v. CNA Fin. Corp.*, 92 Ark. App. 353, 213 S.W.3d 646 (2005).

Appellant's appeal from the circuit court's order granting appellee's motion for summary judgment was dismissed because the appellate court was barred from considering the appeal under subsection (b) of this rule due to the lack of a final order as claims against multiple parties might remain viable, and further, the addendum prepared by appellant appeared to be deficient because it did not contain a copy of the city ordinance that was mandated by § 14-90-801 to provide for the payment of an assessment of special improvement district taxes. *Wilkins & Assocs. v. Vimy Ridge Mun. Water Improvement Dist. 139*, 369 Ark. 50, 250 S.W.3d 246 (2007).

Estate administrator's appeal was dismissed without prejudice where there was not a final order as to John Does 1-10 nor a certification under subsection (b) of this rule; thus, the Arkansas Supreme Court did not have jurisdiction to hear the case. *McKinney v. Bishop*, 369 Ark. 191, 252 S.W.3d 123 (2007).

When a summary judgment failed to dispose of all defendants listed in a water district's complaint of foreclosure against property owners, the supreme court lacked jurisdiction over the appeal because there was no final judgment. *Vimy Ridge Mun. Water Improvement Dist. No. 139 v. Ryles*, 369 Ark. 217, 253 S.W.3d 436 (2007).

Court of appeals lacked jurisdiction to hear an appeal because plaintiff did not file a timely appeal from the trial court's final order under Ark. R. App. P. Civ. 4(b); the order made it clear that all of the named and served defendants were dismissed, and pursuant to subdivision (b)(5) of this rule, the remaining defendants, who had not been served, were also dismissed. *Global Econ. Res., Inc. v. Swaminathan*, 2011 Ark. App. 349, — S.W.3d —, 2011 Ark. App. LEXIS 387 (May 11, 2011).

Court of appeals had jurisdiction to hear an appeal against some defendants even though a summary judgment order did not affect all of the defendants, which ordinarily would render the judgment not final and appealable, because in an amended certificate under subsection (b) of this rule, the trial court made the requisite findings of fact under Rule 54(b).

Bussey v. Bearden, 2011 Ark. App. 353, — S.W.3d —, 2011 Ark. App. LEXIS 389 (May 11, 2011).

In a case involving the disposition of county property in which a taxpayers group appealed a county court's entry of summary judgment in favor of a county judge, there was no final appealable order under subsection (b) of this rule as the grant of summary judgment did not dispose of the complaint against all defendants. There was a remaining defendant that had been served, and the group failed to include a statement in its notice of appeal that it was abandoning any pending but unresolved claim, which would have operated as a dismissal with prejudice of its claim against that defendant. Searcy County Counsel for Ethical Gov't v. Hinchey, 2011 Ark. 533, — S.W.3d —, 2011 Ark. LEXIS 618 (Dec. 15, 2011).

Lienholder's appeal of an order holding that its lien was second in priority to a mortgagee's lien was dismissed; because there was not a final order in the case, nor certification under subsection (b) of this rule, the reviewing court did not have jurisdiction to hear the case. Crafton, Tull, Sparks & Assocs. v. Ruskin Heights, LLC, 2012 Ark. 56, — S.W.3d —, 2012 Ark. LEXIS 65 (Feb. 9, 2012).

#### —Certification.

A certification in the chancellor's order, pursuant to subsection (b) of this rule, must contain: express findings that there is no just reason to delay the appeal; a finding that a likelihood of hardship or injustice will occur unless there is an immediate appeal; and must set forth facts to support the trial court's conclusion. Guebert v. Williams, 319 Ark. 43, 889 S.W.2d 30 (1994).

Appellate court lacked jurisdiction over a mother's appeal of a summary judgment granted in favor of a merchant for the death of one of her children and the injury of another child who were struck by a vehicle while riding an amusement ride outside the merchant's store because the mother's claims against the manufacturer of the vehicle were unresolved and the trial court had refused to certify the judgment as final for the purpose of appeal. Chapman v. Wal-Mart Stores, Inc., 351 Ark. 1, 89 S.W.3d 906 (2002).

Appellate court dismissed plaintiff home buyer's appeal of a summary judgment in favor of co-defendant real estate listing agent because the certificate executed by the trial court did not contain specific factual findings upon which the decision to enter a final judgment was based; the certificate did not conform to the requirements of this rule and was therefore ineffective to certify the appeal. Stouffer v. Kralicek Realty Co., 81 Ark. App. 89, 98 S.W.3d 475 (2003).

Ordered disclosure of an email under a FOIA request where there were issues as to

when the email was deleted and redacted was not a final order and, absent certification of an appeal of the order under subdivision (b)(1) of this rule, appellate jurisdiction did not lie. Ark. Ins. Dep't v. Baker, 358 Ark. 289, 188 S.W.3d 897 (2004).

Where the circuit court issued a certification under subsection (b) of this rule on April 8, 2005, and the personal representative filed a notice of appeal on May 3, 2005, and an amended notice of appeal on May 6, 2005, both of which were filed within 30 days of the judgment as required under Ark. R. App. P. Civ. 4(a), the Supreme Court clerk erred in refusing to lodge the record; it was not until the personal representative obtained the certification under this rule that she could appeal the summary judgment and, thus, the record was timely presented to the clerk on July 26, 2005. Lee v. Martindale, 363 Ark. 249, 213 S.W.3d 1 (2005).

Appeal of a judgment disposing of fewer than all claims in a consolidated case requires certification by subsection (b) of this rule. Grand River Enters. Six Nations, Ltd. v. Beebe, 372 Ark. 384, 277 S.W.3d 171 (2008).

Tobacco manufacturer's appeal was premature because (1) the matter was consolidated with another pending action; (2) subsection (b) of this rule was substantially identical to Fed. R. Civ. P. 54(b); (3) an appeal of a judgment disposing of fewer than all claims in a consolidated case required Fed. R. Civ. P. 54(b) certification; and (4) the issues were similar and intertwined, and the manufacturer argued in a lower court that the consolidated cases both concerned the alleged obligation of the manufacturer to make escrow payments to the State pursuant to Ark. Code Ann. § 26-57-260. Grand River Enters. Six Nations, Ltd. v. Beebe, 372 Ark. 384, 277 S.W.3d 171 (2008).

#### —Determination and Direction.

Where the trial judge never considered an intervenor's claim when finding some likelihood of hardship or injustice existed which would be alleviated by an immediate appeal, its efforts to present a record and order with specific facts to support its permitting an appeal under subsection (b) of this rule fell short because the order altogether omitted any reference to or consideration of the intervenor's claim. South County, Inc. v. First W. Loan Co., 311 Ark. 501, 845 S.W.2d 3 (1993).

When an appropriate certification is made by the trial court, the judgment is final for purposes of appeal. State Farm Mut. Auto. Ins. Co. v. Thomas, 312 Ark. 429, 850 S.W.2d 4 (1993).

A decree that orders a judicial sale of property and places the court's directive into execution is a final order and appealable under ARAP 2(a)1; when there is such an order, a certification under subsection (b) of this rule



is not necessary. *Alberty v. Wideman*, 312 Ark. 434, 850 S.W.2d 314 (1993).

The court will dismiss an appeal where not all of the claims against all of the parties have been resolved, and there has been no certification pursuant to subsection (b) of this rule that there is no need for delay in deciding the case. *Barr v. Richardson*, 314 Ark. 294, 862 S.W.2d 253 (1993).

#### —Jurisdiction.

The failure to comply with subsection (b) of this rule presents a jurisdictional issue which the court may raise on its own, and absent compliance, can dismiss the appeal for lack of a final order. *Barr v. Richardson*, 314 Ark. 294, 862 S.W.2d 253 (1993).

Although the trial court erred in permitting the appellant to take an interlocutory appeal under subsection (b) of this rule, the appellate court was not without jurisdiction to hear the appeal. *Coleman's Serv. Ctr., Inc. v. Southern Inns Mgt., Inc.*, 44 Ark. App. 45, 866 S.W.2d 427 (1993).

The failure to comply with subsection (b) of this rule presents a jurisdictional issue which the Supreme Court will raise on its own and, absent compliance with the rule, the court will dismiss the appeal for lack of a final order. *Ashmore v. Paccar, Inc.*, 315 Ark. 490, 868 S.W.2d 80 (1994).

Supreme Court was unable to reach the merits of appellant's claim because the trial court did not, on record, dispose of an intervenor's claim as is necessary pursuant to subsection (b) of this rule. *Martin v. National Bank of Commerce*, 316 Ark. 83, 870 S.W.2d 738 (1994).

The finality of an order is a jurisdictional requirement the Supreme Court is obliged to raise even when the parties do not. *Martin v. National Bank of Commerce*, 316 Ark. 83, 870 S.W.2d 738 (1994).

The failure to comply with subsection (b) of this rule by the absence of an order adjudicating the rights of all parties is a jurisdictional issue that the appellate court is obligated to raise on its own. *Maroney v. City of Malvern*, 317 Ark. 177, 876 S.W.2d 585 (1994).

It is appellant's burden to produce a record on appeal showing the jurisdictional requirements of subsection (b) of this rule have been met. *Cortese v. Atlantic Richfield*, 317 Ark. 207, 876 S.W.2d 581 (1994), appeal dismissed 320 Ark. 639, 898 S.W.2d 467 (1995).

The failure to comply with subsection (b) of this rule presents a jurisdictional issue which the appellate court will raise on its own, and absent compliance with the rule, the appeal may be dismissed for lack of a final order. *State Office of Child Support Enforcement v. Morrison*, 318 Ark. 563, 885 S.W.2d 900 (1994).

Trial court's order of dismissal of one defendant did not constitute a final judgment

where claims against another defendant remained pending; thus, the appellate court lacked jurisdiction as the order was not certified as a final judgment that would justify an immediate appeal pursuant to subdivisions (b)(1) and (b)(2) of this rule. *Jackson v. Delis*, 76 Ark. App. 436, 67 S.W.3d 596 (2002).

Appellate court had jurisdiction to hear the denial of relief from a default judgment entered in a medical malpractice case where the patient's motion to strike an answer was granted; the specific provisions of Ark. R. App. P. Civ. 2(a)(4) controlled over Ark. R. App. P. Civ. 2(a)(1) and subsection (b) of this rule. *Fields v. Byrd*, 96 Ark. App. 174, 239 S.W.3d 543 (2006).

Appellate court lacked jurisdiction over a defamation plaintiff's appeal from a partial judgment that was certified for immediate review under this rule, because the certification order was defective for failing to state facts showing why there was no just reason for delay, and the case had terminated in the court below. *Cruse v. 451 Press, LLC*, 2010 Ark. App. 115, — S.W.3d —, 2010 Ark. App. LEXIS 108 (Feb. 3, 2010).

In an action for unlawful detainer, the order granting the guarantors' motions for summary judgment was lacking in finality because neither the cross-claim nor the third-party complaint had been adjudicated or dismissed. Therefore, the Court of Appeals of Arkansas lacked jurisdiction to hear the appeal under subdivision (b)(1) of this rule. *Lamco Ltd. P'ship II v. Pasta Concepts, Inc.*, 2012 Ark. App. 145, — S.W.3d —, 2012 Ark. App. LEXIS 250 (Feb. 15, 2012).

#### —No Just Reason for Delay.

In order to determine that there is no just reason for delay, the trial court must find that a likelihood of hardship or injustice will occur unless there is an immediate appeal. *Wormald United States, Inc. v. Cedar Chem. Corp.*, 316 Ark. 434, 873 S.W.2d 152 (1994).

#### —Specific Factual Findings.

That factual underpinnings supporting a certification under subsection (b) of this rule may exist in the record is not enough; they must be set out in the trial court's order. *Davis v. Wausau Ins. Cos.*, 315 Ark. 330, 867 S.W.2d 444 (1993).

In order to determine that there is no just reason for delay, the trial court must find that a likelihood of hardship or injustice will occur unless there is an immediate appeal and must set forth facts to support its conclusion. *Davis v. Wausau Ins. Cos.*, 315 Ark. 330, 867 S.W.2d 444 (1993).

An appeal from an order granting a motion to dismiss to one party to a lawsuit, which involves multiple parties and multiple claims, is permissible under subsection (b) of this rule when the trial court directs the entry of a final

judgment as to one or more of the claims or parties and makes express findings that there is no just reason to delay the appeal. *Davis v. Wausau Ins. Cos.*, 315 Ark. 330, 867 S.W.2d 444 (1993).

Merely tracking the language of subsection (b) of this rule will not suffice; the record must show facts to support the conclusion that there is likelihood of hardship or injustice which would be alleviated by an immediate appeal rather than at the conclusion of the case. *Coleman's Serv. Ctr., Inc. v. Southern Inns Mgt., Inc.*, 44 Ark. App. 45, 866 S.W.2d 427 (1993).

Trial judge's ruling that an appeal should be allowed to prevent a "possible danger of hardship or injustice," was not a sufficient reason for an intermediate appeal. *Reeves v. Hinkle*, 321 Ark. 28, 899 S.W.2d 841 (1995).

Summary judgment set aside where trial court's judgment was based on attorney's innocent but erroneous assertion that opposing party had failed to comply with an earlier order that he file a response to the motion for summary judgment. *Cordell v. Nadeau*, 321 Ark. 300, 900 S.W.2d 556 (1995).

Under subsection (b) of this rule, the trial court must factually set forth reasons in the final judgment, order, or the record, which can then be abstracted, explaining why a hardship or injustice would result if an appeal is not permitted. *Howard v. Dallas Morning News, Inc.*, 324 Ark. 91, 918 S.W.2d 178 (1996).

Where the trial court order did not merely track the language of this rule but also reflected the factual underpinnings supporting certification, it was sufficient to justify the entry of a final, appealable order. *Howard v. Dallas Morning News, Inc.*, 324 Ark. 91, 918 S.W.2d 178 (1996).

### Multiple Orders.

Where in each of the orders entered by the court prior to the decree of divorce, the chancellor specifically held in abeyance certain items which were to be decided later, and therefore, it was obvious the court never intended to terminate the case until the final decree was entered, all of the orders would be reviewed and treated as timely appealed. *Wilson v. Wilson*, 270 Ark. 485, 606 S.W.2d 56 (1980).

### Prevailing Party.

A prevailing party cannot appeal. *Walker v. Kazi*, 316 Ark. 616, 875 S.W.2d 47 (1994).

Trial court did not abuse its discretion in awarding attorney fees and costs to a property owners association in its action against an owner for violation of restrictive covenants; the case did not present a scenario of the trial court abdicating its responsibility and mechanically awarding fees to the pre-

vailing party. *Lineberry v. Riley Farms Prop. Owners Ass'n*, 95 Ark. App. 286, 236 S.W.3d 534 (2006).

When a corporation sought a retainage from a contractor, but the contractor refused to return the money because of alleged deficiencies in the corporation's work, the circuit court properly awarded attorney's fees to the contractor because the contractor was the prevailing party, as it had received three-fourths of the money at issue. *CJ Bldg. Corp. v. TRAC-10*, 368 Ark. 654, 249 S.W.3d 793 (2007).

### Supreme Court Opinion.

The plaintiff's contention that when the Supreme Court reversed and remanded her case the opinion was tantamount to a judgment in her favor was in error. A judgment is the final determination of the rights of the parties in an action. *Tolley v. Wilson*, 212 Ark. 163, 205 S.W.2d 177 (1947).

### Time Limitations.

Trial court did not err in denying terminated county employee's motion for an award of attorney's fees because her motion seeking attorney's fees was not timely filed; the same result held true even if the time was measured from the denial of the county's motion for JNOV because the fee motion was filed 21 days after the order denying the motion was entered. *Crawford County v. Jones*, 365 Ark. 585, 232 S.W.3d 433 (2006).

On appeal from an award of attorney fees in a partition action, § 18-60-419(a)(1) specifically directed the circuit court to award a reasonable attorney fee, to be taxed as costs, to the attorney who brought the partition suit. The motion for fees was filed prior to the entry of the final judgment, and the award of attorney fees was made contemporaneously with the final, appealable judgment; accordingly, the policy behind the time limit in this rule was preserved. *Vaughn v. Bates*, 2010 Ark. App. 98, — S.W.3d —, 2010 Ark. App. LEXIS 104 (Feb. 3, 2010).

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## Rule 55. Default.

(a) *When Entitled.* When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, judgment by default may be entered by the court.

(b) *Manner of Entering Judgment.* The party entitled to a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against an infant or incompetent person. If the party against whom judgment by default is sought has appeared in the action, he (or if appearing by representative, his representative) shall be served with written notice of

the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as it deems necessary and proper and may direct a trial by jury.

(c) *Setting Aside Default Judgments.* The court may, upon motion, set aside a default judgment previously entered for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) the judgment is void; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or (4) any other reason justifying relief from the operation of the judgment. The party seeking to have the judgment set aside must demonstrate a meritorious defense to the action; however, if the judgment is void, no other defense to the action need be shown.

(d) *Plaintiffs, Counterclaimants, Cross-claimants.* The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) *When Presented.* A motion for default judgment may be presented to the court in vacation and at any place in the district or circuit.

(f) *Remand from Federal Court.* No judgment by default shall be entered against a party in an action removed to federal court and subsequently remanded if that party filed an answer or a motion permitted by Rule 12 in the federal court during removal. (Amended December 10, 1990, effective February 1, 1991; amended January 28, 1999; amended October 2, 2003; amended January 22, 2004.)

**Reporter's Notes (as modified by the Court) to Rule 55:** 1. Rule 55 varies substantially from FRCP 55 and generally follows prior Arkansas law. This rule permits only the court to enter default judgment as opposed to the federal practice which permits the clerk to enter judgment in certain instances. Since court clerks in Arkansas normally provide only ministerial services, the judicial function of entering default judgments is left to the trial court itself.

2. Section (b) follows prior Arkansas law regarding the entry of a judgment against an infant or incompetent. No judgment by default may be entered against infants or incompetents under this rule whereas a default judgment may be entered under the Federal Rule where a representative has appeared. Also, where any defendant has appeared in an action, three days notice must be given to him on an application for default judgment.

3. Section (b) also follows superseded *Ark. Stat. Ann.* § 29-402 (Repl. 1962) which permits the trial court to take evidence or refer to a jury the question of damages or any other issue which the court, in its discretion, determined should be so submitted.

4. Section (c) retains the provision of super-

seded *Ark. Stat. Ann.* § 29-401 (Repl. 1962), which permits a default judgment to be set aside for excusable neglect, unavoidable casualty, or other just cause.

5. Section (e) permits a party to apply for a default judgment at any time regardless of whether the court is in vacation and also permits an applicant to move for a default judgment within or without the county where the action is pending so long as the place is inside the overall circuit or chancery district wherein the action is pending.

**Addition to Reporter's Notes, 1990 Amendment:** Rule 55 has been substantially amended to liberalize Arkansas practice regarding default judgments. The revised rule, which reflects a clear preference for deciding cases on the merits rather than on technicalities, is intended to avoid the harsh results that often flowed from the previous version. Because the rule represents a significant break from prior practice, many cases decided under the old rule and the statute from which it was derived will no longer be of precedential value.

Under revised Rule 55(a), the entry of a default judgment is discretionary rather than mandatory. In deciding whether to enter a



default judgment, the court should take into account the factors utilized by the federal courts, including: whether the default is largely technical and the defendant is now ready to defend; whether the plaintiff has been prejudiced by the defendant's delay in responding; and whether the court would later set aside the default judgment under Rule 55(c).

The standard in amended Rule 55(c) for setting aside a default is taken from Federal Rule of Civil Procedure 60(b), which is made applicable in the default judgment context by Federal Rule 55(c), and should be interpreted in accordance with federal case law. Under former Rule 55(c), a default judgment could be set aside only upon a showing of "excusable neglect, unavoidable casualty, or other just cause." The amended rule, however, adopts a more liberal standard. Under subdivision (c)(1), for example, a default judgment may be set aside on the basis of "mistake, inadvertence, surprise, or excusable neglect." In addition, subdivision (c)(4) permits the court to set aside a default judgment "for any other reason justifying relief from the operation of the judgment." The amended rule also makes plain that a defendant seeking to set aside a default judgment must show a meritorious defense, unless the judgment is void. This requirement is consistent with federal practice, see *C. Wright & A. Miller, supra* § 2697, and with Arkansas case law. *E.g., Wilburn v. Keenan Companies, Inc.*, 298 Ark. 461, 768 S.W.2d 531 (1989). It should also be noted that Rule 55(c) is the exclusive basis for setting aside a default judgment. As amended in 1990, Rule 60 does not apply to default judgments.

New subdivision (f) provides a "grace period" after a case that has been removed to federal court is remanded to the state court. During this period, a default judgment cannot be entered and the defendants "may move or plead as they might have done had the case not been removed."

#### **Addition to Reporter's Notes, 1999**

**Amendment:** Subdivision (a) has been amended by replacing the word "appear" with the word "plead," the terminology used in the corresponding federal rule. This revision, while minor, is intended to eliminate potential confusion stemming from the fact that appearance is also relevant under subdivision (b), which requires notice of a hearing on a motion for default judgment if the party against whom the judgment is sought "has appeared in the action . . ."

In addition, use of the word "plead" in subdivision (a) indicates that the phrase "otherwise appear" has independent meaning. Arkansas cases suggest that this phrase means the same thing as an appearance, in which case it would be a redundancy. *E.g., Tapp v.*

*Fowler*, 291 Ark. 309, 724 S.W.2d 176 (1987) (defendant appeared or otherwise defended within meaning of Rule 55(a) by filing motion to dismiss and motion for summary judgment). Under the federal rule, the phrase "otherwise defend" refers to motions, which by definition are not pleadings. *E.g., Bass v. Hoagland*, 172 F.2d 205 (5th Cir.), cert. denied, 338 U.S. 816 (1949). See also Ark. R. Civ. P. 7(a) & (b) (distinguishing pleadings and motions). Amended subdivision (a) reflects the dichotomy recognized by the federal courts.

#### **Addition to Reporter's Notes, 2003**

**Amendment:** Subdivision (c)(3) of the rule has been amended by inserting a parenthetical phrase, "whether heretofore denominated intrinsic or extrinsic," after the word "fraud." Although the prior version of the rule was not by its terms limited to extrinsic fraud, the Court of Appeals has construed it in that fashion. *Graves v. Stevison*, 98 S.W.3d 848 (Ark. App. 2003). The amendment has the effect of overturning *Graves* and makes subdivision (c)(3) consistent with Rule 60(c)(4).

#### **Addition to Reporter's Notes, 2004**

**Amendment:** Subdivision (f) has been rewritten to modify and clarify the practice when a case is removed to federal court and then remanded. A corresponding change has been made in Rule 12(a). These amendments are based on a Texas rule, see *Tex. R. Civ. P. 237a*, and a similar approach has been taken in other states as well.

Under the original version of subdivision (f), a defendant had a 10-day grace period during which file an answer or Rule 12 motion after a removed case was remanded to state court. Even if the defendant had so responded to the complaint while the case was pending in federal court after its removal, he or she was required to file another answer or motion in circuit court to avoid a default judgment. See *NCS Healthcare v. W.P. Malone, Inc.*, 350 Ark. 520, 88 S.W.3d 852 (2002).

Amended Rule 12(a)(3) expands the grace period to 20 days, during which time a defendant who filed neither an answer nor a Rule 12 motion in the federal court must take such action in the state court. By contrast, if the defendant responded to the complaint in federal court while the case was pending there, Rule 55(f) prohibits entry of judgment by default upon remand. Consequently, the defendant need not respond again in circuit court, within the 20-day period, to avoid such a judgment. See *Laguna Village, Inc. v. Laborers International Union*, 672 P.2d 882 (Cal. 1983); *Banks v. Allstate Indemnity Co.*, 757 N.E.2d 776 (Ohio App. 2001).

Because Arkansas procedural rules differ in some respects from those in the federal courts, however, Rule 55(f) does not require the circuit court to adopt the documents filed in federal court for all purposes. See *Laguna*

*Village, supra*. For example, the plaintiff may move for an order from the circuit court directing the defendant to revise his or her answer to conform to the Arkansas pleading rules. In addition, the "bulk filing" of the federal pleadings and motions in the circuit court will not suffice. Rather, a party relying

on a pleading or motion filed in federal court is charged with the responsibility of making the circuit court aware of the filings and must, if challenged, be able to show that the document was served on the other party. *NCS Healthcare, supra; Banks, supra*.

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## CASE NOTES

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### Constitutionality.

This rule does not violate due process because defendants suffering default judgments are given notice of the pending suit through service of the original complaint and summons; moreover, they are presumed to know that if they do not respond they will suffer default judgments and may suffer a monetary judgment against them. *McGraw v. Jones*, 367 Ark. 138, 238 S.W.3d 15 (2006).

### In General.

Default judgments are not favored by the law. *Allstate Ins. Co. v. Bourland*, 296 Ark. 488, 758 S.W.2d 700 (1988), cert. denied 490 U.S. 1006, 109 S. Ct. 1640, 104 L. Ed. 2d 156 (1989) (decision under prior law).

Default judgments are not favorites of the law and should be avoided when possible; the purpose for the 1990 amendment to this rule was to liberalize practice regarding default judgments, and the revised rule reflects a preference for deciding cases on the merits



rather than on technicalities. *B & F Eng'g, Inc. v. Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992).

#### **Construction.**

This rule, which governs the standard for default judgments, is taken from the federal rule and should be interpreted in accordance with federal case law, in which opposition to a motion for entry of a default judgment is regarded as a motion to set aside a default judgment. *B & F Eng'g, Inc. v. Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992).

To permit a court to convert what would otherwise be a default judgment into one on the merits by taking evidence against someone not present in any sense of the word would be to compound the problem sought to be cured in the 1990 amendment; such a judgment would be taken against one whose failure to appear might well fall within the circumstances enumerated in subsection (c) of this rule, and yet that party would be deprived of the benefit of the rule. *Harold M. v. Clark*, 316 Ark. 439, 872 S.W.2d 410 (1994).

ARCP 60 is no longer applicable to default judgments and, therefore, the time limitations imposed by Rule 60 are no longer applicable to default judgments; thus, since the time limitations are no longer applicable to default judgments, the rationale no longer exists for the rule that an order setting aside a default judgment after 90 days is a final appealable order. *Epting v. Precision Paint & Glass, Inc.*, 353 Ark. 84, 110 S.W.3d 747 (2003).

#### **Purpose.**

If, by taking evidence against a party who has neither answered nor appeared, a court could cause a judgment on the merits to be entered against that party, the purpose of subsection (c) of this rule would be subverted; the reason for the amendment of the rule in 1990 was to foster judgments on the merits rather than on technicalities. *Harold M. v. Clark*, 316 Ark. 439, 872 S.W.2d 410 (1994).

The 1990 amendment to subsection (c) of this rule was intended to liberalize Arkansas practice regarding default judgment. *Truhe v. Grimes*, 318 Ark. 117, 884 S.W.2d 255 (1994).

#### **Applicability.**

When a judgment is based upon evidence presented to the court at a trial, as opposed to being based on the failure of a party to appear or attend, the judgment is not a default judgment, and this rule does not apply. *Diebold v. Myers Gen. Agency, Inc.*, 292 Ark. 456, 731 S.W.2d 183 (1987).

Judgment was not a default judgment and appellant was not entitled to the notice under this rule. *Farmers Union Mut. Ins. Co. v. Mockbee*, 21 Ark. App. 252, 731 S.W.2d 239 (1987).

This rule as amended should be applied by

the trial court on remand where: (1) the amendment of this rule is remedial or procedural, and (2) the amendment has no application to the trial court's refusal to grant default judgment on January 18, 1989, but would apply if that issue was again presented to the trial court. *Hood ex rel. Hood v. Arkansas Sch. Bd. Ins. Coop.*, 35 Ark. App. 1, 811 S.W.2d 1 (1991).

Subsection (a) of this rule is applicable to default judgments entered due to the failure of a defending party to appear or respond to a claim, but, it does not apply to default judgments as to liability entered as a sanction pursuant to Rule 37. *Viking Ins. Co. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992).

The amended rule is a procedural rule, is remedial in nature and, accordingly, should be given retroactive effect. *Divelbliss v. Suchor*, 311 Ark. 8, 841 S.W.2d 600 (1992).

Subsection (c) of this rule contemplates a circumstance where a default judgment has been entered properly; however, the rule does not govern when the trial court improperly enters a default judgment by failing to recognize clear authority in an area. *Richardson v. Rodgers*, 334 Ark. 606, 976 S.W.2d 941 (1998).

Where defendant filed an answer in federal court after its motion to remove, the state trial court erred in subsequently granting a default judgment to plaintiff after the case was remanded because amended subsection (f) of this rule was procedural and remedial and should therefore have been applied retroactively; thus, defendant was not required to refile its answer in the trial court after the remand. *JurisDictionUSA, Inc. v. Loislaw.com, Inc.*, 357 Ark. 403, 183 S.W.3d 560 (2004).

Trial court did not err by denying city a default judgment in its declaratory judgment action against telecommunications company after the case was remanded to the trial court from federal court because the company, which filed an answer in federal court, but not state court, was in compliance with subsection (f) of this rule, an amendment to this rule that was given a retroactive effect. *City of Fort Smith v. Didicom Towers, Inc.*, 362 Ark. 469, 209 S.W.3d 344 (2005).

While there was a mandatory response requirement in § 16-112-204(a) for habeas corpus petitions seeking the scientific testing of crime evidence, there was no provision for a default judgment as in this rule, and the trial court did not err in denying a petitioner's motion for a default judgment. The rules of civil procedure did not apply in the habeas proceeding. *Carter v. State*, 2010 Ark. 29, — S.W.3d —, 2010 Ark. LEXIS 39 (Jan. 21, 2010).

#### **Absence of Counsel.**

Illness of a party's counsel, so severe as to prevent him from appearing in behalf of his

client, is an appropriate ground for vacating a default judgment provided the party litigant did not know of it in time to retain other counsel or was prevented in some way from doing so; otherwise, such illness of counsel is not grounds for setting aside the judgment. *Meisch v. Brady*, 270 Ark. 652, 606 S.W.2d 112 (1980).

### **Appeal.**

The burden is on the party making a motion to obtain a ruling from the court, and failure to do so constitutes a waiver of the motion precluding its consideration on appeal. *Hensley v. White River Medical Ctr.*, 28 Ark. App. 27, 770 S.W.2d 190 (1989).

Debtor's appeal to the circuit court from a magistrate's order denying her motion to set aside a default judgment was timely because it was made well within 30 days of the date of the denial of her motion to set aside as required by Ark. Dist. Ct. R. 9(a), although the default judgment had been entered over a year earlier. There was no time limit for seeking relief from default under subsection (c) of this rule. *Gurien v. Access Credit Mgmt.*, 2011 Ark. App. 711, — S.W.3d —, 2011 Ark. App. LEXIS 763 (Nov. 16, 2011).

### **Appearance.**

"Appearance" designates some overt act by which a party against whom a suit has been commenced submits himself to the jurisdiction of the court. *Divelbliss v. Suchor*, 311 Ark. 8, 841 S.W.2d 600 (1992).

Husband's answer, although untimely, recognized his wife's divorce action as being in court and indicated a desire to defend, and therefore constituted an "appearance" for purposes of subsection (b) of this rule. Therefore, the husband should have been allowed to present evidence relating to issues of marital property and debt. *Robinson v. Robinson*, 103 Ark. App. 169, 287 S.W.3d 652 (2008).

### **Criminal Proceedings.**

This rule does not apply to bond forfeiture procedures. *M & M Bonding Co. v. State*, 59 Ark. App. 228, 955 S.W.2d 521 (1997).

### **Damages.**

Although he is entitled to offer proof in mitigation of damages, a defaulting defendant may not controvert the plaintiff's right to recover as the default fixes the defendant's liability on the plaintiff's cause of action. *Gardner v. Robinson*, 42 Ark. App. 90, 854 S.W.2d 356 (1993).

The general rule is that, in an inquiry of damages upon default, all of the plaintiff's material allegations are to be taken as true, and the determination of the amount of the damages to be awarded is all that remains to be done. *Gardner v. Robinson*, 42 Ark. App. 90, 854 S.W.2d 356 (1993).

Subsection (c) of this rule does not permit a

setting aside of the damage award when liability against the defendant remains fixed and is not in dispute. *Byrd v. Dark*, 322 Ark. 640, 911 S.W.2d 572 (1995).

After having received evidence as to the extent of the damages in a default proceeding, the trial court may not transform the judgment from one of default to one based on the merits such that this rule no longer applies. *Tharp v. Smith*, 326 Ark. 260, 930 S.W.2d 350 (1996).

Hearing on damages award to the resident was necessary where there was no testimony specifically regarding the medical bills or the summary; there was no proof that each expense was necessary or related to the accident with the corporation, and the record was silent as to how the trial court arrived at the damage amounts. *Volunteer Transp., Inc. v. House*, 357 Ark. 95, 162 S.W.3d 456 (2004).

After holding a trial on the issue of damages, the circuit court erred by reducing appellant's medical damages from \$7,135 to \$4,500; appellant's uncontradicted testimony showed that nine months of chiropractic treatments were reasonable and necessary after appellant's neck was injured in an assault, and there was no requirement that the chiropractor testify as to the reasonableness and necessity of the treatments. *Young v. Barbera*, 366 Ark. 120, 233 S.W.3d 651 (2006).

After a default judgment was entered against a physician in a medical malpractice case, the trial court was not required to provide the physician with notice of a hearing on damages; however, the damages awarded for mental anguish and future pain and suffering were reversed as they were based on speculation. *McGraw v. Jones*, 367 Ark. 138, 238 S.W.3d 15 (2006).

### **Default Not Entered.**

In a termination of parental rights case under § 9-27-341, a trial court did not really enter a default judgment against a father due to a failure to appear, despite the use of such language, due to its extensive consideration of the evidence in the case. The trial court's approach satisfied its obligation to determine the best interest of the child and to safeguard the father's equal protection and due process rights to the children. *Osborne v. Ark. Dep't of Human Servs.*, 98 Ark. App. 129, 252 S.W.3d 138 (2007).

Home buyer was not entitled to the entry of default judgment against a home seller under this rule because the seller proved that either its owner or the postal service was mistaken as to delivery; that the filing of an answer was only one day late; that the seller appeared and raised a meritorious defense; and that the buyer was not prejudiced. *Benedetto v. Justin Wooten Constr., LLC*, 2009 Ark. App. 825, — S.W.3d —, 2009 Ark. App. LEXIS 1058 (2009).

Judgment against an owner, set aside by a



trial court, was not a default judgment as the owner had filed a timely answer but did not appear at trial, and the trial court entered judgment based on the evidence. Since the judgment was not a default judgment, the trial court was not obligated to fulfill the requirements of subsection (c) of this rule but of Ark. R. Civ. P. 60, which governed the setting aside of judgments other than default judgments. *Cent. Ark. Found. Homes, LLC v. Choate*, 2011 Ark. App. 260, — S.W.3d —, 2011 Ark. App. LEXIS 272 (Apr. 6, 2011).

#### **Default Not Set Aside.**

Evidence did not warrant setting aside default judgment. *Springwind Farms, Inc. v. McLane Co.*, 21 Ark. App. 257, 731 S.W.2d 784 (1987).

The negligence of an insurance company, in failing to respond to a lawsuit for personal injuries following a car collision involving its insured, was imputed to the insured, and the default judgment entered against him was valid. *Truhe v. Grimes*, 318 Ark. 117, 884 S.W.2d 255 (1994).

The trial court did not err in striking an untimely answer where no evidence justifying the delay was presented in the trial court, and, even if defendant had made a threshold showing of mistake, inadvertence, or excusable neglect, she failed to show that she had a meritorious defense to the cause of action. *Martin v. Jetkins*, 320 Ark. 478, 897 S.W.2d 567 (1995).

Where defendant testified that he kept a post office box and did not have a forwarding address in Alaska, and did not check his mail for a couple of months and did not have anyone check it for him, the facts did not demonstrate the surprise or excusable neglect contemplated in the rule to set aside a default judgment against him. *Morgan v. Century 21 Perry Real Estate*, 78 Ark. App. 180, 79 S.W.3d 878 (2002).

Trial court did not err in failing to set aside a default judgment based on the misconduct of appellees' counsel in failing to send a courtesy copy of the lawsuit to the company's counsel where the cause of the default was not plaintiff's counsel's failure to send a courtesy copy of the complaint to the company's counsel, but rather, the cause was the failure of the company's controller to forward the summons and complaint to the company's counsel. *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004).

In a civil forfeiture proceeding, an owner was not entitled to have a default judgment entered in favor of the State set aside based on substantial compliance because the judgment was not void since the summons was sufficient; moreover, the owner failed to present a meritorious defense. Due to that failure,

a separation of powers argument was not considered. *Solis v. State*, 371 Ark. 590, 269 S.W.3d 352 (2007).

#### **Default Required.**

A default judgment is required where there has been a failure to make any sort of timely filing or appearance in a trial court within twenty days. *Goston v. Craig*, 34 Ark. App. 23, 805 S.W.2d 92 (1991).

#### **Default Set Aside.**

Where a deputy sheriff served a writ of garnishment on a corporation's office manager, who was neither a corporate officer nor the designated agent for process, despite the fact that the corporation's president was in the city on the service day, there was a clear failure to comply with the statutory service requirements of § 16-58-124; accordingly, a default judgment against the corporation was properly set aside pursuant to subsection (c) of this rule and Rule 60 for lack of personal jurisdiction. *Pounders v. Chicken Country, Inc.*, 3 Ark. App. 220, 624 S.W.2d 445 (1981).

Where no motion was filed by an opposing party pursuant to this rule to set aside two default judgments, the trial court lacked the authority to set aside the default judgment and enter an order forfeiting the property to the county general fund. *State v. \$258,035.00 United States Currency*, 352 Ark. 117, 98 S.W.3d 818 (2003).

Circuit court did not abuse its discretion in setting aside the default judgment against the car dealership as void where the buyer's summons incorrectly identified the defendants and misstated the deadline for responding to the complaint; this did not strictly comply with the service requirements imposed by the Arkansas Rules of Civil Procedure. *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 120 S.W.3d 525 (2003).

In an employment discrimination case, where two attorneys should have been admitted pro hac vice, the decisions to grant a default judgment and to deem certain responses admitted were also erroneous. *Tobacco Superstore, Inc. v. Darrough*, 362 Ark. 103, 207 S.W.3d 511 (2005).

Trial court erred when entering a default judgment in a foreclosure action because it ordered a buyer to quitclaim a deed to property to two sellers to satisfy a mortgage; there was no authority to do such under § 18-49-103. *Born v. Hodges*, 101 Ark. App. 139, 271 S.W.3d 526 (2008).

Default judgment was set aside under subdivision (c)(3) of this rule where a former husband deceived his former wife into thinking a compromise had been reached and procured her non-attendance and failure to answer a complaint; the distinction between intrinsic and extrinsic fraud had been abol-

ished. Moreover, her assertion that she received nothing in a property distribution was sufficient to raise a meritorious defense due to the presumptions under § 9-12-315(b) and § 9-12-315 (a)(1)(A). *West v. West*, 103 Ark. App. 269, 288 S.W.3d 680 (2008).

Because proper service was not obtained by appellant upon appellee, a decree quieting title in appellant obtained by default judgment was void and could properly have been set aside under subsection (c) of this rule. *Pulaski Choice, L.L.C. v. 2735 Villa Creek, L.P.*, 2010 Ark. App. 451, — S.W.3d —, 2010 Ark. App. LEXIS 478 (May 26, 2010).

Default judgment against a goat seller was set aside under subsection (c) of this rule as: (1) the buyer knew of the seller's whereabouts as the buyer had gone to the seller's house, yet the buyer did not make a diligent inquiry into the seller's whereabouts before applying for a warning order under Ark. R. Civ. P. 4(f)(1); (2) all of the buyer's service attempts in 2000 were at different incorrect addresses; (3) the seller's knowledge of the lien against her property did not validate the void default judgment; (4) the trial court lacked jurisdiction; and (5) laches and estoppel did not apply as the default judgment was void ab initio. *Scott v. Wolfe*, 2011 Ark. App. 438, — S.W.3d —, 2011 Ark. App. LEXIS 469 (June 15, 2011).

In an action for breach of contract arising out of a foreclosure, a mortgagee's motion to set aside a default judgment under subsection (c) of this rule was properly denied as its failure to attend to business was not excusable neglect. *PHH Mortg. Corp. v. Yeager*, 2011 Ark. App. 313, — S.W.3d —, 2011 Ark. App. LEXIS 346 (Apr. 27, 2011).

### **Discretion of Court.**

It is within the sound discretion of the trial court to grant or deny a motion to set aside a default judgment, and the question on appeal is whether there has been an abuse of discretion. Default judgments are not favorites of the law and should be avoided when possible. *Cammack v. Chalmers*, 284 Ark. 161, 680 S.W.2d 689 (1984).

Where the trial court overruled defendants' motion to dismiss and gave defendants 25 days from notice of the order to answer the complaint, but due to circumstances in the clerk's office defendants never received a copy of the order, the trial court did not abuse its discretion in refusing to enter a default judgment for plaintiffs, since the defendants' delay in filing an answer was due to a defect in the proceedings which did not prejudice the plaintiffs' rights. *Cammack v. Chalmers*, 284 Ark. 161, 680 S.W.2d 689 (1984).

The standard of review for the granting or denial of a motion to vacate a default judgment is whether the trial court abused its discretion. *B & F Eng'g, Inc. v. Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992).

The court applied an "abuse of discretion" standard in reviewing the granting of a default judgment under the rule. *Layman v. Bone*, 333 Ark. 121, 967 S.W.2d 561 (1998).

The trial court did not abuse its discretion when it granted a default judgment where, although the complaint was served on January 14, the defendant mistakenly informed his attorney that it was served on January 16 and, therefore, the answer was mailed to defendant's counsel and filed one day late. *Layman v. Bone*, 333 Ark. 121, 967 S.W.2d 561 (1998).

The entry of a default judgment is discretionary rather than mandatory. *Collins v. Keller*, 333 Ark. 238, 969 S.W.2d 621 (1998).

Trial court did not abuse its discretion in denying appellant's motion for default judgment because the trial court was not required to enter a default judgment against appellees; the trial court had the discretion to recognize that a default had occurred without being bound to enter judgment. *Wildlife Farms II LLC v. Robinson*, 2011 Ark. App. 140, — S.W.3d —, 2011 Ark. App. LEXIS 149 (Feb. 23, 2011).

### **Effect of Default Judgment.**

A judgment by default is just as binding and forceful as a judgment entered after a trial on the merits in a case; and it is not to be discredited or regarded lightly because of the manner in which it was acquired. *Meisch v. Brady*, 270 Ark. 652, 606 S.W.2d 112 (1980).

### **Excusable Neglect.**

Affidavit by secretary of garnishee to the effect that she had mailed notice of garnishment to home office in Pennsylvania and was only told later that it never arrived did not amount to excusable neglect. *Sun Gas Liquids Co. v. Helena Nat'l Bank*, 276 Ark. 173, 633 S.W.2d 38 (1982), criticized *Venable v. Becker*, 287 Ark. 236, 697 S.W.2d 903 (1985).

In view of the writ of garnishment's simple and direct message, written in plain language, the garnishee's failure to understand and comply with it could not be said to be due to excusable neglect. *Metal Processing, Inc. v. Plastic & Reconstructive Assocs.*, 287 Ark. 100, 697 S.W.2d 87 (1985); *May v. Bob Hankins Distrib. Co.*, 301 Ark. 494, 785 S.W.2d 23 (1990).

Where defendant approached the general contractor to provide a defense but then did nothing to assure that the general contractor was indeed defending it, and four and one-half months passed from the date of filing the complaint to the date of entry of a default judgment, during which time the defendant apparently did not monitor the case, there was no excusable neglect. *CMS Jonesboro Rehabilitation, Inc. v. Lamb*, 306 Ark. 216, 812 S.W.2d 472 (1991).

Defendant did not show good cause for not



showing up at trial, where he claimed his attorney had rescheduled the trial by an agreement with the prosecutor, for attorneys cannot vary a trial date set by the court. *Rischar v. State*, 307 Ark. 429, 821 S.W.2d 25 (1991).

No excusable neglect shown where defendant was personally served with process and delivered the summons and complaint to his lawyer in adequate time to file an answer. *Moore v. Taylor Sales, Inc.*, 59 Ark. App. 30, 953 S.W.2d 889 (1997).

Company's failure to answer a summons was not the result of excusable neglect where the controller did not dispute the fact that he received the summons and complaint and, moreover, he stated that part of his job was to "monitor lawsuits and work with the attorneys, insurance companies, and contractors involved in those suits"; clearly, the controller was extremely busy at the time he received the suit papers, but his being "too busy" was not excusable neglect. *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004).

Where homeowner testified that he was a business man who was familiar with court processes, but failed to respond to the summons and did nothing until after being informed by letter that a trial on damages was pending, the trial court's conclusion that this did not rise to excusable neglect was not clearly erroneous; thus, the trial court did not abuse its discretion in entering a default judgment against homeowner. *Israel v. Oskey*, 92 Ark. App. 192, 212 S.W.3d 45 (2005).

Default judgment entered in a medical malpractice case was proper as the fact that a physician's office staff failed to forward documents to an in-house attorney did not constitute excusable neglect where the physician did nothing to ensure a defense was being mounted on her behalf; even if there was a meritorious defense, no grounds under this rule were shown. *McGraw v. Jones*, 367 Ark. 138, 238 S.W.3d 15 (2006).

Superintendent did not state or allege any grounds constituting mistake or excusable neglect, or any other grounds that would satisfy subsection (c) of this rule as there was no validity to the superintendent's arguments that a default judgment was not properly granted where an answer was filed or that the "excusable neglect" standard was inapplicable; the superintendent did not raise the issue of inadvertence below, nor did he cite any convincing authority to show that the supreme court had ever held that mere "inadvertence" in filing an answer late warranted the reversal of a default judgment. *Vent v. Johnson*, 2009 Ark. 92, 303 S.W.3d 46 (2009).

#### **Failure to Answer Complaint.**

Where defendant's attorney failed to answer complaint within 20 days as required by ARCP 12, but alleged that he had mailed

copies to the court clerk and both attorneys for plaintiffs, although the three denied receiving them, the court could properly excuse the failure under ARCP 6, even though this rule mandates a default judgment and gives the court no discretion. *Hensley v. Brown*, 2 Ark. App. 175, 617 S.W.2d 867 (1981).

Where the defendant's attorney failed to file an answer within the time allowed and the only proof to justify the attorney's neglect was his affidavit that he had prepared a timely answer, but upon its completion his secretary had misplaced it, the trial court abused its discretion in condoning such negligence and it erred in refusing to enter a default judgment against the defendant because if such carelessness was excusable, then any attorney could shift the responsibility for filing any pleading to his secretary by simply dictating the pleading and dismissing the matter from his mind. *DeClerk v. Tribble*, 276 Ark. 316, 637 S.W.2d 526 (1982).

The trial court did not abuse its discretion in refusing to set aside the default judgment entered against the borrower, in an action brought by a lender against a borrower to collect the balance due under a promissory note, where the borrower failed to prove his allegation that, prior to the filing of the lawsuit, he and the lender had agreed upon a settlement of their differences, and that pursuant to the lender's assurances of his not pursuing the suit, the borrower did not file an answer. *Bell v. Lee*, 8 Ark. App. 139, 648 S.W.2d 524 (1983).

Response was sufficient to prevent a default. *Garrett v. Andrews*, 294 Ark. 160, 741 S.W.2d 257 (1987), cert. denied 487 U.S. 1219, 108 S. Ct. 2873, 101 L. Ed. 2d 908 (1988).

Plaintiffs were not entitled to a default judgment since a defendant who did not submit an answer did appear and defend by virtue of another defendant's answer, which inured to his benefit under the common defense doctrine. *Richardson v. Rodgers*, 334 Ark. 606, 976 S.W.2d 941 (1998).

Corporation's failure to answer the resident's complaint was not clearly the product of mistake, surprise, and/or excusable neglect as the failure to attend to business was not excusable neglect; the corporation had ample time to respond to the complaint and failed to do so. *Volunteer Transp., Inc. v. House*, 357 Ark. 95, 162 S.W.3d 456 (2004).

In an action for breach of restrictive covenants, the trial court did not err under subsection (c) of this rule in granting appellee's motion for a default judgment and in refusing to set aside the default judgment because the trial judge did not extend the time in which to file an answer, and therefore, appellants were in default when they did not file a timely answer. *Adams v. Moody*, 2009 Ark. App. 474, 324 S.W.3d 348 (2009).

Default judgment under subdivision (1) of this rule was properly entered against debtors in a creditor's suit for unpaid invoices because letters from the debtors' president were not answers, particularly as they were not filed by a licensed attorney, and an answer filed by an attorney was filed late and the late filing was not the result of mistake or inadvertence. *Las Colinas Int'l, Inc. v. Crosswood Assocs.*, 2009 Ark. App. 796, — S.W.3d —, 2009 Ark. App. LEXIS 975 (2009).

#### **Failure to Assert Defense.**

Defendant's petition to vacate the default judgment was deficient from the standpoint of failure to assert a valid defense, where defendant simply stated that he had an undoubted defense and further had a counterclaim against the plaintiff for a substantial amount of money in excess of that money allegedly claimed due by the plaintiff and further, he did not, in fact, owe the plaintiff. *Meisch v. Brady*, 270 Ark. 652, 606 S.W.2d 112 (1980).

Where a party defended the action not only by filing a motion to dismiss, but also by submitting a motion for summary judgment with three extensive affidavits, which tended to deny each of the allegations contained in the complaint, as he was permitted to do under ARCP 12(b) and 56, it was held that he had not "failed to appear or otherwise defend" under this rule. *Tapp v. Fowler*, 291 Ark. 309, 724 S.W.2d 176 (1987).

#### **Failure to Serve Other Documents.**

Failure to serve an affidavit containing a verified statement of damages was not grounds to set aside a default judgment, where the same information was contained in the complaint, which was served on defendant, and defendant did not show how he was prejudiced by not receiving the affidavit. *Miller v. Transamerica Commer. Fin. Corp.*, 74 Ark. App. 237, 47 S.W.3d 288 (2001).

#### **Foreign Judgments.**

Foreign judgments, regardless of whether entered by default, are protected against collateral attack by the full faith and credit clause of U.S. Const., Art. IV, § 1, unless the defenses of fraud in the procurement or want of jurisdiction in the rendering court, can be established. *Butler Fence Co. v. Acme Fence & Iron Co.*, 42 Ark. App. 30, 852 S.W.2d 826 (1993).

#### **Hearing.**

Where on regularly scheduled trial date, defendant and his counsel failed to appear, and court entered judgment in favor of plaintiff based on the complaint, answers and evidence adduced by the parties, no motion for default judgment having been filed, this was not a default judgment based on the failure to answer or appear, and defendant was not entitled to a hearing three days prior

to judgment under this rule. *Dawson v. Picken*, 1 Ark. App. 168, 613 S.W.2d 846 (1981).

There is no authority to the effect that a court must hold a hearing pursuant to this rule on the issue of liability when that issue has already been established by the entry of a default. *PolSELLI v. Aulgur*, 328 Ark. 111, 942 S.W.2d 832 (1997).

#### **Joint Defendants.**

A default judgment should not be entered, and if entered it should be set aside, when the action is against several defendants jointly, and the defense interposed by an answering defendant is not personal to himself but is common to himself and the nonanswering defendant. *Firestone Tire & Rubber Co. v. Little*, 269 Ark. 636, 599 S.W.2d 756 (1980), *rev'd in part on other grounds sub nom. Shelton v. Firestone Tire & Rubber Co.*, 281 Ark. 100, 662 S.W.2d 473 (1983).

Where codefendant doctor was served complaint in wrongful death action, filed a timely answer of a general denial and reserved the right to amend his answer at a later date, the default judgment entered against defendant nursing home was properly set aside since the general denial of the doctor put all material allegations into issue and inured to the benefit of the nursing home. *Capitol City Manor, Inc. v. Culberson*, 1 Ark. App. 137, 613 S.W.2d 835 (1981).

#### **Judgment on the Merits.**

Where defendant failed to show at the trial, but had answered and otherwise appeared in the matter by requesting a continuance, and where the court, with defendant's answer and other matters before it, made its findings and reduced plaintiff's claim to judgment, then such judgment was entered upon the merits, and defendant was not entitled to set it aside as a default judgment under subsection (c) of this rule. *McCourt Mfg. Co. v. Credit Bureau*, 319 Ark. 23, 888 S.W.2d 650 (1994).

Judgment in favor of the plaintiff in circuit court, after defendant appealed a municipal court's ruling, and after defendant failed to appear in circuit court, was not a default judgment, but was one which was decided on the merits. *Fazeli v. Barnes*, 47 Ark. App. 99, 885 S.W.2d 908 (1994).

#### **Meritorious Defense.**

Assuming that the notice requirement of subsection (b) of this rule applied and had not been complied with, the appellant must also make a prima facie showing that he has a valid or meritorious defense to the action before he is entitled to have the judgment set aside; the motion itself must assert this defense. The only time that a valid defense need not be shown is when the judgment is void, not voidable, such as when the appellant has received no notice whatsoever, actual or con-



structive. *Bunker v. Bunker*, 17 Ark. App. 7, 701 S.W.2d 709 (1986).

In order to prevail under either this rule, or ARCP 60(b) or (c), a party is required to show that it has a meritorious defense, and the motion itself must assert this defense. *Hendrix v. Hendrix*, 26 Ark. App. 283, 764 S.W.2d 472 (1989).

In order to have a judgment set aside under this rule, ARCP 60(b) or (c), a party is required to show in its motion that it has a meritorious defense. A meritorious defense is evidence, not allegations, sufficient to justify the refusal to grant a directed verdict against the party required to show a meritorious defense, and the motion itself must assert the defense. *Goston v. Craig*, 34 Ark. App. 23, 805 S.W.2d 92 (1991).

When a default judgment is set aside because of excusable neglect, the party having the judgment set aside must demonstrate a meritorious defense; if the judgment is void, it is not necessary for the party seeking to have it set aside to plead a meritorious defense. *Hubbard v. Shores Group, Inc.*, 313 Ark. 498, 855 S.W.2d 924 (1993).

The court properly refused to open a default judgment where it found that there was no mistake, inadvertence, surprise, excusable neglect, or other just cause for relief from the operation of judgment; the assertion of an allegedly meritorious defense was irrelevant in the absence just cause for relief. *Tyrone v. Dennis*, 73 Ark. App. 209, 39 S.W.3d 800 (2001).

#### **Mistake.**

Default judgment rendered against the defendant insurance company would not be set aside based upon defendant's claim that its failure to respond to a second suit was based upon excusable mistake; the nature of an alleged mistake is considered on a case by case basis. *B & F Eng'g, Inc. v. Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992).

The "mistake" or "excusable neglect" contemplated under subsection (c) of this rule refers to mistake or excusable neglect by the defendant in failing to respond to the lawsuit; it does not mean a mistake in the award of damages. *Byrd v. Dark*, 322 Ark. 640, 911 S.W.2d 572 (1995).

Default judgment was not the result of mistake, inadvertence, surprise, or excusable neglect where, when the company's controller received the summons and complaint, he did nothing, and the trial court's finding that the controller's failure to notify outside counsel of the receipt of the summons and complaint did not constitute "mistake" under subdivision (c)(1) of this rule. *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004).

#### **Necessity of Establishing Damages.**

Where a default judgment was entered against a defendant for money owed by defendant and plaintiff to a third party, failure to introduce evidence to establish the amount of the judgment was reversible error, since the amount of damages cannot, under ARCP 8, be deemed admitted when not denied in the responsive pleadings, so that it must be established by proof, and this requirement is not changed by subsection (b) of this rule. *Rice v. Kroeck*, 2 Ark. App. 223, 619 S.W.2d 691 (1981).

#### **Notice.**

The trial court had jurisdiction to grant the defendant's motion to set aside the default judgment that had been entered against him even though the 90-day period of ARCP 60(b) had expired, because it was granted without giving the defendant, who had answered in the case, a three days' written notice of the hearing on the application for the default as required by subsection (b) of this rule. This constitutes sufficient grounds for setting the judgment aside under ARCP 60(c)(7). *Magness v. Masonite Corp.*, 12 Ark. App. 117, 671 S.W.2d 230 (1984).

At least three days notice is required under subsection (b) of this rule; otherwise the application is not timely. *Colclasure v. Kansas City Life Ins. Co.*, 290 Ark. 585, 720 S.W.2d 916 (1986), cert. denied 481 U.S. 1069, 107 S. Ct. 2462, 95 L. Ed 2d 871 (1987).

Subsection (b) of this rule does not require that notice be given to a defaulting defendant who has not appeared; perhaps the reason is that it would be superfluous to again serve a defendant who already received one notice but has failed on an ongoing basis to respond. *Divelbliss v. Suchor*, 311 Ark. 8, 841 S.W.2d 600 (1992).

Although a hearing is required to determine the amount of damages, subsection (b) of this rule does not require that notice of the hearing be given to a defaulting defendant who has not appeared. *Tharp v. Smith*, 326 Ark. 260, 930 S.W.2d 350 (1996).

Because the healthcare corporation did not receive service of notice that the order remanding the case from a federal court had been filed in state circuit court, the state circuit court's order of default judgment had to be reversed pursuant to subsection (f) of this rule. *NCS Healthcare of Ark. v. W.P. Malone, Inc.*, 350 Ark. 520, 88 S.W.3d 852 (2002).

Trial court was required by subsection (b) of this rule to give a debtor three days notice before hearing a bank's default motion because the debtor personally appeared at the hearing, which was an overt act submitting himself to the trial court's jurisdiction, and the debtor's appearance was made before the bank orally moved for a default judgment.

The trial court abused its discretion by granting the bank's motion for a default judgment without first allowing the debtor three days' notice to prepare a defense to the motion. *Brooks v. Farmers Bank & Trust Co.*, 101 Ark. App. 359, 276 S.W.3d 727 (2008).

#### **Remand from Federal Court.**

After remand from the federal court, the "bulk" filing in state court of the federal pleadings, including appellant's answers to appellee's original complaint and amended complaint, were not sufficient to satisfy the requirements of subsection (a) of this rule, thus, appellant's federal answer was not a responsive pleading in the state court proceedings pursuant to subsection (f) of this rule. *NCS Healthcare of Ark. v. W.P. Malone, Inc.*, 350 Ark. 520, 88 S.W.3d 852 (2002).

#### **Removal to Federal Court.**

While there is no longer a need to comply with state court filing deadlines to avoid default if the case is removed to the federal court, removal is not effected unless the removal documents are filed promptly with the state court. *Allstate Ins. Co. v. Bourland*, 296 Ark. 488, 758 S.W.2d 700 (1988), cert. denied 490 U.S. 1006, 109 S. Ct. 1640, 104 L. Ed. 2d 156 (1989) (decision under prior law).

#### **Sanctions.**

Trial court did not abuse its discretion in entering summary judgment against a business as a sanction for the business's failure to respond to the state's discovery requests and refusal to appear at a hearing on the state's motion to compel discovery set three days before the scheduled trial date after the business had been granted three continuances of the hearing date; trial court did not have to issue an order compelling discovery before imposing the sanction. *Nat'l Front Page v. State*, 350 Ark. 286, 86 S.W.3d 848 (2002).

#### **Service of Process.**

Plaintiff's attempt at service of process and notice of impending default must be measured against the extremely heavy burden imposed upon him. *Meeks v. Stevens*, 301 Ark. 464, 785 S.W.2d 18 (1990).

The plaintiff in a motor vehicle accident case was properly granted summary judgment, notwithstanding that the summons was improperly served on the driver of the truck with which the plaintiff collided, rather than the owner of the truck, by which the driver was employed, since the owner waived the defense of insufficiency of process by not raising it as a defense in its answer. *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998).

Trial court abused its discretion in not granting retailer's motion to set aside a default judgment in builder's third-party breach of contract action because the builder failed to

comply with the service of process requirements of Ark. R. Civ. P. 4(d)(8) where it addressed a certified letter to the retailer; a limited liability company was clearly not a "natural person" within the meaning of Rule 4(d)(8), and the letter failed to name a human being as an addressee. *Grand Slam Stores, LLC v. L&P Builders, Inc.*, 92 Ark. App. 210, 212 S.W.3d 6 (2005).

Default judgment in a child support case should have been set aside because service was unquestionably defective where it was effectuated upon a purported father's brother; therefore, a circuit court abused its discretion when it took any action other than a dismissal of the case under Ark. R. Civ. P. 4(i). The father's subsequent participation in enforcement proceedings, including his act of filing for paternity testing, did not validate the void judgment. *Ivy v. Office of Child Support Enforcement*, 99 Ark. App. 341, 260 S.W.3d 328 (2007).

Although a debtor alleged an incorrect zip code for a circuit court's address rendered the summons served on her fatally defective, the circuit court properly determined the debtor was not entitled to set aside a default judgment, pursuant to subdivision (c)(2) of this rule, as void because nothing in Ark. R. Civ. P. 4(b) required the court address to appear in the summons and, as such, there was exact compliance with Rule 4. *Talley v. Asset Acceptance, LLC*, 2011 Ark. App. 757, — S.W.3d —, 2011 Ark. App. LEXIS 809 (Dec. 7, 2011).

#### **Setting Aside Default Judgments.**

Subsection (c) of this rule does not authorize a trial court to vacate a judgment for damages while the judgment on liability stands. *Tharp v. Smith*, 326 Ark. 260, 930 S.W.2d 350 (1996).

Subsection (c) of this rule requires, in effect, two steps to having a default judgment set aside: first, a defaulting defendant must show one of the four enumerated categories of reasons to have the judgment set aside; and second, if the reason is any other than that the judgment is void, a defaulting defendant must then demonstrate a meritorious defense to the action. *Tharp v. Smith*, 326 Ark. 260, 930 S.W.2d 350 (1996).

Appellant's argument that the "reason" to set aside a default judgment against him was because he had a meritorious defense and a miscarriage of justice would result if he was not allowed to present it was clearly an attempt to circumvent the dual requirements of subsection (c) of this rule. *Tharp v. Smith*, 326 Ark. 260, 930 S.W.2d 350 (1996).

Fed. R. Civ. P. 55(c) should be interpreted in accordance with federal case law; thus, under federal law, a district court's grant of a motion to set aside a default judgment was not an appealable final order where the setting-aside paved the way for a trial on the merits and,



under similar circumstances, the Arkansas trial court's order setting aside a default judgment, entered more than 90 days after the default judgment was entered, was not a final appealable order. *Epting v. Precision Paint & Glass, Inc.*, 353 Ark. 84, 110 S.W.3d 747 (2003).

Whether default judgments are void is a question of law involving no discretionary rulings by the trial court; accordingly, in cases where an appellant claims that the default judgment is void, the Supreme Court of Arkansas will review a trial court's granting or denial of a motion to set aside default judgment using a *de novo* standard. *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004).

Where company contended that a default judgment was void under Ark. R. Civ. P. 4(c)(2) due to insufficiency of service of process and insufficiency of process, the appellate court held that a motion to strike writs of garnishment was not a responsive pleading because it did not address the merits of the case; the purpose of that motion was to prevent appellees from garnishing the company's bank account and, thus, the company had not waived its insufficient service of process argument. *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004).

Trial court set aside a divorce decree obtained by default where husband failed to strictly comply with the requirements of Ark. R. Civ. P. 4(f) in attempting to perfect service by warning order; further, husband could not appeal from the order setting aside the default judgment while the issue of child custody was still pending as it was not a final order. *Littleton v. Albert-Littleton*, 89 Ark. App. 325, 202 S.W.3d 563 (2005).

Trial court properly dismissed a judgment debtor's lawsuit against a judgment creditor for tortious conduct and other civil causes of action, which sought an injunction against the enforcement of a default judgment that was entered against the debtor in connection with an action by the creditor to recover unpaid legal fees, because the debtor relied incorrectly on Ark. R. Civ. P. 60 as authority for filing a new lawsuit to attack a default judgment, instead of following the procedure set forth in this rule, which provides the exclusive basis for setting aside a default judgment. *Meadows v. Nancy E. Pryor, Inc.*, 90 Ark. App. 258, 205 S.W.3d 199 (2005).

### Standard of Review.

*De novo* review was the appropriate standard in a case where a buyer sought to have a default judgment set aside based on an argument that a trial court had no authority to order him to quitclaim his property to two sellers in order to satisfy a mortgage in a foreclosure action. *Born v. Hodges*, 101 Ark. App. 139, 271 S.W.3d 526 (2008).

### Unavoidable Casualty.

Where in wrongful death action, defendant's president received copy of the complaint and summons which he alleged he had given to both his attorney and insurance agent, but which they both denied receiving or discussing, there was no unavoidable casualty under subsection (c) of this rule sufficient to set aside default judgment entered against defendant. *Capitol City Manor, Inc. v. Culberson*, 1 Ark. App. 137, 613 S.W.2d 835 (1981).

### Waiver.

There is no provision under Arkansas law for "waiver" of the right to a default judgment. *Lewis v. Crowe*, 296 Ark. 175, 752 S.W.2d 280 (1988).

Bail bondsman was not entitled to set aside a judgment of bail forfeiture under Ark. R. Civ. P. 60(c) because he failed to seek to set aside the bond-forfeiture judgment until after 90 days had expired and his arguments regarding newly discovered evidence and fraud were not made to the circuit court. This rule, relief from default, had no application in a bail forfeiture proceeding because the bail was deposited in the registry of the court. *Buddy York Bail Bonds, Inc. v. State*, 2012 Ark. App. 252, — S.W.3d —, 2012 Ark. App. LEXIS 355 (Apr. 11, 2012).

**Cited:** *Friend v. Goslee*, 276 Ark. 484, 637 S.W.2d 568 (1982); *Transit Homes, Inc. v. Bellamy*, 282 Ark. 453, 671 S.W.2d 153 (1984), overruled *Peters v. Pierce*, 314 Ark. 8, 858 S.W.2d 680 (1993); *Whitlock v. G.P.W. Nursing Home, Inc.*, 283 Ark. 158, 672 S.W.2d 48 (1984); *Webb v. Lambert*, 295 Ark. 438, 748 S.W.2d 658 (1988); *Bohra v. Montgomery*, 31 Ark. App. 253, 792 S.W.2d 360 (1990); *Sphere Drake Ins. Co. v. Bank of Wilson*, 307 Ark. 122, 817 S.W.2d 870 (1991); *Arnold Fireworks Display, Inc. v. Schmidt*, 307 Ark. 316, 820 S.W.2d 444 (1991); *Weidrick v. Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992), limited, *Thomas v. Cornell*, 316 Ark. 366, 872 S.W.2d 370 (1994); *B.A.R. Enters., Inc. v. Palin Mfg. Co.*, 312 Ark. 500, 850 S.W.2d 322 (1993); *Henry v. Gaines-Derden Enters., Inc.*, 314 Ark. 542, 863 S.W.2d 828 (1993); *McDonald's Corp. v. Hawkins*, 315 Ark. 487, 868 S.W.2d 78 (1994); *Arnold & Arnold v. Williams*, 315 Ark. 632, 870 S.W.2d 365, cert. denied 513 U.S. 990, 115 S. Ct. 489, 130 L. Ed. 2d 400 (1994); *McDonald's Corp. v. Hawkins*, 319 Ark. 1, 888 S.W.2d 649 (1994); *Marcinkowski v. Affirmative Risk Mgt. Corp.*, 322 Ark. 580, 910 S.W.2d 679 (1995); *Steward v. Wurtz*, 327 Ark. 292, 938 S.W.2d 837 (1997); *Richardson v. Rodgers*, 329 Ark. 402, 947 S.W.2d 778 (1997); *In re Reichenbach*, 219 Bankr. 247 (Bankr. E.D. Ark. 1998); *Southeast Foods, Inc. v. Keener*, 335 Ark. 209, 979 S.W.2d 885 (1998); *Huffman v. Alderson*, 335 Ark. 411, 983 S.W.2d 899

(1998); *Nationwide Ins. Enter. v. Ibanez*, 368 Ark. 432, 246 S.W.3d 883 (2007).

### Rule 56. Summary judgment.

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. Absent leave of court for good cause shown, the party must file any such motion no later than 45 days before any scheduled trial date.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. Absent leave of court for good cause shown, the party must file any such motion no later than 45 days before any scheduled trial date.

(c) *Motion and Proceedings Thereon.* (1) The motion shall specify the issue or issues on which summary judgment is sought and may be supported by pleadings, depositions, answers to interrogatories and admissions on file, and affidavits. The adverse party shall serve a response and supporting materials, if any, within 21 days after the motion is served. The moving party may serve a reply and supporting materials within 14 days after the response is served. For good cause shown, the court may by order reduce or enlarge the foregoing time periods. No party shall submit supplemental supporting materials after the time for serving a reply, unless the court orders otherwise. The court, on its own motion or at the request of a party, may hold a hearing on the motion not less than 7 days after the time for serving a reply. For good cause shown, the court may by order reduce the foregoing time period.

(2) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law on the issues specifically set forth in the motion. A partial summary judgment, interlocutory in character, may be rendered on any issue in the case, including liability.

(d) *Case Not Fully Adjudicated on Motion.* If upon motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court, at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively



that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavit caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. (Amended February 1, 2001; amended May 25, 2006.)

**Reporter's Notes to Rule 56:** 1. Rule 56 is identical to FRCP 56 and also identical to superseded Ark. Stat. Ann. § 29-211 (Repl. 1962) which tracked the Federal Rule. This rule makes no changes in Arkansas law.

**Addition to Reporter's Notes, 2001**

**Amendment:** Subdivision (c) of Rule 56 has been divided into two paragraphs, the first of which is new. Paragraph (1) addresses motion and hearing practice under the rule. Other states have adopted similar provisions. See, e.g., Rule 56(c), Ariz. R. Civ. P.; Rule 56(c), Ind. R. Trial P.; Rule 237(c), Iowa R. Civ. P.; Rule 74.04(c), Mo. R. Civ. P. The original version of the rule led to several problems, including last-minute submissions by the party opposing a motion for summary judgment. The rule provided that the opposing party could submit opposing affidavits at any time "prior to the day of the hearing." By contrast, paragraph (1) establishes a time frame for the parties to follow and makes plain that additional submissions are not permissible without leave of court. As under prior practice, a hearing on the motion is not mandatory in all cases. See *Campbell v. Bard*, 315 Ark. 366, 868 S.W.2d 62 (1993). However, the new time frame effectively precludes the court from ruling on the motion until after the parties have had an opportunity to present their evidence. Corresponding changes have

been made in Rules 12(i) and 78(b) to except summary judgment motions from their requirements.

Paragraph (2) provides for partial summary judgment on any issue in the case, including liability. The term "partial summary judgment" has not heretofore been used in the rule but frequently appears in the cases. See, e.g., *City of Russellville v. Banner Real Estate*, 326 Ark. 673, 933 S.W.2d 803 (1996). A similar provision, limited to liability, previously appeared in subdivision (c), and summary judgment on some but not all of the issues is plainly contemplated by subdivision (d).

**Addition to Reporter's Notes, 2006**

**Amendment:** Several parts of Rule 56 governing the timing of motions for summary judgment, the related briefing, and the hearing have been amended. These changes continue the effort to refine the Rule by making summary-judgment practice more fair, predictable, and efficient.

The amendments to subdivisions (a) and (b) eliminate a party's right to seek summary judgment at any time. Instead, absent good cause, a party must move at least 45 days before any scheduled trial date. This deadline allows for full briefing and a hearing on the motion before trial, which should promote more efficient use of judicial resources. In addition, it prevents a party from using a late

motion for summary judgment as a stealth motion for continuance.

Subdivision (c)(1) has been amended to allow the circuit court to reduce the time periods for responses and replies. Under the former Rule, the court could only enlarge the time periods. Both reductions and enlargements must now be justified by a showing of good cause. Finally, the presumptive period

between the due date for any reply and any hearing has been shortened from 14 to 7 days. This change accommodates the pre-trial deadline for filing the motion, while giving the non-moving party adequate time to prepare for the hearing in light of any reply. Revised subdivision (c)(1) also allows the circuit court to shorten the seven-day period for good cause, for example, scheduling difficulties.

## RESEARCH REFERENCES

**Ark. L. Rev.** Note, Default Judgments in Arkansas, 43 Ark. L. Rev. 921.

Estes, Wallace v. Broyles: Arkansas Summary Judgment, A Thing of the Past?, 53 Ark. L. Rev. 99.

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Recent Developments, 2006 Amendments Arkansas Rules of Civil Procedure, 59 Ark. L. Rev. 803.

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## CASE NOTES

### ANALYSIS

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### In General.

Summary judgment is an extreme remedy which should only be allowed when it is clear that there is no issue of fact to be litigated. Lee v. Doe, 274 Ark. 467, 626 S.W.2d 353 (1981); Johnson v. Stuckey & Speer, Inc., 11 Ark. App. 33, 665 S.W.2d 904 (1984); Ford v. Cunningham, 291 Ark. 56, 722 S.W.2d 567

(1987); Pinkston v. Lovell, 296 Ark. 543, 759 S.W.2d 20 (1988); McMullan v. Molnaird, 24 Ark. App. 126, 749 S.W.2d 352 (1988); Hatley v. Payne, 25 Ark. App. 8, 751 S.W.2d 20 (1988); Mathews v. Garner, 25 Ark. App. 27, 751 S.W.2d 359 (1988); McCaleb v. National Bank of Commerce, 25 Ark. App. 53, 752 S.W.2d 54 (1988); Muddiman v. Wall, 33 Ark. App. 175, 803 S.W.2d 945 (1991); Dillard v. Resolution Trust Corp., 308 Ark. 357, 824 S.W.2d 387 (1992); Franklin v. Osca, Inc., 308 Ark. 409, 825 S.W.2d 812 (1992); Madden v. Continental Cas. Co., 53 Ark. App. 250, 922 S.W.2d 731 (1996).

A motion for summary judgment cannot be used to submit a disputed question of fact to a trial judge. Walker v. Stephens, 3 Ark. App. 205, 626 S.W.2d 200 (1981).

Under some circumstances a summary judgment motion is an extension of the motion to dismiss for failure to state a claim; while the motion to dismiss alleges the failure to state a claim, the motion for summary judgment, in these circumstances, alleges the failure to have a claim. Joey Brown Interest, Inc. v. Merchants Nat'l Bank, 284 Ark. 418, 683 S.W.2d 601 (1985).

Neither ARCP 12 nor this rule authorizes the trial court to summarily dismiss a complaint where there are matters before the court that show there is an issue of fact to be decided. Maas v. Merrell Assocs., 13 Ark. App. 240, 682 S.W.2d 769 (1985); Dickson v. Delhi Seed Co., 26 Ark. App. 83, 760 S.W.2d 382 (1988).



Procedurally, the denial of the motion for summary judgment is not an appealable order even after there has been a trial on the merits. *Cater v. Cater*, 311 Ark. 627, 846 S.W.2d 173 (1993).

A summary judgment should only be granted when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admissions on file is such that the nonmoving party is not entitled to a day in court, i.e., when there is not any genuine remaining issued of material fact and the moving party is entitled to judgment as a matter of law. *Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998).

Trial court properly granted summary judgment to state insurance commissioner on his claim that the insured was not entitled to recover from the state's Guaranty Fund for claims against the insured after the insurance company of the insured was declared to be insolvent; the trial court properly included the net worth of the Nevada corporation that had earlier purchased all of the insured's stock as the Nevada corporation was an "affiliate" whose net worth could be included in determining whether the insured's net worth was less than the \$50 million cap required for a claim to be a "covered claim" which the Guaranty Fund would pay, and the fact that the Nevada corporation was an out-of-state resident did not affect that conclusion because Arkansas law only required that the insured be a resident of the state for the purpose of determining the insured's "net worth" and "covered claim" status. *Harold Ives Trucking Co. v. Pickens*, 355 Ark. 407, 139 S.W.3d 471 (2003).

### **Constitutionality.**

This rule was not unconstitutional as it did not deny the patient her right to a jury trial where there were no factual disputes; instead, there were differing legal interpretations of undisputed facts. *Scamardo v. Sparks Reg'l Med. Ctr.*, 375 Ark. 300, 289 S.W.3d 903 (2008).

### **Construction.**

The wording of subsection (c) of this rule gives respondents the right to assume they may submit opposing affidavits up until "the day of the hearing." *Campbell ex rel. Chapman v. Bard*, 315 Ark. 366, 868 S.W.2d 62 (1993).

While subsection (c) of this rule plainly intimates that the opposing party is entitled to 10 days notice before a ruling on a motion for summary judgment, the Supreme Court has hesitated to formalize that interpretation of the rule. *Campbell ex rel. Chapman v. Bard*, 315 Ark. 366, 868 S.W.2d 62 (1993).

The standard for granting a directed verdict under ARCP 50 is somewhat different from the summary judgment standard under

subsection (c) of this rule. *Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998).

Subsection (c) of this rule contains no requirement that a statement of undisputed facts accompany a motion for summary judgment. *Davis v. Little Rock Sch. Dist.*, 92 Ark. App. 174, 211 S.W.3d 587 (2005).

### **Purpose.**

The object of summary judgment proceedings is not to try the issues, but to determine if there are any issues to be tried, and if there is any doubt whatsoever, the motion should be denied. *Walker v. Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981); *Rowland v. Gastroenterology Assocs.*, 280 Ark. 278, 657 S.W.2d 536 (1983); *Township Bldrs., Inc. v. Kraus Constr. Co.*, 286 Ark. 487, 696 S.W.2d 308 (1985); *Wolner v. Bogaev*, 290 Ark. 299, 718 S.W.2d 942 (1986); *Muddiman v. Wall*, 33 Ark. App. 175, 803 S.W.2d 945 (1991).

The purpose of the summary judgment rule is expeditiously to determine cases without necessity for formal trial where there is no substantial issue of fact, and it is in the nature of an inquiry to determine whether genuine issues of fact exist; if no factual dispute exists and the complaint does not state a cause of action, it should be disposed of by summary judgment rather than exposing the litigants to unnecessary delay, work, and expense in going to trial when the trial judge would be bound to direct a verdict in movant's favor after all the evidence is adduced. *Joey Brown Interest, Inc. v. Merchants Nat'l Bank*, 284 Ark. 418, 683 S.W.2d 601 (1985).

### **Affidavits.**

Affidavits are not required in support of a response to a properly documented motion for summary judgment. *Adams v. Hudspeth Motors, Inc.*, 266 Ark. 790, 587 S.W.2d 227 (1979).

The qualification, "as affiant understands it," in an affidavit does not assert the required personal knowledge and cannot withstand a motion for summary judgment. *Hughes W. World, Inc. v. Westmoor Mfg. Co.*, 269 Ark. 300, 601 S.W.2d 826 (1980).

The requirement of personal knowledge in subsection (e) of this rule has no applicability to an expert witness who is, in many instances, testifying to an opinion based entirely on assumed facts. *Wolner v. Bogaev*, 290 Ark. 299, 718 S.W.2d 942 (1986).

Affidavits supporting motion for summary judgment are to be construed against the movant. *McDonald v. Eubanks*, 292 Ark. 533, 731 S.W.2d 769 (1987).

Affidavits which are conclusory rather than factual are insufficient. *McDonald v. Eubanks*, 292 Ark. 533, 731 S.W.2d 769 (1987); *Swindle v. Lumbermens Mut. Cas. Co.*, 315 Ark. 415, 869 S.W.2d 681 (1993).

Subsection (f) of this rule makes evident

that the decision to grant a continuance is within the discretion of the trial court. The refusal to grant a continuance will not be reversed absent an abuse of the trial court's discretion. *Pinkston v. Lovell*, 296 Ark. 543, 759 S.W.2d 20 (1988).

Opposing affidavits filed on the date of hearing are untimely and run afoul of the express provisions of subsection (c) of this rule, as well as the trial court's inherent power to control proceedings before it. Such affidavits and documents need not be considered by the court. *McMullan v. Molnaird*, 24 Ark. App. 126, 749 S.W.2d 352 (1988).

There is nothing in this rule which prohibits a party from submitting his motion on briefs so long as he has submitted the necessary documents to support the materials contained in the brief. *Mathews v. Garner*, 25 Ark. App. 27, 751 S.W.2d 359 (1988).

Subsection (e) of this rule does not prohibit or limit the filing of self-serving affidavits, but it does require that affidavits establishing prima facie entitlement to judgment be controverted. *Mathews v. Garner*, 25 Ark. App. 27, 751 S.W.2d 359 (1988).

Although affidavits for summary judgment are construed against the moving party, once the movant makes a prima facie showing of entitlement, the respondent must meet proof with proof by showing a genuine issue as to a material fact. *Guthrie v. Kemp*, 303 Ark. 74, 793 S.W.2d 782 (1990).

No affidavit was filed by the plaintiffs substantiating the fact that they were having problems gathering facts to support their opposition to summary judgment, as was their right under subsection (f) of this rule; had they done so, the trial court might well have foregone a decision on summary judgment for an additional period of time pursuant to subsection (f) so that other discovery could be pursued. *Jenkins v. International Paper Co.*, 318 Ark. 663, 887 S.W.2d 300 (1994).

An affidavit which is inherently and blatantly inconsistent with prior deposition testimony may not be used to establish a question of fact to ward off the granting of a summary judgment motion. *Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995).

### Appellate Review.

On appeal, the appellate court must view the evidence in the light most favorable to the one against whom summary judgment was granted. *Young v. Paxton*, 316 Ark. 655, 873 S.W.2d 546 (1994); *Madden v. Continental Cas. Co.*, 53 Ark. App. 250, 922 S.W.2d 731 (1996).

On appeal, the appellate court determines if summary judgment was proper based on whether the evidence presented by the movant left a material question of fact unan-

swered. *Keller v. Safeco Ins. Co. of Am.*, 317 Ark. 308, 877 S.W.2d 90 (1994).

Where the motion to dismiss was effectively converted to one for summary judgment under ARCP 12(b) by the presentation of matters outside the pleadings, its denial was not subject to review on appeal. *Amalgamated Clothing & Textile Workers Int'l Union v. Earle Indus., Inc.*, 318 Ark. 524, 886 S.W.2d 594 (1994).

The denial of a motion for summary judgment is neither reviewable nor appealable. *Amalgamated Clothing & Textile Workers Int'l Union v. Earle Indus., Inc.*, 318 Ark. 524, 886 S.W.2d 594 (1994).

Summary judgment is a remedy that should be granted by the trial court only when it is clear that there is no genuine issue of material fact to be litigated; on appellate review, the appellate court must only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leaves a material question of fact unanswered. *Knowlton v. Ward*, 318 Ark. 867, 889 S.W.2d 721 (1994).

The appellate court could not reach the merits of appellant's argument, and therefore affirmed summary judgment, where appellant failed to attach a copy of the contract which formed the basis of the cause of action. *Hartford Ins. Co. v. Brewer*, 54 Ark. App. 1, 922 S.W.2d 360 (1996).

The court rejected the contention that the trial court erred in granting summary judgment to the defendants because he was not allowed to depose the defendants; although the plaintiff filed a motion requesting that the defendants be made available for depositions, he failed to pursue the matter and failed to bring up the matter in his response to the motion for summary judgment or at the hearing on the motion. *Crawford v. Lee County Sch. Dist.*, 64 Ark. App. 90, 983 S.W.2d 141 (1998).

With regard to the subcontractor's contention that summary judgment was not proper because there were unresolved fact questions regarding representations made by the insurer's agents, the insurer submitted a motion for summary judgment that was supported by a brief and numerous exhibits, and in order to raise a fact question on the point, the subcontractor was required to offer more than mere allegations of factual disputes; however, the case was reversed and remanded on separate grounds. *U.S. Fid. & Guar. Co. v. Cont'l Cas. Co.*, 353 Ark. 834, 120 S.W.3d 556 (2003).

Where clinic and its insurer were completely dismissed from the lawsuit pursuant to the first summary-judgment order and the nonsuit as to the individual doctors excused them in the lawsuit, the order granting summary judgment was final and appealable after



the voluntary nonsuit and, as the administrator did not file a notice of appeal within 30 days, the order granting summary judgment could not be reviewed on appeal. *Winkler v. Bethell*, 362 Ark. 614, 210 S.W.3d 117 (2005).

In parents' medical malpractice action against hospital and doctor, the trial court erred in granting summary judgment for the hospital as the hospital responded to the amended complaint and asserted a limitations defense under Ark. R. Civ. P. 8(c), but as the hospital never raised the issue of insufficient service of process, the hospital waived that defense; however, the doctor never received the amended complaint or responded to it and, thus, did not waive the defense of insufficient service of process, so summary judgment against parents was proper. *Posey v. St. Bernard's Healthcare, Inc.*, 365 Ark. 154, 226 S.W.3d 757 (2006).

#### **Applicability to Proceedings for Postconviction Relief.**

Although proceedings for postconviction relief from a criminal proceeding are civil in nature, the trial court erred in applying the summary judgment provisions of this rule to deny a petition for postconviction relief filed by a defendant in a capital murder case who had been sentenced to death on the grounds that defendant had raised no genuine issue of material fact in support of his petition. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003).

#### **Burden of Proof.**

The burden in a summary judgment proceeding is on the moving party and cannot be shifted when there is no offer of proof on a controverted issue. *Collyard v. American Home Assurance Co.*, 271 Ark. 228, 607 S.W.2d 666 (1980).

Movant has the burden of showing there is no genuine issue of material fact. *Lee v. Doe*, 274 Ark. 467, 626 S.W.2d 353 (1981); *Walker v. Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981); *Chick v. Rebsamen Insurance — Springdale*, 8 Ark. App. 157, 649 S.W.2d 196 (1983); *Johnson v. Stuckey & Speer, Inc.*, 11 Ark. App. 33, 665 S.W.2d 904 (1984); *Township Bldrs., Inc. v. Kraus Constr. Co.*, 286 Ark. 487, 696 S.W.2d 308 (1985); *Ford v. Cunningham*, 291 Ark. 56, 722 S.W.2d 567 (1987); *McDonald v. Eubanks*, 292 Ark. 533, 731 S.W.2d 769 (1987); *Gleghorn v. Ford Motor Credit Co.*, 293 Ark. 289, 737 S.W.2d 451 (1987).

The burden is on the moving party to demonstrate that, even though the facts may be in dispute, reasonable minds could not differ as to the conclusion to be drawn from them. *Moeller v. Theis Realty, Inc.*, 13 Ark. App. 266, 683 S.W.2d 239 (1985).

The burden of proving that there is no genuine issue of material fact is upon the movant, and all proof submitted must be

viewed in a light most favorable to the party resisting the motion. Any doubts and inferences must be resolved against the moving party. *Pinkston v. Lovell*, 296 Ark. 543, 759 S.W.2d 20 (1988); *Cross v. Coffman*, 304 Ark. 666, 805 S.W.2d 44 (1991).

The burden of sustaining a motion for a summary judgment is always the responsibility of the moving party. *Cordes v. Outdoor Living Ctr., Inc.*, 301 Ark. 26, 781 S.W.2d 31 (1989).

Summary judgment was proper where plaintiff failed to present proof of a material element of his defective product claim under § 4-86-102. *Bushong v. Garman Co.*, 311 Ark. 228, 843 S.W.2d 807 (1992).

The burden of sustaining a motion for summary judgment is always the responsibility of the moving party and all proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Tullock v. Eck*, 311 Ark. 564, 845 S.W.2d 517 (1993).

The burden of showing that there is no remaining genuine issue of material fact and entitlement to judgment as a matter of law is upon the summary judgment movant, and all proof submitted must be viewed most favorably to the party resisting the motion; any doubt and all inferences must be resolved against the moving party. *Mount Olive Water Ass'n v. City of Fayetteville*, 313 Ark. 606, 856 S.W.2d 864 (1993).

The moving party bears the burden of showing that there are no genuine issues of material fact. *Young v. Paxton*, 316 Ark. 655, 873 S.W.2d 546 (1994).

A party moving for summary judgment must show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Keller v. Safeco Ins. Co. of Am.*, 317 Ark. 308, 877 S.W.2d 90 (1994).

All proof must be considered in the light most favorable to the non-moving party; and doubts or inferences must be resolved against the moving party. *Keller v. Safeco Ins. Co. of Am.*, 317 Ark. 308, 877 S.W.2d 90 (1994).

All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party; only when the movant makes a prima facie showing of entitlement does the burden shift, and then the respondent must meet proof with proof by showing a genuine issue as to a material fact. *Knowlton v. Ward*, 318 Ark. 867, 889 S.W.2d 721 (1994).

Trial court properly granted home sellers' motion for summary judgment in a suit brought by the home buyers, alleging breach of contract and fraud in the inducement, as there was no genuine issue of material fact

when the contract between the parties contained a buyers' disclaimer of reliance that provided that the buyer inspected or had someone else inspect the property and that the buyer was not relying on any other representations; before buying the home, the buyers had hired two inspectors and had relied on the reports of the inspectors. *Morris v. Rush*, 77 Ark. App. 11, 69 S.W.3d 876 (2002).

In a wrongful death case, summary judgment was properly granted to several landlords in a case where an unknown occupant died from injuries sustained in a gas explosion because there was no duty due to the fact that the occupants were not discovered where a sublease was prohibited, and there was no evidence of willful and wanton conduct. The fact that such proof could have been discovered in later depositions did not matter because the time limitations in subsection (c) of this rule were not met. *Miller v. Centerpoint Energy Res. Corp.*, 98 Ark. App. 102, 250 S.W.3d 574 (2007).

#### **Cause of Action Alleged.**

Where no cause of action is alleged upon which relief could be granted, there is no need to consider whether there are issues of material fact relevant to this rule. *Brandt v. St. Vincent Infirmary*, 287 Ark. 431, 701 S.W.2d 103 (1985).

Where plaintiff did not have a case, summary judgment should have been granted with prejudice. *Haase v. Starnes*, 323 Ark. 263, 915 S.W.2d 675 (1996), appeal dismissed 337 Ark. 193, 987 S.W.2d 704 (1999).

#### **Continuance.**

The continuance granted by subsection (f) of this rule is a matter within the trial court's discretion, and a refusal to grant such a continuance will not be reversed absent an abuse of that discretion. *Harvison v. Charles E. Davis & Assocs.*, 310 Ark. 104, 835 S.W.2d 284 (1992).

Subsection (f) of this rule makes the decision on whether to grant a continuance a matter of discretion with the trial court. *Jenkins v. International Paper Co.*, 318 Ark. 663, 887 S.W.2d 300 (1994).

In a dispute regarding voting in a bank holding company, the trial court did not err by refusing to grant a continuance and a stay before granting summary judgment because there was no indication that the issues considered in the case necessitated any further inquiry into the surrounding facts and circumstances. *Bennett v. Lonoke Bancshares, Inc.*, 356 Ark. 371, 155 S.W.3d 15 (2004).

#### **Effect of Oral Testimony.**

Oral testimony is not provided for in this rule and cannot be considered; accordingly, where no affidavits are filed in support of a motion for summary judgment, the court must rely solely on the original pleadings to

determine if summary judgment should be granted. *Montgomery Ward & Co. v. Credit*, 274 Ark. 66, 621 S.W.2d 855 (1981).

This rule does not permit supplementation of the pleadings, depositions, answers to interrogatories, admissions, and affidavits with oral testimony in considering whether summary judgment is appropriate. *Dixie Furn. Co. v. Arkansas Power & Light Co.*, 19 Ark. App. 160, 718 S.W.2d 120 (1986); *McMullan v. Molnaird*, 24 Ark. App. 126, 749 S.W.2d 352 (1988); *Mathews v. Garner*, 25 Ark. App. 27, 751 S.W.2d 359 (1988).

Order of circuit court entered following hearing on motion for summary judgment in which circuit court heard testimony would be treated as a judgment following a bench trial. *Hannon v. Armored Sch. Dist. # 9*, 329 Ark. 267, 946 S.W.2d 950 (1997).

#### **Evidence in Support of Motion.**

Evidence in support of motion for summary judgment must be viewed most favorably to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Cummings, Inc. v. Beardsley*, 271 Ark. 596, 609 S.W.2d 66 (1980); *Walker v. Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981); *Storhiz v. Commercial Nat'l Bank*, 276 Ark. 10, 631 S.W.2d 613 (1982); *Leigh Winham, Inc. v. Reynolds Ins. Agency*, 279 Ark. 317, 651 S.W.2d 74 (1983); *Rowland v. Gastroenterology Assocs.*, 280 Ark. 278, 657 S.W.2d 536 (1983); *Chick v. Rebsamen Insurance — Springdale*, 8 Ark. App. 157, 649 S.W.2d 196 (1983); *Johnson v. Stuckey & Speer, Inc.*, 11 Ark. App. 33, 665 S.W.2d 904 (1984); *Township Bldrs., Inc. v. Kraus Constr. Co.*, 286 Ark. 487, 696 S.W.2d 308 (1985); *McCaleb v. National Bank of Commerce*, 25 Ark. App. 53, 752 S.W.2d 54 (1988).

When a party cannot present proof on an essential element of his claim, there is no remaining genuine issue of material fact, and the party moving for a summary judgment is entitled to judgment as a matter of law. *Short v. Little Rock Dodge, Inc.*, 297 Ark. 104, 759 S.W.2d 553 (1988).

On a motion for summary judgment, the evidence must be viewed in the light most favorable to the opposing party. *Cordes v. Outdoor Living Ctr., Inc.*, 301 Ark. 26, 781 S.W.2d 31 (1989).

By going beyond the pleadings, discovery, and affidavits, the trial court erred for purposes of summary judgment, and the procedure followed did not fall within the specific parameters of this rule. *Godwin v. Churchman*, 305 Ark. 520, 810 S.W.2d 34 (1991).

Answers to interrogatories are admissible for consideration in summary judgment proceedings. *Piercy v. Wal-Mart Stores, Inc.*, 311 Ark. 424, 844 S.W.2d 337 (1993), reh'g denied, 312 Ark. 434A, — S.W.2d — (1993).

The trial court may only consider plead-



ings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, for summary judgment purposes. *Pyle v. Robertson*, 313 Ark. 692, 858 S.W.2d 662 (1993).

Under subsections (c) and (e) of this rule, documents incorporated in the pleadings, which went beyond "mere allegations or denials," should have been examined and considered by the trial court as it entertained a motion for summary judgment. *Henry v. Gaines-Derden Enters., Inc.*, 314 Ark. 542, 863 S.W.2d 828 (1993).

Transcript of trial testimony is as reliable as a transcript of deposition testimony or an affidavit, both of which may be considered in summary judgment proceedings under the provisions of this rule. *Laird v. Shelnut*, 348 Ark. 632, 74 S.W.3d 206 (2002).

This rule does not require a party to attach supporting documents to a motion for summary judgment in order for those documents to become part of the record, and the Arkansas Supreme Court will not extend its previous holdings to sanction such an absurd result. *Laird v. Shelnut*, 348 Ark. 632, 74 S.W.3d 206 (2002).

Trial court erred in granting summary judgment to a clinic in a wife's medical malpractice action brought after her husband died after surgery where, in deciding whether to grant summary judgment, the trial court weighed the evidence and determined that the wife's experts were not credible and the evidence presented by the wife, which should have been ruled admissible, clearly established the existence of genuine issues of material fact as to whether her husband's surgeon breached his standard of care when operating on the husband and whether the clinic knew or should have known that the surgeon would pose an unreasonable risk of harm to patients. *Turner v. Northwest Ark. Neurosurgery Clinic, P.A.*, 84 Ark. App. 93, 133 S.W.3d 417 (2003).

Where both parties moved for summary judgment in an action wherein a bank sought to recover from a physician under a limited commercial guaranty agreement, and both parties proceeded on the same legal theory and under the same material facts, the trial court correctly determined that the issue was one of law to be decided by the court. *Cranfill v. Union Planters Bank, N.A.*, 86 Ark. App. 1, 158 S.W.3d 703 (2004).

#### **Failure to File Formal Response.**

Summary judgment is not appropriate where genuine issues of material fact exist or where reasonable minds could differ as to the interpretation of the facts as shown by the pleadings, even if no formal response to the motion has been filed. *Inge v. Walker*, 70 Ark. App. 114, 15 S.W.3d 348 (2000).

#### **Hearsay Evidence.**

In a motion for summary judgment the court may rely upon a hearsay statement in an affidavit, presented by the nonmoving party, which may constitute a declaration against interest, and which may be admissible at trial, to show that there is a disputed question of fact in the case because the burden of proving that there is no genuine issue of material fact rests on the moving party, and the opposing party is entitled to all of the favorable inferences that reasonably may be drawn from the papers before the court. *Baxley v. Colonial Ins. Co.*, 31 Ark. App. 235, 792 S.W.2d 355 (1990).

It was improper for chancellor to exclude evidence in affidavits of opponents to summary judgment motion which he suspected was inadmissible hearsay, without ruling on its admissibility under the present-intent exception to the hearsay rule. *Jones v. Abraham*, 58 Ark. App. 17, 946 S.W.2d 711 (1997).

In an action involving endorser liability, statements contained in an affidavit in opposition to summary judgment were properly excluded because the company was unable to show that the statements fell under any hearsay exception. *Holt Bonding Co. v. First Fed. Bank*, 82 Ark. App. 8, 110 S.W.3d 298 (2003).

#### **Issue of Fact.**

Summary judgment motion and supporting documents did not show the lack of a remaining genuine issue of material fact as to those allegations. *Selby v. Burgess*, 289 Ark. 491, 712 S.W.2d 898 (1986).

In considering a motion for summary judgment, a judge may consider pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, to determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to summary judgment. *Hallmark Cards, Inc. v. Peevy*, 293 Ark. 594, 739 S.W.2d 691 (1987); *McCaleb v. National Bank of Commerce*, 25 Ark. App. 53, 752 S.W.2d 54 (1988).

Summary judgment based upon failure to state a claim upon which relief can be granted is different from summary judgment based upon a lack of disputed material facts, which is the failure to have a claim; when summary judgment is granted because of failure to state a claim, the dismissal should be without prejudice in order to afford the plaintiff-appellant a chance to plead further. *Bushong v. Garman Co.*, 311 Ark. 228, 843 S.W.2d 807 (1992).

Where there were no questions of fact to be determined and the parties agreed upon and stipulated to the relevant facts and exhibits, thereby acknowledging the truth of such facts, the chancellor clearly treated the motion as one to dismiss for failure to state facts upon which relief could be granted, rather

than as a motion for summary judgment. *Daniel v. Jones*, 332 Ark. 489, 966 S.W.2d 226 (1998).

Trial court erred in granting a daughter's motion for summary judgment and in finding that the daughter's rights in property that she held as a joint tenant with her deceased father were superior to the father's widow's homestead rights in the property; genuine issues of fact remained, such as whether the widow had lived on the property for all 14 years, or whether she had left the property to reside elsewhere. *Rogers v. Lamb*, 347 Ark. 102, 60 S.W.3d 456 (2001).

Although the existence of a joint enterprise was ordinarily a question for the jury, summary judgment was proper where it was abundantly clear that the parties testified in agreement on the essential factual question, the facts showing that the first element of a joint enterprise, the common object and purpose to the undertaking, was undisputed and, with respect to the second element of a joint enterprise, both parties affirmed that every employee in the rental car had an equal right to direct and govern the movements and conduct of each other in respect to the common object and purpose of the undertaking, which was to return home from their job of delivering vehicles. *Yant v. Woods*, 353 Ark. 786, 120 S.W.3d 574 (2003).

Where the non-movant presented evidence in the form of an affidavit that the water areas at issue had some recreational usefulness, which intimated that the water areas could be navigable and raised a question of fact, summary judgment was erroneously entered. *Ark. River Rights v. Echubby Lake Hunting Club*, 83 Ark. App. 276, 126 S.W.3d 738 (2003).

### **Motion to Dismiss.**

In distinguishing between motions to dismiss and motions for summary judgment, it is incorrect for a trial judge to base his or her decision whether to grant summary judgment on factual allegations made in the briefs and exhibits. *Pyle v. Robertson*, 313 Ark. 692, 858 S.W.2d 662 (1993).

A motion to dismiss was converted into a motion for summary judgment when the court considered affidavits and other documents outside the pleadings. *Stapleton v. M.D. Limbaugh Constr. Co.*, 333 Ark. 381, 969 S.W.2d 648 (1998).

Writ of prohibition was granted because a circuit court was wholly without jurisdiction to decide whether the Arkansas Workers' Compensation Act applied since there was a conflict over the narrow exception to the exclusivity doctrine; moreover, there was no adequate remedy since a motion for summary judgment was not subject to appeal. A motion to dismiss was treated as such since matters outside of the pleadings were considered. Get

*Rid of It Ark., Inc. v. Hughes*, 368 Ark. 535, 247 S.W.3d 838 (2007).

Former patient argued that trial court's dismissal of her complaint against a hospital should have been treated as based on summary judgment under subsection (c) of this rule; however, because the trial court proceeding was at all times treated as a hearing on a motion to dismiss under Ark. R. Civ. P. 12(b)(6) and the patient never asked the trial court to consider the hospital's motion as one for summary judgment, that argument was not considered on appeal. *Alvarado v. St. Mary-Rogers Mem'l Hosp., Inc.*, 99 Ark. App. 104, 257 S.W.3d 583 (2007).

### **Notice.**

Because in cases involving redemption of tax delinquent lands, strict compliance with the requirement of notice of the tax sales themselves is required before an owner can be deprived of his property, before allowing summary judgment the appellate court must be sure that proper notice was communicated before a party is entitled to judgment. *Pyle v. Robertson*, 313 Ark. 692, 858 S.W.2d 662 (1993).

Where counsel had been permitted to withdraw by court order and new counsel had not yet entered the case, it was error for the trial court to act on the pending motion for summary judgment while plaintiff lacked representation without adequate notice that the court was about to do so. *Campbell ex rel. Chapman v. Bard*, 315 Ark. 366, 868 S.W.2d 62 (1993).

Trial court erred by sua sponte granting summary judgment under this rule because, even though a purported owner filed a motion for summary judgment relating to the navigability of an adjoining river, it was not on notice that it needed to meet proof with proof regarding the amount and significance of the recreational use on its property. *Nichols v. Culottes Bay Navigation Rights Comm., LLC*, 2009 Ark. App. 365, 309 S.W.3d 218 (2009).

Trial court's consideration of evidentiary materials beyond the pleadings converted what was essentially an Ark. R. Civ. P. 12(c) request for relief into a summary-judgment situation pursuant to this rule. Because the trial court notified the parties of its intentions, and both parties responded by submitting evidentiary materials along with their legal arguments, it did not err as a matter of procedure in considering whether the issues in question were ripe for summary judgment. *York v. York*, 2010 Ark. App. 343, — S.W.3d —, 2010 Ark. App. LEXIS 347 (Apr. 21, 2010).

### **Partial Adjudication on Motion.**

Where the trial court did not grant summary judgment in the whole case, but simply determined what it thought to be the contro-



verted issues and continued the case for a jury trial, such procedure was contemplated by subsection (d) of this rule and was not the equivalent of a final determination of the case so as to constitute an appealable order. *Heffner v. Harrod*, 278 Ark. 188, 644 S.W.2d 579 (1983).

### Response to Motion.

When movant makes a prima facie showing of entitlement to a summary judgment, the respondent must meet proof with proof by showing a genuine issue as to a material fact. *Hughes W. World, Inc. v. Westmoor Mfg. Co.*, 269 Ark. 300, 601 S.W.2d 826 (1980); *Cummings, Inc. v. Beardsley*, 271 Ark. 596, 609 S.W.2d 66 (1980); *Storthz v. Commercial Nat'l Bank*, 276 Ark. 10, 631 S.W.2d 613 (1982); *Chick v. Rebsamen Insurance — Springdale*, 8 Ark. App. 157, 649 S.W.2d 196 (1983); *Johnson v. Stuckey & Speer, Inc.*, 11 Ark. App. 33, 665 S.W.2d 904 (1984); *Pruitt v. Cargill, Inc.*, 284 Ark. 474, 683 S.W.2d 906 (1985); *McMullan v. Molnaird*, 24 Ark. App. 126, 749 S.W.2d 352 (1988); *Mathews v. Garner*, 25 Ark. App. 27, 751 S.W.2d 359 (1988); *Dillard v. Resolution Trust Corp.*, 308 Ark. 357, 824 S.W.2d 387 (1992).

If a dismissal motion or motion for judgment on the pleadings is treated as one for summary judgment, it should not be granted if a fact question remains. *Sisson v. Ragland*, 294 Ark. 629, 745 S.W.2d 620 (1988).

Once the moving party has demonstrated prima facie that no material issue of fact remains, then the defending party must respond, showing facts which would be admissible in evidence to create a factual issue. *Dixie Ins. Co. v. Joe Works Chevrolet, Inc.*, 298 Ark. 106, 766 S.W.2d 4 (1989).

The failure to respond to the untimely motion for summary judgment did not obligate the trial judge to enter summary judgment. *Karnes v. Trumbo*, 28 Ark. App. 34, 770 S.W.2d 199 (1989).

Where a non-movant's response was filed less than 10 working days after it was due, no previous extension had been granted, and the response was filed almost 60 days before the hearing was held, the trial court did not err in granting the non-movant an extension of time to respond to the motion for summary judgment. *Ark. River Rights v. Echubby Lake Hunting Club*, 83 Ark. App. 276, 126 S.W.3d 738 (2003).

### Standard for Appellate Review.

Appellate court needs only to decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the appellee in support of the motion left a material question of fact unanswered. *Barracough v. Arkansas Power & Light Co.*, 268 Ark. 1026, 597 S.W.2d 861 (1980).

It would be error for a court on motion for summary judgment to consider any allegations brought out for the first time in the parties' briefs and exhibits attached thereto, but this does not imply that the parties cannot submit briefs in support of a motion for summary judgment or that the court ought not entertain argument by counsel on the motion. *Eldridge v. Board of Cor.*, 298 Ark. 467, 768 S.W.2d 534 (1989).

When an order denying a motion for summary judgment is appealed, the test is whether the trial court abused its discretion in denying the motion. *Karnes v. Trumbo*, 28 Ark. App. 34, 770 S.W.2d 199 (1989).

Review on appeal of a summary judgment is limited and focuses on the pleadings, affidavits and other documents filed by the parties in support of their respective arguments. *Pyle v. Robertson*, 313 Ark. 692, 858 S.W.2d 662 (1993).

If a moving party supports its motion for summary judgment by making a prima facie showing of an absence of factual issues and entitlement to judgment as a matter of law, and the adverse party fails to set forth specific facts showing a genuine issue of material fact, then the appellate court will not say the trial judge erred in granting summary judgment. *Pyle v. Robertson*, 313 Ark. 692, 858 S.W.2d 662 (1993).

Normally, on a summary judgment appeal, the evidence is viewed most favorably for the party resisting the motion and any doubts and inferences are resolved against the moving party, but in a case where the parties agree on the facts that a rule is inapplicable, the appellate court simply determines whether the appellee was entitled to judgment as a matter of law. *Earp v. Benton Fire Dep't*, 52 Ark. App. 66, 914 S.W.2d 781 (1996).

### Statute of Limitations.

Arkansas has long adhered to the traditional occurrence rule in legal malpractice; thus where plaintiff did not allege that her attorneys concealed their alleged wrongdoing, and she was not prevented from bringing suit, the trial court's finding that her case was barred by the three-year statute of limitations and the grant of summary judgment was correct. *Ragar v. Brown*, 332 Ark. 214, 964 S.W.2d 372 (1998).

### Summary Judgment Improper.

Summary judgment held not warranted. *Camp v. Elmore*, 271 Ark. 407, 609 S.W.2d 86 (Ct. App. 1980); *Taurus Leasing Corp. v. Howard*, 272 Ark. 323, 614 S.W.2d 502 (1981); *Lee v. Doe*, 274 Ark. 467, 626 S.W.2d 353 (1981); *Findley Mach. Co. v. Miller*, 3 Ark. App. 264, 625 S.W.2d 542 (1981); *Slayton v. Brunner*, 276 Ark. 143, 633 S.W.2d 29 (1982); *Rowland v. Gastroenterology Assocs.*, 280 Ark. 278, 657 S.W.2d 536 (1983); *Chick v. Rebsamen Insur-*

ance — Springdale, 8 Ark. App. 157, 649 S.W.2d 196 (1983); Johnson v. Stuckey & Speer, Inc., 11 Ark. App. 33, 665 S.W.2d 904 (1984); Township Bldrs., Inc. v. Kraus Constr. Co., 286 Ark. 487, 696 S.W.2d 308 (1985); Wolner v. Bogaev, 290 Ark. 299, 718 S.W.2d 942 (1986); Gleghorn v. Ford Motor Credit Co., 293 Ark. 289, 737 S.W.2d 451 (1987); City of Fort Smith v. Driggers, 294 Ark. 311, 742 S.W.2d 921 (1988); Baxley v. Colonial Ins. Co., 31 Ark. App. 235, 792 S.W.2d 355 (1990); Register v. Oaklawn Jockey Club, Inc., 306 Ark. 318, 811 S.W.2d 315 (1991), modified 306 Ark. 321, 821 S.W.2d 475 (1991); Hood v. Arkansas Sch. Bd. Ins. Coop., 35 Ark. App. 1, 811 S.W.2d 1 (1991); Brooks v. City of Benton, 308 Ark. 571, 826 S.W.2d 259 (1992); Hickson v. Saig, 309 Ark. 231, 828 S.W.2d 840 (1992); Lively v. Libbey Mem. Physical Medical Ctr., 311 Ark. 41, 841 S.W.2d 609 (1992).

It is error for the trial court to grant summary judgment to defendants where the plaintiff's interrogatories and requests for production of documents have not been answered. First Nat'l Bank v. Newport Hosp. & Clinic, 281 Ark. 332, 663 S.W.2d 742 (1984); Pults v. City of Springdale, 23 Ark. App. 182, 745 S.W.2d 144 (1988).

Where, even if the evidence was characterized as the plaintiffs would have it, it would not prove a claim of the tort of bad faith, the court properly granted summary judgment. Stevenson v. Union Std. Ins. Co., 294 Ark. 651, 746 S.W.2d 39 (1988).

Grant of summary judgment was erroneous. Muddiman v. Wall, 33 Ark. App. 175, 803 S.W.2d 945 (1991).

When the matter of a legal duty was the subject of a construction contract which was ambiguous as to the parties' intent, a question of fact was presented, precluding summary judgment in a wrongful death action. Elkins v. Arkla, Inc., 312 Ark. 280, 849 S.W.2d 489 (1993).

The evidence presented on the issue of whether the statute of limitations barred the claim did not entitle the defendants to a summary judgment. Green v. National Health Lab., Inc., 316 Ark. 5, 870 S.W.2d 707 (1994).

In attorneys' action for declaratory judgment that malpractice carrier was liable on its policy, summary judgment in favor of carrier was improper where there were questions of fact as to whether the attorneys' actions related to the practice of law, whether, on the underlying claim, an attorney/client relationship was established, and whether attorneys' actions fell within the policy exclusions. Madden v. Continental Cas. Co., 53 Ark. App. 250, 922 S.W.2d 731 (1996).

Requirement that an oral contract to make a will be proven by clear, cogent and convincing evidence did not apply at the summary judgment level, and it was error for chancellor

to award summary judgment based upon this heightened standard of proof required for oral contracts. Jones v. Abraham, 58 Ark. App. 17, 946 S.W.2d 711 (1997).

The trial court should not have granted a motion for summary judgment prior to a hearing set on the motion, where the opposing party was seeking to complete discovery before the motion, unless it clearly appeared that the opposing party could produce no proof contrary to that advanced by the movant. Ingram v. Chandler, 63 Ark. App. 1, 971 S.W.2d 801 (1998).

A court may deny a motion for summary judgment based on the lack of credibility of the moving party's supporting evidence. Clark v. Progressive Ins. Co., 64 Ark. App. 313, 984 S.W.2d 54 (1998).

In an action for breach of contract based on insurer's failure to pay on a fire loss claim, the trial court erred in granting summary judgment in favor of the insurer by finding that the insurance policy had been rescinded and void due to a material misrepresentation made by the insured in the insurance application; there were genuine issues of material fact as to whether the insured answered "no" to the questions on the application regarding prior fire loss, or was even aware of the application, and summary judgment was improper. Buie v. Certain Underwriters at Lloyds of London, 79 Ark. App. 344, 87 S.W.3d 832 (2002).

Trial court erred in granting summary judgment to a county in connection with a cooperative's action seeking damages for an easement encroachment because whether the county, the cooperative, or both possessed a right-of-way in the land in question had not been determined by the trial court and, thus, factual issues remained. Craighead Elec. Coop. Corp. v. Craighead County, 352 Ark. 76, 98 S.W.3d 414 (2003).

Trial court erred in granting a potential employer's motion for summary judgment in a negligence action because it did not have jurisdiction to determine if the claim was covered by the provisions of the Arkansas Workers' Compensation Act; the evidence failed to clearly show which employer an employee was working for on the date of an accident. Johnson v. Union Pac. R.R., 352 Ark. 534, 104 S.W.3d 745 (2003).

Where injured person, a volunteer firefighter, responded to an accident scene in his own car and was injured while obtaining information from inside the wrecked vehicle, whether his injuries were caused by an accident "arising out of the operation, maintenance or use of an underinsured motor vehicle," was a question for the jury to resolve. Hisaw v. State Farm Mut. Auto. Ins. Co., 353 Ark. 668, 122 S.W.3d 1 (2003).

Administratrix, wife of the decedent, who



sought to divorce the decedent but reconciled shortly before his death, convinced the trial court the monies in a transfer-on-death account (TOD account) naming children from the decedent's former marriage as the beneficiaries was a fraudulent transfer; however, the decedent's children presented compelling facts that the account was separate property owned by the decedent, and the trial court erred in granting summary judgment in favor of the administratrix. *Ginsburg v. Ginsburg*, 353 Ark. 816, 120 S.W.3d 567 (2003).

Subcontractor's insurance policy defined an "occurrence" as "an accident," and the appellate court held that the remaining fact question which had to be resolved before coverage could be determined was whether the subcontractor's workmanship on the major retailer's projects constituted an "accident"; accordingly, summary judgment for the insurer was reversed, and the matter remanded to resolve the issue. *U.S. Fid. & Guar. Co. v. Cont'l Cas. Co.*, 353 Ark. 834, 120 S.W.3d 556 (2003).

In insurer's malpractice action against the insured's attorney for failing to timely appeal a judgment against the insured, the trial court in the underlying jury trial improperly refused to allow the insured to fully develop testimony from a mechanic regarding the physical condition of the truck before the accident, which would have been grounds for reversal, and the trial court erred in excluding proffered testimony of an accident reconstructionist expert, which also would have been reversible error; therefore, the trial court's grant of summary judgment for the attorney on the issue of malpractice was reversed. *Southern Farm Bureau Cas. Ins. Co. v. Daggett*, 354 Ark. 112, 118 S.W.3d 525 (2003).

In a victim's action against a perpetrator's employer arising from the perpetrator's rape and attempted murder of the victim, partial summary judgment was improperly granted as to the claims alleging negligent supervision and negligent retention because there was evidence that another customer had attempted to report the perpetrator's improper behavior to the employer in the past and that the employer had not followed up on the report. *Saine v. Comcast Cablevision of Ark., Inc.*, 354 Ark. 492, 126 S.W.3d 339 (2003).

In a personal injury case, where a workers' compensation commission determined that the injured visitor was not performing employment services when she fell and that she had not proven that the fall caused her injuries, it was error to grant two hotels summary judgment based on collateral estoppel grounds because a court of appeals affirmed on the issue of work-related duties but specifically declined to address the causation issue on appeal; thus, because the decision was based on two alternative, independent

grounds and the decision was affirmed on appeal on only one of the grounds, collateral estoppel precluded only that ground that was affirmed on appeal. *Beaver v. John Q. Hammons Hotels, L.P.*, 355 Ark. 359, 138 S.W.3d 664 (2003).

Trial court erred in granting summary judgment to an insured in a declaratory judgment action concerning insurance coverage where there was a triable issue of fact as to whether an insurance agent ever asked the insured about prior insurance claims. *Neill v. Nationwide Mut. Fire Ins. Co.*, 355 Ark. 474, 139 S.W.3d 484 (2003).

Injured worker testified that he fell because there was no landing area behind the door into the greenhouse and the facts established that, because the door opened away from the person entering the greenhouse, a reasonable person might well have taken a couple of steps forward while pushing the door open; however, even if there were no disputed questions of fact regarding whether the worker had knowledge of the dangerous condition or whether the stairs were an obvious danger, reasonable men could have reached different conclusions from the facts regarding the duty owed by the premises owner, and summary judgment was inappropriate. *Van DeVeer v. RTJ, Inc.*, 81 Ark. App. 379, 101 S.W.3d 881 (2003).

Trial court erred in granting summary judgment in a negligence action brought by a woman who slipped and fell on a wet floor in a hotel while attending a seminar in connection with her employment; prior decision of the Arkansas Workers' Compensation Commission denying the woman's claim for workers' compensation on the dual grounds that the woman was not performing employment services at the time of the injury and that the woman failed to prove that her herniated disc was caused by the fall did not collaterally estop the woman from relitigating the causation issue because the appellate decision affirming the decision in the workers' compensation action was based solely on the employment issue and did not address causation. *Beaver v. John Q. Hammons Hotels, Inc.*, 81 Ark. App. 413, 102 S.W.3d 903 (2003), superseded 355 Ark. 359, 138 S.W.3d 664 (2003).

In employee's suit against former employer arising out of employee's termination for possession of store property, summary judgment was improper on the claim of intrusion and invasion of privacy because, where the former employer's loss prevention officer did not leave the former employee's home after the latter thrice refused to consent to a search for store property and a deputy sat in the driveway, a factual issue existed as to whether the employee's consent subsequently was volun-

tarily given. *Addington v. Wal-Mart Stores, Inc.*, 81 Ark. App. 441, 105 S.W.3d 369 (2003).

Summary judgment was improper in a negligence action arising from a slip and fall where a wedding reception guest fell on a slippery spot on the floor of the owner's property and the guest raised the issue of whether her fall was proximately caused by the owner's method of waxing the floor, namely, whether the wax products instructions were followed. *Newberg v. Next Level Events, Inc.*, 82 Ark. App. 1, 110 S.W.3d 332 (2003).

Summary judgment dismissing a commercial tenant's suit against his landlord for personal injury occurring when the tenant stepped on a loose board on a deck was improper because there were issues of fact as to whether the lease created a duty on the part of the landlord to maintain the deck or whether the landlord assumed the duty by its conduct of having its employees patrol the deck and make minor repairs. *Denton v. Pennington*, 82 Ark. App. 179, 119 S.W.3d 519 (2003).

Trial court erred when it granted summary judgment to a grocery store in a shopper's suit for malicious prosecution where the evidence was in dispute as to whether there was a knowing concealment upon her person of the unpurchased books and a magazine and the shopper had been found not guilty at her trial. *Miller v. Kroger Co.*, 82 Ark. App. 281, 105 S.W.3d 789 (2003).

Allowing an insurer to assert its right to a lien against the tortfeasor as well as its insured served to further the intent of § 11-9-410 where the insurer was denied its statutory right to either participate in an action against the tortfeasor brought by the insured or to have notice of the settlement and an opportunity to be heard; the trial court was incorrect in finding that a release signed by the insured operated to bar any claims by the insurer against the tortfeasor and it was immaterial that the insurer failed to give notice of its claim to the tortfeasor's insurance company and, thus, the grant of summary judgment to the tortfeasor was improper. *Liberty Mut. Ins. Co. v. Whitaker*, 83 Ark. App. 412, 128 S.W.3d 473 (2003).

Summary judgment was improperly granted in favor of the heir in the estate administrator's third-party complaint where claim preclusion could not apply; the administrator had not yet had a full and fair opportunity to litigate the issues and the filing of the lawsuits by the original plaintiffs was a subsequent event giving rise to a new claim that was not barred by the prior judgment. *Cox v. Keahey*, 84 Ark. App. 121, 133 S.W.3d 430 (2003).

Uninsured motorist policy that relieved an insured of the burden of proving that another driver was uninsured only in cases where

there was actual physical contact does not violate Arkansas public policy because the policy exceeds the requirements of § 23-89-403; therefore, a trial court erred in granting summary judgment in favor of an insured in a case involving an insurer's failure to pay uninsured motorist benefits where the insured sustained injuries after running off the road due the negligence of an unidentified driver. *State Farm Mut. Auto. Ins. Co. v. Henderson*, 356 Ark. 335, 150 S.W.3d 276 (2004).

Summary judgment was improperly granted in favor of the city where, although participation by the city in a police officers' retirement plan was discretionary, the trial court should have determined whether the adoption of another plan was similar in purpose to § 24-10-302 to determine if there was a violation of the statute. *Gonzales v. City of DeWitt*, 357 Ark. 10, 159 S.W.3d 298 (2004).

Where two insurers were potentially liable for damages in a nursing home negligence suit, but one of the insurers took over the defense in the negligence trial, it assumed the burden of apportionment of those damages; however, the trial court nevertheless erred in granting summary judgment and in apportioning the damages 25 percent to that insurer without having provided its reasoning. *MedMarc Cas. Ins. Co. v. Forest Healthcare, Inc.*, 359 Ark. 495, 199 S.W.3d 58 (2004).

Trial court erred in granting summary judgment to insurer and in holding that insurer was not required to defend the insured based on a pollution exclusion clause because the term "pollutants" in the clause was ambiguous, given that the term did not include or exclude gasoline, which leaked from insured's tanks and subjected the insured to a lawsuit. *Anderson Gas & Propane, Inc. v. Westport Ins. Corp.*, 84 Ark. App. 310, 140 S.W.3d 504 (2004).

Where decedent refused to follow the directives of a medical center and its nurse not to drive after being sedated for a procedure, and he was killed while driving home, the trial court erred in granting summary judgment to the medical center because there was a question created by differing expert opinions as to whether the center's conduct satisfied the required standard of care. *Young v. Gastro-Intestinal Ctr., Inc.*, 86 Ark. App. 167, 167 S.W.3d 180 (2004).

Trial court erred in granting summary judgment to appellee bank where (1) the bank failed to produce evidence of an assignment of appellant couple's mortgage and note to the bank, (2) the bank failed to produce the original 1986 promissory note, and (3) the parties had proceeded on different legal theories. *Corn Ins. Agency, Inc. v. First Fed. Bank of Ark., F.A.*, 88 Ark. App. 8, 194 S.W.3d 230 (2004).



In insurer's declaratory judgment action, the trial court erred in granting summary judgment to insurer where the policy language, when coupled with the relevant statutory provisions, did not clearly exclude liability coverage for a semitrailer used solely as a residence; the Missouri Administrator of the State Office of Motor Vehicles unequivocally stated that the camper trailer in question was not subject to registration based upon its use as a residence. *Smith v. Farm Bureau Mut. Ins. Co. of Ark., Inc.*, 88 Ark. App. 22, 194 S.W.3d 212 (2004).

In a case involving negligent entrustment, summary judgment should not have been granted to the owner of a car based on the testimony of three interested witnesses where they all gave inconsistent testimony regarding whether or not the driver had permission to operate the vehicle; the witnesses all had a similar motive in concealing the facts of the case to avoid liability. *Collins v. Morgan*, 92 Ark. App. 95, 211 S.W.3d 14 (2005).

Where a decedent, prior to his death, and his wife retained the services of a lawyer to set up a revocable trust for the benefit of the decedent's son, where the decedent became incapacitated before executing deeds to transfer his assets to the trust, where the lawyer consulted with the decedent's son and wife and petitioned to have the son appointed guardian so that he could execute the deeds, where the lawyer did not disclose that, if the son did not sign the deed, he would inherit by intestate succession but that, if he executed the deeds, his stepmother would gain control and could divest him of the assets, and where the stepmother did just that after the decedent succumbed, the trial court erred in granting summary judgment of attorneys hired to pursue a legal malpractice claim against the lawyer and in holding that no valid claim existed because the son lacked privity of contract with his father's lawyer. Summary judgment was improper because the evidence revealed conflicting accounts of the son's contractual relationship with the lawyer and gave rise to the implication that the lawyer had a duty to advise the son of his inheritance rights and the possibility that his stepmother could cut him out of the trust. *Howard v. Adams*, 2009 Ark. App. 621, 332 S.W.3d 24 (2009).

### Summary Judgment Proper.

Where the facts are not disputed and the law can be applied, a summary judgment is an appropriate means of avoiding the expense and time of a formal trial. *Childs v. Berry*, 268 Ark. 970, 597 S.W.2d 134 (1980).

Summary judgment held appropriate. *Thomas v. Poff*, 268 Ark. 939, 597 S.W.2d 838 (1980); *Childs v. Berry*, 268 Ark. 970, 597 S.W.2d 134 (1980); *Woodell v. Brown & Root, Inc.*, 2 Ark. App. 106, 616 S.W.2d 781 (1981);

*Turner v. Baptist Medical Ctr.*, 275 Ark. 424, 631 S.W.2d 275 (1982); *Rickenbacker v. Wal-Mart Stores, Inc.*, 302 Ark. 119, 788 S.W.2d 474 (1990); *Neff v. St. Paul Fire & Marine Ins. Co.*, 304 Ark. 18, 799 S.W.2d 795 (1990); *Keenan v. American River Transp. Co.*, 304 Ark. 42, 799 S.W.2d 801 (1990); *National Bank of Commerce v. HCA Health Servs.*, 304 Ark. 55, 800 S.W.2d 694 (1990); *Diebold v. Vanderstek*, 304 Ark. 78, 799 S.W.2d 804 (1990); *Anderson v. First Nat'l Bank*, 304 Ark. 164, 801 S.W.2d 273 (1990); *Watts v. Life Ins. Co.*, 30 Ark. App. 39, 782 S.W.2d 47 (1990); *Harrell v. International Paper Co.*, 305 Ark. 490, 808 S.W.2d 779 (1991); *Carmichael v. Nationwide Life Ins. Co.*, 305 Ark. 549, 810 S.W.2d 39 (1991); *Arkansas-Oklahoma Gas Corp. v. Lukis Stewart Price Forbes & Co.*, 306 Ark. 425, 816 S.W.2d 571 (1991); *Black v. American Gen. Fire & Cas. Co.*, 36 Ark. App. 164, 819 S.W.2d 308 (1991); *Moore v. Columbia Mut. Cas. Ins. Co.*, 36 Ark. App. 226, 821 S.W.2d 59 (1991); *Schultz v. Farm Bureau Mut. Ins. Co.*, 328 Ark. 64, 940 S.W.2d 871 (1997); *Jones v. Abraham*, 58 Ark. App. 17, 946 S.W.2d 711 (1997).

Partial summary judgment held appropriate. *Hallmark Cards, Inc. v. Peevy*, 293 Ark. 594, 739 S.W.2d 691 (1987).

Summary judgment is appropriate only where the pleadings, depositions, and answers to interrogatories, together with the affidavits, show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Dickson v. Delhi Seed Co.*, 26 Ark. App. 83, 760 S.W.2d 382 (1988); *Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995).

Summary judgment is only appropriate when no issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Young v. Paxton*, 316 Ark. 655, 873 S.W.2d 546 (1994).

Although questions of intent are particularly inappropriate for summary judgment, in a contract action where, from the face of a written instrument, there was no ambiguity, there was no genuine issue of material fact about whether parol evidence could be admitted, and summary judgment was proper. *Chlanda v. Estate of Fuller*, 326 Ark. 551, 932 S.W.2d 760 (1996).

Whether a sale of collateral was conducted in a commercially reasonable manner under § 4-9-504 is essentially a factual question; however, summary judgment granted where plaintiff established a prima facie case that the sale was conducted in a commercially reasonable manner and that defendant failed to "meet proof with proof" in response. *Prince v. R & T Motors, Inc.*, 59 Ark. App. 16, 953 S.W.2d 62 (1997).

Where insured was injured when a car

crashed into the wall of her business, the trial court properly granted summary judgment for the insurance company which denied the insured underinsured motorist coverage and personal injury protection coverage based upon the clear and unambiguous terms of the policy's business premises exclusion. *Harasyn v. St. Paul Guardian Ins. Co.*, 349 Ark. 9, 75 S.W.3d 696 (2002).

Where former client sued lawyer for negligence, breach of contract, and breach of fiduciary duty, over alleged mistaken terms in a property settlement agreement, partial summary judgment for the lawyer on the breach of fiduciary claim was proper where there was no evidence the lawyer engaged in self-dealing. *Cole v. Laws*, 349 Ark. 177, 76 S.W.3d 878 (2002), cert. denied 537 U.S. 1003, 123 S. Ct. 509, 154 L. Ed. 2d 400 (2002).

Although the parent corporation's name and logo appeared on the master agreement that was executed between contractor and subsidiary company, the fact remained that the parties to the contract were clearly stated and that the contractor chose to make the assumption, without further investigation on his part, that subsidiary company was financially backed by the parent corporation which sold its stock to a corporation that went bankrupt; the contractor's beliefs, standing alone, did not create genuine issues of material fact sufficient to avoid a summary judgment. *Little Rock Elec. Contrs. v. Entergy Corp.*, 79 Ark. App. 337, 87 S.W.3d 842 (2002).

Trial court properly granted a railroad's motion for partial summary judgment on the issue of inadequate warning devices because it would have been unfair to apply the doctrine of offensive collateral estoppel where an employee could have joined in a prior federal action, and the railroad lacked any incentive to pursue an appeal of the federal claim. *Johnson v. Union Pac. R.R.*, 352 Ark. 534, 104 S.W.3d 745 (2003).

Summary judgment was properly entered dismissing a claim brought by the live-in girlfriend of an insured party seeking recovery under the underinsured motorist clause of the insured's motor vehicle insurance policy; recovery was limited to member's of the insured's "family" living in the insured's household, and the term "family" was properly construed to mean only those persons related to the insured by blood, adoption, or marriage, and did not include a person outside those categories who happened to reside with the insured. *Smith v. S. Farm Bureau Cas. Ins. Co.*, 353 Ark. 188, 114 S.W.3d 205 (2003).

Because the returns of after-tax contributions to a retirement plan were property, pursuant to Ark. Const., Art. XVI, § 5, and not income, the Arkansas Department of Finance and Administration's attempted tax of the returns under § 26-51-307 was unconsti-

tutional given the prohibition in Ark. Const., Amend. 47 that prohibited an ad valorem tax being levied on property; thus, the trial court properly granted partial summary judgment in favor of the taxpayers. *Weiss v. McFadden*, 353 Ark. 868, 120 S.W.3d 545 (2003).

In a victim's action against a perpetrator's employer arising from the perpetrator's rape and attempted murder of the victim, partial summary judgment was properly granted as to the claim alleging negligent hiring where the victim claimed that the employer had failed to do a proper background check before hiring the perpetrator but failed to show that a proper background check would have revealed that the perpetrator had a propensity for sexual assault. *Saine v. Comcast Cablevision of Ark., Inc.*, 354 Ark. 492, 126 S.W.3d 339 (2003).

Where no exception to the general rule that an employer owed no duty to employees of its independent contractors existed, and where the plain language of the contract specified that it was the independent contractor's, and not the employer's, responsibility to ensure that the former hired qualified workers to perform the job functions of a lineman, the trial court properly granted summary judgment against the lineman in his suit against the general contractor, who employed his company, in his personal injury suit. *Stoltze v. Ark. Valley Elec. Coop. Corp.*, 354 Ark. 601, 127 S.W.3d 466 (2003).

Trial court did not err in granting an insurer summary judgment in connection with an action brought by insureds regarding the lapse of their coverage; the doctrine of estoppel did not apply to extend the scope of coverage under an insurance policy, and a form letter received by the insureds two months before the policy's renewal date did not indicate when any policy was up for cancellation or non-renewal. *Johnson v. Encompass Ins. Co.*, 355 Ark. 1, 130 S.W.3d 553 (2003).

In a father's action to terminate the maternal grandmother's visitation rights, where he had failed to appeal a prior ruling that the Arkansas Grandparent Visitation Act, § 9-13-103, was constitutional, *res judicata* precluded him from relitigating this issue because the same parties and issue had been involved in the prior action, and the trial court properly granted the grandmother partial summary judgment on this issue. *Hunt v. Perry*, 355 Ark. 303, 138 S.W.3d 656 (2003), cert. denied 541 U.S. 1074, 124 S. Ct. 2428, 158 L. Ed. 2d 984 (2004).

Trial court properly granted summary judgment to the owners of a pool in a wrongful death action arising from the drowning of a child; the owners did not engage in any willful or wanton conduct which contributed to the child's drowning because, even though only



one adult who could swim was present in the area, a pool owner had repeatedly told the deceased child to wear a life jacket and had told the children to stay in the shallow end of the pool. *Moses v. Bridgeman*, 355 Ark. 460, 139 S.W.3d 503 (2003).

Where a reasonable person could not construe the deed and easement therein as limiting the rights conveyed to uses relating only to water utilities, the trial judge was correct in granting summary judgment for the city. *Bishop v. City of Fayetteville*, 81 Ark. App. 1, 97 S.W.3d 913 (2003).

Grant of summary judgment against shopper in his action for malicious prosecution and abuse of process was proper where the entry of a nolle prosequere did not preclude a finding of probable cause to arrest; based on the municipal court's determination of guilt, the court held that there was probable cause to arrest the shopper for obstructing governmental operations and attempting to influence a public official. *Sundeen v. Kroger*, 81 Ark. App. 371, 101 S.W.3d 891 (2003), superseded 355 Ark. 138, 133 S.W.3d 393 (2003).

In employee's suit against former employer arising out of employee's termination for possession of store property, summary judgment was properly granted to the store on the employee's false-light invasion of privacy and defamation claims where the employee had admitted to the employer's loss prevention officer that he had in his possession store property for which he had not paid and the statements referring to stolen property in the employee's possession were made under a qualified privilege only to appropriate store and law enforcement. *Addington v. Wal-Mart Stores, Inc.*, 81 Ark. App. 441, 105 S.W.3d 369 (2003).

Trial court did not err in granting a bank's motion for summary judgment in an action involving an insufficient check because a company was liable as an endorser where it gave a bondsman actual authority to endorse its name on a check; it was irrelevant that the bondsman later misappropriated the funds. *Holt Bonding Co. v. First Fed. Bank*, 82 Ark. App. 8, 110 S.W.3d 298 (2003).

Trial court did not err in granting a motion for summary judgment filed by a property owners' association because several owners were unable to show that a change in a declaration to allow a two-tiered property assessment scheme was unreasonable, arbitrary, discriminatory, or capricious; moreover, the declaration was not subject to strict construction because it did not fall within the definition of a restrictive covenant. *Hutchens v. Bella Vista Vill. Prop. Owners' Ass'n*, 82 Ark. App. 28, 110 S.W.3d 325 (2003).

Trial court did not err when it granted summary judgment to a niece as the owner of content's of her deceased uncle's safety de-

posit box where, even though his will had not been probated, a copy of his unprobated will named her as sole beneficiary; the situation fit within the parameters of § 28-40-104(b)(2), which allowed evidence of the testator's intention and provided the evidence that supported the trial court's conclusion that niece was the owner of the box contents. *Atkinson v. Knowles*, 82 Ark. App. 224, 105 S.W.3d 818 (2003).

Trial court did not err when it granted summary judgment to a grocery store in a shopper's suit for false imprisonment where the shopper voluntarily returned to the store in order to resolve the matter of whether she had stolen books from the store and the shopper had not presented any evidence of threats of force or that she had been restrained against her will. *Miller v. Kroger Co.*, 82 Ark. App. 281, 105 S.W.3d 789 (2003).

Summary judgment was properly granted in favor of the insureds in their suit against the insurer where the trial court did not err in finding that the policy language was a condition precedent to coverage and that there was an enforceable insurance contract; the insurance contract provided automatic coverage for a thoroughbred horse the insureds acquired, even though the horse was injured and put to death the same day of the insureds' acquisition. *Clarendon Nat'l Ins. Co. v. Roberts*, 82 Ark. App. 515, 120 S.W.3d 141 (2003).

Grant of summary judgment in favor of the employer in its action to recover interest on a promissory note used to purchase stock was proper where the employee admitted that he signed the note and did not contend that the note was invalid; further, he did not demonstrate that the provisions of the stockholders agreement were against public policy. *Wingfield v. Contech Constr. Prods.*, 83 Ark. App. 16, 115 S.W.3d 336 (2003).

Summary judgment was properly granted in favor of the doctor where the former patient's estate's suit against the doctor for negligence was time barred; the statute of limitations began to run from the date that the negligent act occurred and the traditional rule for applying the statute of limitations applied. *Harris v. Ozment*, 83 Ark. App. 94, 117 S.W.3d 647 (2003).

Grant of summary judgment in favor of the city was proper where the agreement to sell real estate was unenforceable because the document did not adequately furnish a description as to the property and there was no meeting of the minds; further, the document was in the nature of an agreement to engage in future negotiations and such agreements were generally void because they failed to contain all of the essential terms. *Dev. & Constr. Mgmt. v. City of N. Little Rock*, 83 Ark. App. 165, 119 S.W.3d 77 (2003).

Trial court properly granted summary judgment

ment for defendant doctors on plaintiff patient's informed consent and medical battery claims where patient failed to provide expert testimony on her informed consent claim, and her battery claim, in turn, was based on her informed consent claim. *Parkerson v. Arthur*, 83 Ark. App. 240, 125 S.W.3d 825 (2003).

Summary judgment was properly granted in favor of defendant bank which failed to reinstate the mortgage of plaintiff couple; it was undisputed that the couple had failed to pay the entire amount of the past-due payments, late fees, and costs and expenses, including attorney's fees, before curing the default pursuant to § 18-50-114(a). *Lambert v. Firststar Bank, N.A.*, 83 Ark. App. 259, 127 S.W.3d 523 (2003).

In a case regarding a third party's liability (co-employee) for the employee's injury at work, because the co-employee was responsible for transporting the employee to and from a work site, he was involved in the employer's duty of providing the employee a safe place to work; thus, workers' compensation was the employee's exclusive remedy pursuant to § 11-9-105 and the trial court did not err when it granted the co-employee's motion for summary judgment. *Gafford v. Cox*, 84 Ark. App. 57, 129 S.W.3d 296 (2003).

Grant of summary judgment against the bankruptcy trustee was improper where there was no evidence of an intent to manipulate the judicial process; although the bank offered evidence that the petition signed under oath failed to include the cause of action pending against the bank, no evidence of intent was offered by the bank and the application of judicial estoppel in Arkansas required intent. *Dupwe v. Wallace*, 355 Ark. 521, 140 S.W.3d 464 (2004).

Trial court properly entered summary judgment for defendant railroad in decedent's estate's wrongful death lawsuit where the decedent's guardian had already sued the railroad and the case had been settled and the guardian had signed a release. *Estate of Hull v. Union Pac. R.R.*, 355 Ark. 547, 141 S.W.3d 356 (2004).

Trial court did not err in granting summary judgment to sub-contractor on the basis of collateral estoppel based on an arbitration decision where, although the sub-contractor was not a party to the arbitration between a developer and a contractor, the developer had named the sub-contractor as a party in an amended complaint in a law suit it had brought and all the issues in the suit were the same as those decided in the arbitration. *Riverdale Dev. Co., LLC v. Ruffin Bldg. Sys.*, 356 Ark. 90, 146 S.W.3d 852 (2004).

Where an oil company sold its lease interest in a tract to a production company in 1987, and the production company sold its lease interest in the tract to an energy company in

1996, and where both sales contracts included indemnification clauses, the latter parties either assumed the risk of the environmental conditions on the property or, in the case of the energy company, explicitly agreed to indemnification, and summary judgment against the oil company and in favor of the other two parties as to the indemnification issue was reversed. *Chevron U.S.A. Inc. v. Murphy Exploration & Prod. Co.*, 356 Ark. 324, 151 S.W.3d 306 (2004).

Complaint to the plant board filed within ten days after defectiveness of seeds became apparent was a condition precedent to a legal action against the seed manufacturer and farmer's failure to comply with the mandatory notice requirements precluded his legal action for damages; thus, the trial court did not err when it granted summary judgment to the manufacturer. *Slusser v. Farm Serv., Inc.*, 359 Ark. 392, 198 S.W.3d 106 (2004).

Instrument executed by company accountant constituted a check under § 4-3-104(f)(i), and not a promissory note, because the owner of the company was the one who asked two creditors to delay presentment of the document for payment; therefore, summary judgment was properly granted in favor of the accountant, who was not personally liable for payment. *Billingsley v. Smith*, 85 Ark. App. 128, 147 S.W.3d 697 (2004).

After employee received unemployment benefits based on a finding of no work-related misconduct, collateral estoppel did not bar the employer from asserting, in a racial discrimination case, that the employee was fired for inappropriate behavior; an administrative finding that the employee was discharged for reasons that did not disqualify him for unemployment benefits under § 11-10-514(a)(1) did not address the issue of whether an improper racial motive was present within the meaning of § 16-123-107(a)(1) and, absent evidence of racial animus, summary judgment for the employer was proper. *Crockett v. Counseling Servs. of E. Ark., Inc.*, 85 Ark. App. 371, 154 S.W.3d 278 (2004).

Where there were no disputed facts, and where the trial court properly concluded that the word "explosion" was not ambiguous and that a partial collapse of the insured's home from the gradual accumulation of ice or snow on the roof did not fall within the common understanding of "explosion," or that term as defined in the insurance policy, the insurer was entitled to judgment as a matter of law. *Curley v. Old Reliable Cas. Co.*, 85 Ark. App. 395, 155 S.W.3d 711 (2004).

Trial court did not err in granting summary judgment for the landowner pursuant to this rule and dismissing the parks department's condemnation complaint because the department failed to follow the procedures set forth in Ark. Code Ann. § 22-4-106 for acquiring



park lands, such as the Governor's written approval; and 2001 Ark. Acts 1102 and 2003 Ark. Acts 1605, the acts funding the land acquisition, were not more specific legislation that negated the procedures in Ark. Code Ann. § 22-4-106. Nothing in the Acts specifically provided funding for the department to acquire the land or set forth any criteria to be followed in acquiring lands, other than to state that disbursements were to comply with other applicable state laws; rather the Acts were general appropriation provisions that provided the funding mechanisms for the department to acquire additional lands, while Ark. Code Ann. § 22-4-106 established the procedures to be followed. *State ex rel. Ark. Dep't of Parks & Tourism v. Jeske*, 365 Ark. 279, 229 S.W.3d 23 (2006).

In a wrongful death suit brought against a medical center, a husband was not unconstitutionally denied his right to a jury trial, under Ark. Const., Art. 2, § 7, and a summary judgment was proper because no factual issues existed as to whether the medical center was entitled to governmental or charitable immunity. *Anglin v. Johnson Reg'l Med. Ctr.*, 375 Ark. 10, 289 S.W.3d 28 (2008).

There was no reversible error in an action alleging breach of the covenant of good faith, breach of fiduciary duty, fraud, conversion, unjust enrichment, and intentional infliction of emotional distress due to a bank's misconduct in relation to a loan where counsel failed to appear at a summary judgment hearing; the land purchasers filing the action failed to show how they were prejudiced due to conflicting correspondence, and the trial judge was familiar with the facts and issues of the case, despite not going over every single document submitted. *Bibbs v. Cmty. Bank*, 101 Ark. App. 462, 278 S.W.3d 564 (2008).

#### Time of Filing Motion.

In an action seeking to determine heirship, a circuit court did not err by considering a motion for summary judgment that was filed less than 45 days before trial; the fact that three surviving sons obtained leave and filed their own motion for summary judgment was sufficient reason for several surviving spouses and children to file their counter motion within the same forty-five day period. *Scroggin v. Scroggin*, 103 Ark. App. 144, 286 S.W.3d 758 (2008).

#### Time of Serving Motion.

The purpose of the requirement in this rule that the motion be served at least 10 days before a hearing is held is to allow the non-moving party time to prepare a response; accordingly, where the summary judgment motion submitted by the plaintiff on the day of the trial was the same motion that it had submitted some six months earlier, and the arguments of counsel appeared from the re-

cord to have been the same arguments made when the motion was denied at that time, the defendants could not claim to have been prejudiced by the reconsideration of the motion, and the trial court did not err in reconsidering the motion on the day of trial. *Craft v. Arkansas La. Gas Co.*, 8 Ark. App. 169, 649 S.W.2d 409 (1983).

Defendant was not prejudiced by plaintiff's failure to comply with the notice requirement of subsection (c) of this rule where defendant filed a response to the motion and had the opportunity to argue it. *Keenan v. American River Transp. Co.*, 304 Ark. 42, 799 S.W.2d 801 (1990).

**Cited:** *Marion County Rural Sch. Dist. No. 1 v. Polk*, 268 Ark. 354, 596 S.W.2d 700 (1980); *Gilstrap v. Jackson*, 269 Ark. 876, 601 S.W.2d 270 (1980); *Fausett Co. v. Rand*, 2 Ark. App. 216, 619 S.W.2d 683 (1981); *Daniels v. Commercial Union Ins. Co.*, 5 Ark. App. 142, 633 S.W.2d 396 (1982); *Schulte v. Benton Sav. & Loan Ass'n*, 279 Ark. 275, 651 S.W.2d 71 (1983); *Farmers Ins. Exch. v. Staples*, 8 Ark. App. 224, 650 S.W.2d 244 (1983); *Carter v. Grain Dealers Mut. Ins. Co.*, 10 Ark. App. 16, 660 S.W.2d 952 (1983); *Guthrie v. Tyson Foods, Inc.*, 285 Ark. 95, 685 S.W.2d 164 (1985); *Williams v. Joyner-Cranford-Burke Constr. Co.*, 285 Ark. 134, 685 S.W.2d 503 (1985); *Hufsmith v. Weaver*, 285 Ark. 357, 687 S.W.2d 130 (1985); *Brewington v. St. Paul Fire & Marine Ins. Co.*, 285 Ark. 389, 687 S.W.2d 838 (1985); *Clinton v. Rehab Hosp. Servs. Corp.*, 285 Ark. 393, 688 S.W.2d 272 (1985); *Gathright v. Lincoln Ins. Co.*, 286 Ark. 16, 688 S.W.2d 931 (1985); *Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985), cert. denied 475 U.S. 1036, 106 S. Ct. 1245, 89 L. Ed 2d 354 (1986); *Hogue v. Ameron, Inc.*, 286 Ark. 481, 695 S.W.2d 373 (1985); *B.G. Coney Co. v. Radford Petro. Equip. Co.*, 287 Ark. 108, 696 S.W.2d 745 (1985); *Edwards v. Arkansas Power & Light Co.*, 287 Ark. 403, 700 S.W.2d 52 (1985); *Ray v. Shelby Mut. Ins. Co.*, 14 Ark. App. 265, 687 S.W.2d 526 (1985); *Milligan v. County Line Liquor, Inc.*, 289 Ark. 129, 709 S.W.2d 409 (1986), overruled *Shannon v. Wilson*, 947 S.W.2d 349 (Ark. 1997); *Earl v. Mosler Safe Co.*, 291 Ark. 276, 724 S.W.2d 174 (1987); *Tapp v. Fowler*, 291 Ark. 309, 724 S.W.2d 176 (1987); *Carpenter v. Horace Mann Life Ins. Co.*, 21 Ark. App. 112, 730 S.W.2d 502 (1987); *Cigna Ins. Co. v. Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988); *Lubin v. Crittenden Hosp. Ass'n*, 295 Ark. 429, 748 S.W.2d 663 (1988); *Generation Prods. Co. v. Van Hoya*, 24 Ark. App. 81, 748 S.W.2d 353 (1988); *Ragar v. Hooper*, 298 Ark. 353, 767 S.W.2d 521 (1989); *Glasgow v. Century Property Fund XIX*, 299 Ark. 221, 772 S.W.2d 312 (1989); *Johnson v. State*, 299 Ark. 223, 772 S.W.2d 322 (1989); *Bland v. Verser*, 299 Ark. 490, 774 S.W.2d 124 (1989); *Cozart v. Lewis*,

299 Ark. 500, 774 S.W.2d 127 (1989); Grimes v. M.H.M., Inc., 299 Ark. 560, 776 S.W.2d 336 (1989); Dean Leasing, Inc. v. Van Buren County, 27 Ark. App. 134, 767 S.W.2d 316 (1989); Woods v. Hopmann Mach., Inc., 301 Ark. 134, 782 S.W.2d 363 (1990); Ragar v. Krug, 303 Ark. 161, 794 S.W.2d 151 (1990); Parks v. Hillhaven Nursing Home, 303 Ark. 557, 798 S.W.2d 106 (1990), appeal dismissed 309 Ark. 106, 827 S.W.2d 148 (1992), appeal dismissed 309 Ark. 373, 829 S.W.2d 419 (1992); Walker v. Hyde, 303 Ark. 615, 798 S.W.2d 435 (1990); Fisher Trucking, Inc. v. Fleet Lease, Inc., 304 Ark. 451, 803 S.W.2d 888 (1991); West v. Searle & Co., 305 Ark. 33, 806 S.W.2d 608 (1991); Car Transp. v. Garden Spot Distribs., 305 Ark. 82, 805 S.W.2d 632 (1991); Magness v. McEntire, 305 Ark. 503, 808 S.W.2d 783 (1991); Thomas ex rel. City Nat'l Bank v. Valmac Indus., Inc., 306 Ark. 228, 812 S.W.2d 673 (1991), questioned Estate of Donley v. Pace Indus., 336 Ark. 101, 984 S.W.2d 421 (1999), questioned Rohrer v. 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Skokos, 335 Ark. 41, 977 S.W.2d 217 (1998); Rankin v. City of Ft. Smith, 337 Ark. 599, 990 S.W.2d 535 (1999); Brown v. Fountain Hill Sch. Dist., 67 Ark. App. 358, 1 S.W.3d 27 (1999); Tackett v. McDonald's Corp., 68 Ark. App. 41, 3 S.W.3d 344 (1999); Oxford v. Perry, 340 Ark. 577, 13 S.W.3d 567 (2000); Ball v. State Dep't of Community Punishment, 340 Ark. 424, 10 S.W.3d 873 (2000); Flentje v. First Nat'l Bank, 340 Ark. 563, 11 S.W.3d 531 (2000); Smith v. Rogers Group, Inc., 348 Ark. 241, 72 S.W.3d 450 (2002); Loghry v. Rogers Group, Inc., 348 Ark. 369, 72 S.W.3d 499 (2002); Chavers v. GMC, 349 Ark. 550, 79 S.W.3d 361 (2002); Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002); Meadow Lake Farms, Inc. v. Cooper, 360 Ark. 164, 200 S.W.3d 399 (2004); Jordan v. Diamond Equip. & Supply Co., 362 Ark. 142, 207 S.W.3d 525 (2005); Small v. Kulesa, 90 Ark. App. 108, 204 S.W.3d 99 (2005); Cowan v. Ellison Enters., 93 Ark. App. 135, 217 S.W.3d 175 (2005); Murchison v. Safeco Ins. Co., 367 Ark. 166, 238 S.W.3d 11 (2006); Harris v. Alzheimer Unified Sch. Dist., 94 Ark. App. 152, 227 S.W.3d 437 (2006); Foscoe v. McDaniel, 2009 Ark. 223, 308 S.W.3d 122 (2009); Loveless v. Tucker, 2009 Ark. 424, — S.W.3d —, 2009 Ark. LEXIS 542 (2009); Vibo Corp. v. State ex rel. McDaniel, 2011 Ark. 124, — S.W.3d —, 2011 Ark. LEXIS 122 (Mar. 31, 2011); Summers v. Byrd, 2012 Ark. App. 171, — S.W.3d —, 2012 Ark. App. LEXIS 274 (Feb. 22, 2012); Killian v. Gibson, 2012 Ark. App. 299, — S.W.3d —, 2012 Ark. App. LEXIS 397 (Apr. 25, 2012).



**Rule 57. Declaratory judgments.**

The procedure for obtaining a declaratory judgment pursuant to *Ark. Code Ann.* §§ 16-111-101 through 16-111-111 shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. (Amended November 11, 1991, effective January 1, 1992.)

**Reporter's Notes to Rule 57:** 1. *Ark. Stat. Ann.* § 34-2501 [now see § 16-111-103], with minor modifications, adopted the Uniform Declaratory Judgment Act. Rule 57 incorporates this statutory enactment by reference and does not effect any significant changes in Arkansas procedure.

2. Prior Arkansas law did not specifically

authorize the advancement of declaratory judgment actions on the trial docket. Rule 57 recognizes, however, that some declaratory judgment actions involve matters of public interest and therefore gives the trial court discretion to advance such a case on the trial docket.

**CASE NOTES**

**Cited:** *City of Jacksonville v. Martin*, 286 Ark. 288, 692 S.W.2d 226 (1985); *Yamauchi v. Sovran Bank/Central S.*, 309 Ark. 532, 832 S.W.2d 241 (1992).

**Rule 58. Entry of judgment or decree.**

Subject to the provisions of Rule 54(b), upon a general or special verdict, or upon a decision by the court granting or denying the relief sought, the court may direct the prevailing party to promptly prepare and submit, for approval by the court and opposing counsel, a form of judgment or decree which shall then be entered as the judgment or decree of the court. The court may enter its own form of judgment or decree or may enter the form prepared by the prevailing party without the consent of opposing counsel. A judgment or decree shall omit or redact confidential information as provided in Rule 5(c)(2).

Every judgment or decree shall be set forth on a separate document. A judgment or decree is effective only when so set forth and entered as provided in Administrative Order No. 2. Entry of judgment or decree shall not be delayed for the taxing of costs. (Amended December 10, 1990, effective February 1, 1991; amended October 23, 2008, effective January 1, 2009.)

**Reporter's Notes to Rule 58:** 1. Rule 58 varies substantially from FRCP 58 and is designed to incorporate prior Arkansas procedure into a formal rule. Under the Federal Rule, the court clerk, in certain instances, has the responsibility of preparing the formal judgment. In all other instances, the court or the clerk prepares the judgment. This rule recognizes and continues the prior practice in this State of having the prevailing party prepare and submit the form of judgment or decree to the court for its approval.

2. Implicit in this rule is the right of opposing counsel to be afforded an opportunity to approve the form of judgment or decree. Where there is disagreement between the parties as to the form of the judgment or decree, the court should hold a hearing to consider whatever objections there might be. After such a hearing, the court may either enter its own form of judgment or decree; it may enter the form submitted by counsel if the same fairly represents the action of the court or jury or it may require counsel to

revise the judgment or decree prepared by counsel. There was no specific statutory authority in Arkansas which governed prior practice in this area and such practice simply developed as an unwritten rule. This rule should have little or no effect on prior practice.

3. The federal practice of having the court prepare the judgment or order is more or less based upon the notion that delays will result if the preparation of judgments and decrees is left to counsel. The Committee did not consider this to be serious enough to warrant changing the longstanding practice in Arkansas of having counsel prepare judgments and decrees. The rule does provide, however, that if counsel is dilatory in the preparation of a judgment or decree, the court can take appropriate action to compel the preparation of the decree or it can prepare it itself.

4. This rule provides that a judgment or decree shall not be effective unless and until it is entered pursuant to Rule 79(a). Thus for appeal purposes, the date of entry or filing of the judgment or decree is the effective date, as opposed to the date of rendition. *Cranna v. Long*, 225 Ark. 153, 279 S.W.2d 828 (1955); *Wilhelm v. McLaughlin*, 228 Ark. 582, 309 S.W.2d 203 (1958).

**Addition to Reporter's Notes, 1990 Amendment:** This housekeeping amendment replaced the reference to Rule 79(a) in the second paragraph with a reference to Administrative Order No. 2, which appears in the appendix to the Rules of Civil Procedure. Rule 79 was abolished in 1987 when the administrative order was adopted.

**Addition to Reporter's Notes (1999):** The second paragraph of this rule provides that a judgment or decree "is effective only

when ... set forth [on a separate document] and entered as provided in Administrative Order No. 2." As amended in 1999, Administrative Order No. 2(b) provides that a judgment, decree or order is "entered" when stamped or otherwise marked by the clerk with the time and date and the word "filed," irrespective of when it is recorded in the judgment book. When the clerk's office is not open for business, and upon an express finding of extraordinary circumstances, an order is effective immediately when signed by the judge. Such order must be filed with the clerk on the next day on which the clerk's office is open, and this filing date controls all appeal-related deadlines.

The 1999 amendment to Administrative Order No. 2(b) also requires any clerk's office with a facsimile machine to "accept facsimile transmission of a judgment, decree or order filed in such manner at the direction of the court." The faxed judgment, decree or order is effective when entered by the clerk. To ensure the permanency of official court records, the original judgment, decree or order must be substituted for the facsimile copy within 14 days of transmission, but this step does not have any bearing on the effectiveness of the faxed document or the time for taking an appeal.

**Addition to Reporter's Notes, 2008 Amendment:** The rule has been amended to reflect Administrative Order 19's requirement that any necessary and relevant confidential information in a case record — a category which includes judgments and decrees — must be redacted. See Addition to Reporter's Notes, 2008 Amendment to Rule of Civil Procedure 5.

## RESEARCH REFERENCES

**Ark. L. Notes.** Gitelman and Watkins, No Requiem for Ricarte: Separation of Powers,

the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

## CASE NOTES

### ANALYSIS

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### In General.

A judgment or decree may not be effective until it has been "entered" as provided in this rule and Arkansas Supreme Court Administrative Order 2. *Standridge v. Standridge*, 298 Ark. 494, 769 S.W.2d 12 (1989), withdrawn by publisher — Ark. —, 771 S.W.2d 262 (1989); *Morrell v. Morrell*, 48 Ark. App. 54, 889 S.W.2d 772 (1994).

This rule, rather than § 16-65-121, con-



trolled the effective date of a divorce decree, and the rule effectively supercedes the statute. *Price v. Price*, 341 Ark. 311, 16 S.W.3d 248 (2000).

In a wrongful death action filed by the special administrator of decedent's estate, the trial court properly granted the doctors' motion to dismiss for lack of subject matter jurisdiction because the suit was filed before the order appointing the administrator was filed with the court clerk and a judicial order is not effective under this rule and Ark. Sup. Ct. Admin. Order No. 2 until it is filed with the clerk of court. *Filyaw v. Bouton*, 87 Ark. App. 320, 191 S.W.3d 540 (2004).

Civil order entered the day after a jury verdict which (1) contained a caption with the designation of the court, the names of the parties, and the case number, (2) stated that the cause came on for a jury trial and that the parties appeared with counsel, (3) noted that a jury was selected, evidence received, and a verdict rendered in the amount of \$5,000 compensatory and \$5,000 punitive, (4) was signed by the trial judge, file-marked by the clerk, and contained in a handwritten notation the date of the jury's verdict, contained the substantive aspects of a judgment and differed from an ordinary, typewritten judgment in form only. *White v. Mattingly*, 89 Ark. App. 55, 199 S.W.3d 724 (2004).

Wrongful-death and survival action brought by the administratrix of the decedent's estate against the medical center was time-barred under § 16-114-203 as the order appointing the administratrix was not effective until it was filed almost two weeks after the complaint was filed; therefore, at the time the administratrix filed this cause of action against the medical center, she was not the administrator of the estate and did not have standing to pursue the claim against the medical center. As such, the complaint a nullity. *Hubbard v. Nat'l Healthcare of Pocahontas, Inc.*, 371 Ark. 444, 267 S.W.3d 573 (2007).

In a case involving a dispute over credit life insurance, an appeal was timely filed under Ark. R. App. P. Civ. 4(a) because the first judgment in the case did not comply with Ark. Sup. Ct. Admin. Order No. 2 where the original of the facsimile-filed judgment was never filed with the trial court. The appeal was timely filed from a second judgment. *Francis v. Protective Life Ins. Co.*, 98 Ark. App. 1, 249 S.W.3d 828 (2007).

After a bench trial, the circuit court often issues a letter opinion, which decides the case, and directs the prevailing party's lawyer to prepare a judgment. This rule authorizes the circuit court to do this or prepare its own judgment. *T&S Mach. Shop, Inc. v. KD Sales*, 2009 Ark. App. 836, — S.W.3d —, 2009 Ark. App. LEXIS 1048 (2009).

### Construction.

"Entry" of a document is distinct from "dated" or "filed": the term "dated" refers to the date the judge signs the order; a document is "filed" on the date the clerk file-stamps it; and a document is "entered" when it is actually recorded on the docket sheet or book by the clerk. In re *Bunt*, 165 B.R. 894 (Bankr. E.D. Ark. 1994).

The policy set forth in this rule, that a judgment or decree is effective only when set forth and entered as provided in Ark. Sup. Ct. Admin. Order No. 2, holds true for orders of the court for extraordinary circumstances. *Republican Party of Ark. v. Kilgore*, 350 Ark. 537, 98 S.W.3d 796 (2002).

Court did not err in finding that appellees timely revived the 1999 decree where they filed their writ of scire facias on May 13, 2009, within ten years from May 25, 1999, the effective date of the decree, because the Arkansas Supreme Court had previously found this rule effectively superseded § 16-65-121, and there was no reason not to extend this finding, which involved the more generally applicable § 16-65-121, to § 16-65-501. *Middleton v. Lockhart*, 2012 Ark. 131, — S.W.3d —, 2012 Ark. LEXIS 154 (Mar. 29, 2012).

### Purpose.

The purpose of this rule is to provide a definite point at which a judgment, be it a decree of divorce or other final judicial act, becomes effective. *Standridge v. Standridge*, 298 Ark. 494, 769 S.W.2d 12 (1989), withdrawn by publisher — Ark. —, 771 S.W.2d 262 (1989).

### Application.

Clarification of findings made pursuant to Ark. R. Civ. P. 52(a) was required in a suit for money allegedly owed because—in a letter opinion issued pursuant to this rule that was not made part of the judgment—the circuit court may have simply reversed the parties' names. The circuit court was entitled to the opportunity to clarify its findings in what was essentially a swearing-match. *T&S Mach. Shop, Inc. v. KD Sales*, 2009 Ark. App. 836, — S.W.3d —, 2009 Ark. App. LEXIS 1048 (2009).

### Consent Judgments.

A consent judgment is a different in nature from a judgment rendered on the merits, and although this rule does not apply to consent judgments, where there is disagreement between the parties as to the form of the judgment or decree, the court should hold a hearing to consider whatever objections there might be. *McIlroy Bank & Trust v. Acro Corp.*, 30 Ark. App. 189, 785 S.W.2d 47 (1990), overruled in part *Carden v. McDonald*, 69 Ark. App. 257, 12 S.W.3d 643 (2000).

### Criminal Judgments.

Copies of a criminal defendant's prior judgments which were not signed are admissible

for enhancement purposes in the penalty phase of trial where they were authenticated by evidence that satisfied the trial court of their validity beyond a reasonable doubt. *Sullinger v. State*, 310 Ark. 690, 840 S.W.2d 797 (1992).

Circuit court erred in revoking defendant's suspended sentence and probation as the conduct underlying the revocations occurred between when he entered his guilty plea and when a judgment and disposition order was entered. The circuit court's oral order pronouncing defendant's sentences was not in effect until the written order was entered. *Garduno-Trejo v. State*, 2010 Ark. App. 779, — S.W.3d —, 2010 Ark. App. LEXIS 812 (Nov. 17, 2010).

### Discretion of Court.

Chancellor did not abuse his discretion in awarding alimony retroactively, for, although the alimony award could not be enforced until the entry of the decree, the date on which it began to accrue was a decision within the broad discretion of the chancellor. *Franklin v. Franklin*, 25 Ark. App. 287, 758 S.W.2d 7 (1988).

Trial court erred in denying plaintiffs' motion for new trial as § 18-11-106(a)(2) required only that the real property owned by plaintiffs be contiguous to the property claimed by adverse possession; thus, the matter was remanded to determine if that was the case. *Roberts v. Boyd*, 94 Ark. App. 345, 230 S.W.3d 301 (2006).

### Divorce Judgment.

A judgment in a divorce action will not be effective until both a docket entry pursuant to former ARCP 79(a) and a separate document setting forth a final decree pursuant to this rule have been made. *Cook v. Lobianco*, 8 Ark. App. 60, 648 S.W.2d 808 (1983) (decision prior to abolition of ARCP 79; now see Administrative Order No. 2).

Where the chancellor in a divorce proceeding entered a notation on the chancery court docket to the effect that the divorce was granted and that the parties had 10 days within which to submit a stipulated property agreement, but the wife died prior to the expiration of the 10-day period and no property agreement had been submitted to the court or filed, the divorce action abated upon the death of the wife and the wife's estate was not entitled to any of the marital property, because at the time of the wife's death the divorce action was still under submission and had not been fully and formally ended. *Cook v. Lobianco*, 8 Ark. App. 60, 648 S.W.2d 808 (1983).

Where divorce was announced from the bench at the close of trial, but the husband died before the decree was entered, the decree entered after the husband's death was a nul-

lity because this rule plainly states a decree is effective only when entered as provided by former ARCP 79(a) [see now Administrative Order No. 2]. *Childress v. McManus*, 282 Ark. 255, 668 S.W.2d 9 (1984).

Revocation of a holographic will that provided that the decedent's estate would pass to his former wife was appropriate because the parties' divorce occurred after the execution of the decedent's holographic will and his bequest was revoked by operation of law. The wife's argument that the divorce occurred on the day of the hearing when the settlement agreement was announced from the bench was improper pursuant to Ark. R. App. P. Civ. 4(d) and this rule because, notwithstanding that there was a lack of evidence of the settlement agreement on March 20, 2000, the divorce decree was not entered until May 23, 2000, after the decedent executed his holographic will; the March 20, 2000, date was of no consequence and the divorce was finalized on May 23, 2000, when the divorce decree was filed with the circuit court. *Langston v. Langston*, 371 Ark. 404, 266 S.W.3d 716 (2007).

Trial court erred in holding that a wife had no marital interest in her former husband's full retirement benefits that had vested during marriage because the decree provided that the parties were to "divide equally the retirement which accrued during the marriage" and the wife was entitled to share in all of the husband's retirement benefits that accrued prior to the date the decree was filed not as of the date of the hearing as the husband claimed. *Allen v. Allen*, 99 Ark. App. 292, 259 S.W.3d 480 (2007).

### Oral.

Despite an oral pronouncement, because there was no written judgment regarding a default judgment entered in a foreclosure action, the case was dismissed without prejudice under Ark. R. Civ. P. 54(b); the record was void of any proof that one alleged interest holder was served, so it was impossible to tell if a default judgment was appropriate. *Nat'l Home Ctrs., Inc. v. Coleman*, 370 Ark. 119, 257 S.W.3d 862 (2007).

Trial court misapplied Ark. R. Civ. P. 15(a) by dismissing a judgment creditor's amended complaint prior to the trial court's entry of judgment under this rule on its prior oral ruling granting summary judgment to the judgment debtor and her transferees. The trial court also erred in denying the creditor's motion under Ark. R. Civ. P. 59. *Mullen v. Shockley*, 2009 Ark. App. 855, — S.W.3d —, 2009 Ark. App. LEXIS 1023 (2009).

Dismissal of the appeal from a finding in favor of a parent and his son in their action after the son was injured in an all-terrain vehicle accident was proper because there were parties who were orally dismissed from the case without entry of subsequent written



orders of dismissal; thus, the supreme court lacked jurisdiction. No written orders of dismissal were entered of record, and because the oral dismissals were not effective until reduced to writing, the order currently appealed was not a final order. *Carr v. Nance*, 2010 Ark. 25, — S.W.3d —, 2010 Ark. LEXIS 37 (Jan. 21, 2010).

#### Notification.

Dismissal of the patient's medical malpractice claim was appropriate because it was untimely under § 16-56-126(a)(1) since Ark. R. Civ. P. 41(a)(1) stated that the one-year period began when the circuit court entered an order granting the non-suit; additionally, this rule did not require courts to notify parties of the entry of an order of judgment. The patient also offered no proof that the hospital's attorney defrauded her or intended to defraud her in any way when he told her that the signing date was the date from which the statute would run. *Collins v. St. Vincent Doctors*, 98 Ark. App. 190, 253 S.W.3d 26 (2007), review denied — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 422 (May 10, 2007), cert. denied 552 U.S. 902, 128 S. Ct. 233, 169 L. Ed. 2d 174 (2007).

#### Reissued.

The trial court did not have jurisdiction to vacate an order and issue a new identical order in order to give the appellant a chance to file a timely appeal; instead, the court should have extended the time to file an appeal pursuant to RAP-Civ 4(b)(3). *Oak Hill*

*Manor v. Arkansas Health Servs. Agency*, 72 Ark. App. 458, 37 S.W.3d 681 (2001).

**Cited:** *Pendergist v. Pendergist*, 267 Ark. 1114, 593 S.W.2d 502 (1980), questioned *Standridge v. Standridge*, 298 Ark. 494, 769 S.W.2d 12 (1989); *Koelzer v. Bagley*, 13 Ark. App. 48, 680 S.W.2d 111 (1984); *Standridge v. State*, 290 Ark. 150, 717 S.W.2d 795 (1986), overruled *Johninson v. State*, 330 Ark. 381, 953 S.W.2d 883 (1997); *Moore v. Moore*, 21 Ark. App. 165, 731 S.W.2d 215 (1987); *Standridge v. Standridge*, 304 Ark. 364, 803 S.W.2d 496 (1991); *Fitzhugh v. Committee on Professional Conduct*, 308 Ark. 313, 823 S.W.2d 896 (1992); *Kelly v. Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992); *Arkansas Dep't of Human Servs. v. Hardy*, 316 Ark. 119, 871 S.W.2d 352 (1994); *Smith v. Quality Ford, Inc.*, 324 Ark. 272, 920 S.W.2d 497 (1996); *Johninson v. State*, 330 Ark. 381, 953 S.W.2d 883 (1997), questioned *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003); *Blaylock v. Shearson Lehman Bros.*, 330 Ark. 620, 954 S.W.2d 939 (1997); *Montgomery Ward & Co. v. Anderson*, 334 Ark. 561, 976 S.W.2d 382 (1998); *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003); *Hankins v. State*, 84 Ark. App. 370, 141 S.W.3d 905 (2004); *Page v. Anderson*, 85 Ark. App. 538, 157 S.W.3d 575 (2004); *Francis v. Protective Life Ins. Co.*, 371 Ark. 285, 265 S.W.3d 117 (2007); *DFH/PJH Enters., LLC v. Caldwell*, 373 Ark. 412, 284 S.W.3d 66 (2008); *Exigence, LLC v. Baylark*, 2010 Ark. 306, — S.W.3d —, 2010 Ark. LEXIS 353 (June 24, 2010).

### Rule 59. New trials.

(a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the claim on the application of the party aggrieved, for any of the following grounds materially affecting the substantial rights of such party: (1) any irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial; (2) misconduct of the jury or prevailing party; (3) accident or surprise which ordinary prudence could not have prevented; (4) excessive damages appearing to have been given under the influence of passion or prejudice; (5) error in the assessment of the amount of recovery, whether too large or too small; (6) the verdict or decision is clearly contrary to the preponderance of the evidence or is contrary to the law; (7) newly discovered evidence material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial; (8) error of law occurring at the trial and objected to by the party making the application. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) *Time for Motion.* A motion for a new trial shall be filed not later than 10 days after the entry of judgment. A motion made before entry of judgment shall become effective and be treated as filed on the day after the judgment

is entered. If the court neither grants nor denies the motion within 30 days of the date on which it is filed or treated as filed, it shall be deemed denied as of the 30th day.

(c) *Form of Motion.* The motion must be in writing setting forth in separate paragraphs the grounds or assignments of error relied upon for a new trial. The grounds mentioned in section (a)(2), (3) and (7) of this rule must be supported by affidavits showing their truth and may be controverted in the same manner.

(d) *Time for Filing Affidavits.* When a motion for a new trial is based upon affidavits, they shall be filed with the motion. The opposing party shall have 10 days after service within which to file opposing affidavits which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(e) *On Initiative of Court.* Not later than 10 days after entry of judgment, the court on its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely filed, for a reason not stated in the motion. In either case, the court shall specify in the order the ground therefor.

(f) *Motion for New Trial Not Necessary for Appeal.* A party who has preserved for appeal an error that could be the basis for granting a new trial is not required to make a motion for new trial as a prerequisite for appellate review of that issue. (Amended May 17, 1982; amended May 16, 1983; amended July 9, 1984, effective September 1, 1984; subsection (a) amended December 5, 1994, effective January 15, 1995; amended January 28, 1999; amended March 13, 2003.)

**Reporter's Notes to Rule 59:** 1. Rule 59 represents a combination of the provisions found in FRCP 59 and features of prior Arkansas law as codified in superseded *Ark. Stat. Ann.* § 27-1901, et seq. (Repl. 1962). This rule will apply to both legal and equitable causes and in equity court replaces the bill of review which is abolished in Rule 60.

2. FRCP 59 does not define the grounds upon which new trials may be granted. Instead, it simply incorporates by reference those grounds traditionally recognized by the federal courts. Rather than refer to a body of law by reference, Section (a) of this rule specifies the grounds upon which a new trial may be granted. These grounds are lifted from superseded *Ark. Stat. Ann.* § 27-1901 (Repl. 1962). Thus, no changes are effected in Arkansas law by Section (a). The final sentence of FRCP 59(a) is made a part of this rule so as to permit the granting of similar relief in cases tried without a jury, whether the claims be legal or equitable. This is implicit in superseded *Ark. Stat. Ann.* § 27-1901 (Repl. 1962), but it is expressly made a part of Rule 59.

3. Section (b) marks a significant departure from prior Arkansas practice. Under this

section, a motion for new trial must be filed within ten days after entry or filing of the judgment. Under prior Arkansas law, as codified in superseded *Ark. Stat. Ann.* § 27-1904 (Repl. 1962), such a motion had to be filed within fifteen days following the verdict or decision, regardless of when the formal judgment or decree was actually filed. *Henderson v. Skerczak*, 247 Ark. 446, 446 S.W.2d 243 (1969), *Peek v. Meadors*, 255 Ark. 347, 500 S.W.2d 333 (1973).

4. Section (c) is not found in FRCP 59, but is practically identical to superseded *Ark. Stat. Ann.* § 27-1905 (Repl. 1962). The purpose of this provision is to insure that a motion based upon the grounds set forth in Section (a)(2) and (a)(3) and (a)(7), is supported by affidavit in order to avoid (prevent) groundless or baseless motions from being filed.

5. Section (d) is taken from Section (c) of FRCP 59. The word "served" has been changed to "filed" in keeping with the overall scheme of these rules.

6. Section (e) is identical to Section (d) of FRCP 59. There was no specific provision under prior Arkansas law which gave the trial



court the authority to order a new trial on its own initiative although the court may have had the inherent power to do so.

7. Section (f) is identical to FRCP 59(e). There was no comparable provision under prior Arkansas law and its effect is to place motions under Rule 59(f) on the same footing, timewise, with motions for new trials.

**Addition to Reporter's Notes, 1982 Amendment:** The word "clearly" was added to Rule 59(a)(6).

**Addition to Reporter's Notes, 1983 Amendment:** Rule 59(f) is deleted. The time within which a trial court may modify, set aside or vacate judgment appears in Rule 60(b).

**Addition to Reporter's Notes, 1984 Amendment:** Rule 59(f) is added to reinstate the principle of superseded Ark. Stat. Ann. § 27-2127.5 (Repl. 1962). The matter of the necessity of a motion for new trial to preserve error for appeal had not been addressed in these rules.

**Addition to Reporter's Notes, 1994 Amendment:** The first sentence of subdivision (a) is amended by substituting the word "claim" for the word "issues." The amendment is intended to reflect case law prohibiting a partial new trial on the issue of damages (or the issue of liability), on the theory that a jury's verdict cannot be divided by the court. *E.g., Smith v. Walt Bennett Ford*, 314 Ark. 591, 864 S.W.2d 817 (1993). As amended,

subdivision (a) does not allow a partial new trial limited to a given issue. However, it expressly authorizes, in cases involving multiple parties or multiple claims, a partial new trial with respect to a single party or single claim.

**Addition to Reporter's Notes, 1999 Amendment:** Subdivision (b) has to be amended by adding a new second sentence that effectively overturns *Benedict v. National Bank of Commerce*, 329 Ark. 590, 951 S.W.2d 562 (1997), which held that a motion for new trial filed before entry of judgment is ineffective. As amended, the rule reflects the practice in the federal courts. The new third sentence provides that a motion for new trial not ruled on by the court within 30 days of its filing (or within 30 days of the date it is treated as filed) is "deemed denied as of the 30th day." This provision also appears in Rule 4(b)(1) of the Rules of Appellate Procedure-Civil but was added here as a reminder to counsel.

In addition, the title of the rule has been modified by striking the words "amendment of judgments." A provision in the original version of the rule dealing with this issue was deleted in 1983. *See Addition to Reporter's Notes, 1983 Amendment.*

**Addition to Reporter's Notes, 2003 Amendment:** Subdivision (f) has been rewritten to reflect the holding in *Stacks v. Jones*, 323 Ark. 643, 916 S.W.2d 120 (1996).

## RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey, Civil Procedure, 14 U. Ark. Little Rock L.J. 285.

## CASE NOTES

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### Construction.

A motion for new trial in a criminal case, made pursuant to ARAP 4(c), is analogous to a motion made pursuant to this rule. Banning

v. State, 43 Ark. App. 106, 861 S.W.2d 119 (1993).

"Entry" of a document is distinct from "dated" or "filed": the term "dated" refers to the date the judge signs the order; a document is "filed" on the date the clerk file-stamps it; and a document is "entered" when it is actually recorded on the docket sheet or book by the clerk. In re Bunt, 165 B.R. 894 (Bankr. E.D. Ark. 1994).

A reopened hearing is not a new trial. Beck v. State, 317 Ark. 154, 876 S.W.2d 561 (1994).

Neither a motion for new trial, nor an appeal arguing that the jury's verdict was against the preponderance of the evidence under subsections (a) and (f) of this rule, tests the sufficiency of the evidence to go to the jury and neither is precluded by ARCP 50(e). Hall v. Grimmer, 318 Ark. 309, 885 S.W.2d 297 (1994).

ARCP 60 may not be used to breathe life into an otherwise defunct motion under this rule. United S. Assurance Co. v. Beard, 320 Ark. 115, 894 S.W.2d 948 (1995).

Although this rule specifically states that a motion for a new trial may be granted where the verdict is clearly contrary to a preponderance of the evidence, such a motion does not test the sufficiency of the evidence to go to the jury; a party must test the sufficiency of the evidence by a motion for a directed verdict or judgment notwithstanding the verdict, not a motion for a new trial. Benton v. Barnett, 53 Ark. App. 146, 920 S.W.2d 30 (1996).

Subdivisions (a)(4) and (a)(5) of this rule are separate and distinct grounds for granting a new trial, and appellant was not required to raise one argument in order to preserve the other. Coca-Cola Bottling Co. v. Priddy, 328 Ark. 666, 945 S.W.2d 355 (1997).

### Applicability.

Jury misconduct may apparently be used in a criminal proceeding as a basis for granting a new trial, pursuant to subdivision (a)(2) of this rule. Trimble v. State, 316 Ark. 161, 871 S.W.2d 562 (1994).

A motion filed as a "Motion for Reconsideration" that claimed the divorce decree was contrary to the preponderance of the evidence was really a motion for a new trial under subdivision (a)(6) of this rule. Slaton v. Slaton, 330 Ark. 287, 956 S.W.2d 150 (1997).

Class representative's motion pursuant to this rule was not the proper motion to challenge the denial of a motion for class certification as no judgment had been entered. Valley v. Nat'l Zinc Processors, Inc., 364 Ark. 184, 217 S.W.3d 832 (2005).

### Additur.

Since Arkansas does not recognize the principle of additur, a motion for additur does not qualify as a motion for judgment nov or a motion for new trial. Routh Wrecker Serv.,

Inc. v. Washington, 335 Ark. 232, 980 S.W.2d 240 (1998).

### Amended Pleadings.

Trial court misapplied Ark. R. Civ. P. 15(a) by dismissing a judgment creditor's amended complaint prior to the trial court's entry of judgment under Ark. R. Civ. P. 58 on its prior oral ruling granting summary judgment to the judgment debtor and her transferees. The trial court also erred in denying the creditor's motion under this rule. Mullen v. Shockley, 2009 Ark. App. 855, — S.W.3d —, 2009 Ark. App. LEXIS 1023 (2009).

### Appeal.

When an appealable order has been entered and a notice of appeal has been filed within 30 days thereafter, the filing of a motion provided for in ARAP 4(b) will extend the time for filing the notice of appeal, and the notice of appeal filed before the time is extended will be ineffective. Mitchell v. Mitchell, 40 Ark. App. 81, 842 S.W.2d 66 (1992).

Under a motion to amend the court's findings of fact or to make additional findings under ARCP 52(b), or a motion for new trial under subsection (b) of this rule, the time to appeal runs from the entry of an order on the motion or from the 30th day after the filing of the motion, whichever comes first. Mitchell v. Mitchell, 40 Ark. App. 81, 842 S.W.2d 66 (1992).

ARAP 4(c) is clear that the failure to act within the 30-day period results in loss of jurisdiction in the circuit court to consider the motion; nor does the reference to certain miscarriages of justice in ARCP 60(b) invest the trial court with jurisdiction to act on a motion for a new trial beyond the 30-day period. Reis v. Yates, 313 Ark. 300, 854 S.W.2d 335 (1993).

Where the notice of appeal was filed before the disposition of appellant's posttrial motion for a new trial, under the express language of ARAP 4(c) it had no effect; it follows that the appellate court lacked jurisdiction to hear the appeal. Banning v. State, 43 Ark. App. 106, 861 S.W.2d 119 (1993).

An appeal asking for a new trial under this rule does not require a motion in the trial court testing whether a verdict was clearly against the preponderance of the evidence. Marvel v. Parker, 317 Ark. 232, 878 S.W.2d 364 (1994).

Under subsection (f) of this rule, it is not necessary to move for a new trial to preserve for appeal any error which could be the basis for granting a new trial; subsection (a) of this rule specifically states that a motion for new trial may be granted for eight reasons, one of which is where the verdict is clearly contrary to the preponderance of the evidence. Hall v. Grimmer, 318 Ark. 309, 885 S.W.2d 297 (1994).

Where appellee's reply brief asks the Su-



preme Court to review the sufficiency of the evidence because the verdict was against the preponderance of the evidence (a matter which is not waived by failure to move for a new trial on that ground), but that argument was not raised in appellee's opening brief, the Supreme Court declined to address it. *Yam's, Inc. v. Moore*, 319 Ark. 111, 890 S.W.2d 246 (1994).

A post-trial motion permitted by ARAP 4(b) may be timely amended, but the amendment will relate back to the date the original post-trial motion was filed and will not extend the time for filing the notice of appeal as provided in ARAP 4(c). *Williams v. Hudson*, 320 Ark. 635, 898 S.W.2d 465 (1995).

Under subsection (f) of this rule, if a party has already properly preserved his or her error concerning any of the grounds listed in subsection (a) of this rule, that party is not required to make a motion for new trial in order to argue those grounds on appeal; nonetheless, because the rules do not provide for plain error, any error argued on appeal must have first been directed to the trial court's attention in some appropriate manner, so that court had an opportunity to address the issue. *Stacks v. Jones*, 323 Ark. 643, 916 S.W.2d 120 (1996).

### Appellate Review.

Trial court's finding in favor of the spouse that a pharmacist incorrectly filled the decedent's prescription resulting in his death was proper where the store's point on appeal was a challenge to the sufficiency of the evidence, ARCP 50(e), and not a motion for a new trial under this rule; because the motion for a new trial was really a challenge to the sufficiency of the evidence supporting the proximate-cause element of the spouse's action for medical injury, it had not been properly preserved. *Wal-Mart Stores, Inc. v. Tucker*, 353 Ark. 730, 120 S.W.3d 61 (2003).

In an action alleging that the tobacco company breached the terms of the Master Settlement Agreement, the tobacco company did not amend its notice of appeal to include an appeal from the denial of its motion to amend or alter the judgment. Thus, its motion to amend or alter the judgment, which included its request to join indispensable parties, could not be addressed on appeal. *Vibo Corp. v. State ex rel. McDaniel*, 2011 Ark. 124, — S.W.3d —, 2011 Ark. LEXIS 122 (Mar. 31, 2011).

### Attorney's Fees.

Motions for attorney's fees are not required to be filed within the ten-day period set out in ARCP 52(b) and subsection (b) of this rule. *Sunbelt Exploration Co. v. Stephens Prod. Co.*, 320 Ark. 298, 896 S.W.2d 867 (1995).

### Burden of Proof.

In a hearing on a motion for a new trial based on newly discovered evidence, the burden is on the movant to establish that he could not with reasonable diligence have discovered and produced the evidence at the time of the trial, that the evidence is not merely impeaching or cumulative, and that the additional testimony would probably have changed the result of the trial. *Piercy v. Wal-Mart Stores, Inc.*, 311 Ark. 424, 844 S.W.2d 337 (1993).

The moving party bore the burden of proving an "appearance of juror misconduct," which would be sufficient to warrant relief under subdivision (a)(2) of this rule. *Rathbun v. Ward*, 315 Ark. 264, 866 S.W.2d 403 (1993).

### Characterization of Motion.

Owner's motion, claiming that a miscarriage of justice occurred when judgment was entered against her because she did not receive notice of the trial, legitimately invoked Ark. R. Civ. P. 60 and was, therefore, timely, as the owner did not complain of any errors occurring during trial nor did she challenge the sufficiency of the evidence at trial; thus, the motion was a motion under Ark. R. Civ. P. 60 and not a motion for a new trial. *Cent. Ark. Found. Homes, LLC v. Choate*, 2011 Ark. App. 260, — S.W.3d —, 2011 Ark. App. LEXIS 272 (Apr. 6, 2011).

### Discretion of Court.

Trial court did not abuse its discretion when the motion for new trial was granted where summary of the material evidence before the judge was a fair summary of the evidence as disclosed by the transcript. *Toney v. Miller*, 268 Ark. 795, 597 S.W.2d 102 (Ct. App. 1980), overruled *Eisner v. Fields*, 67 Ark. App. 238, 998 S.W.2d 421 (1999); *Schrader v. Bell*, 301 Ark. 38, 781 S.W.2d 466 (1989).

This rule gives the trial court the discretionary power to grant a new trial to any party for grounds materially affecting the substantial rights of such party, including error in the assessment of the amount of recovery, whether too large or too small, or where the verdict is contrary to the preponderance of the evidence. *Lawson v. Lewis*, 276 Ark. 7, 631 S.W.2d 611 (1982).

Trial court held not to have abused its discretion. *First State Bank v. Gamble*, 14 Ark. App. 53, 685 S.W.2d 173 (1985); *Penny v. Phillips*, 298 Ark. 481, 769 S.W.2d 4 (1989); *St. Louis S.W. Ry. v. White*, 302 Ark. 193, 788 S.W.2d 483 (1990); *Turrisse v. Crane*, 303 Ark. 576, 798 S.W.2d 684 (1990); *Gipson v. Garrison*, 308 Ark. 344, 824 S.W.2d 829 (1992).

A showing of abuse of discretion is more difficult when a new trial has been granted because there is less basis for a claim of prejudice by the beneficiary of the verdict which was set aside than by one who has

unsuccessfully moved for a new trial. *Adams v. Parker*, 289 Ark. 1, 708 S.W.2d 617 (1986).

Abuse of discretion in granting a new trial means a discretion improvidently exercised, that is, exercised without due consideration, and a showing of abuse is more difficult when a new trial has been granted because the party opposing the motion will have another opportunity to prevail. *Arkansas Power & Light Co. v. Bolls*, 48 Ark. App. 23, 888 S.W.2d 319 (1994).

Although juror's apparently unintentional failure to disclose disqualifying information was not done knowingly, the trial court did not abuse its discretion in granting a new trial. *Arkansas Power & Light Co. v. Bolls*, 48 Ark. App. 23, 888 S.W.2d 319 (1994).

The trial court has limited discretion as it may not substitute its view of the evidence for the jury's except when the verdict is clearly against the preponderance of the evidence; however, the trial court may grant a new trial when a miscarriage of justice has occurred. *Young v. Honeycutt*, 324 Ark. 120, 919 S.W.2d 216 (1996).

While a trial court's discretion is much broader where the question is whether a jury verdict is supported by a preponderance of the evidence, still, its discretion when granting a new trial under other provisions of this rule should not be disturbed absent manifest abuse of discretion, or discretion improvidently exercised. *Suen v. Greene*, 329 Ark. 455, 947 S.W.2d 791 (1997).

#### —Amount of Recovery.

Under subdivision (a)(5) of this rule, the inadequacy of the recovery is a ground for a new trial even where there is no other error; where the argument is the inadequacy of the verdict, the appellate court will sustain the trial court's denial of a new trial unless there is a clear and manifest abuse of discretion. *Warner v. Liebhaber*, 281 Ark. 118, 661 S.W.2d 399 (1983); *Gilbert v. Diversified Graphics*, 286 Ark. 261, 691 S.W.2d 162 (1985); *Fields v. Stovall*, 297 Ark. 402, 762 S.W.2d 783 (1989); *Hamilton v. Russell*, 307 Ark. 478, 821 S.W.2d 35 (1991); *National Bank of Commerce v. McNeill Trucking Co.*, 309 Ark. 80, 828 S.W.2d 584 (1992).

Trial judge does not abuse discretion when a new trial is granted if it could fairly be found that the jury failed to take into account all the elements of the total injury proven, even if it might be possible to explain the verdict on the basis of something like awarding the plaintiff only the proven pecuniary loss or where the jury has been instructed on comparative negligence. *Carr v. Woods*, 294 Ark. 13, 740 S.W.2d 145 (1987).

Although the judgment was in excess of the amount of damages pleaded, there was substantial evidence to support the court's entering judgment as it did; therefore, the trial

court did not err in not allowing a motion for new trial under subsection (a) of this rule. *RLI Ins. Co. v. Coe*, 306 Ark. 337, 813 S.W.2d 783 (1991), cert. dismissed 502 U.S. 1067, 112 S. Ct. 959, 117 L. Ed. 2d 126 (1992).

Trial court erred in disallowing as damages the medical expense attributable to victim's heart examination. *National Bank of Commerce v. McNeill Trucking Co.*, 309 Ark. 80, 828 S.W.2d 584 (1992).

#### —Contrary to Preponderance of Evidence.

The trial court has some discretion in setting aside a jury verdict, but not the broad discretion that has been heretofore recognized. The trial court is not to substitute its view of the evidence for that of the jury's unless the jury verdict is found to be clearly against the preponderance of the evidence. *Clayton v. Wagnon*, 276 Ark. 124, 633 S.W.2d 19 (1982); *Ray v. Green*, 310 Ark. 571, 839 S.W.2d 515 (1992).

Trial court did not abuse discretion in finding that verdict was clearly against preponderance of evidence. *Dyer v. Woods*, 289 Ark. 127, 710 S.W.2d 1 (1986); *Stephens v. Saunders*, 293 Ark. 279, 737 S.W.2d 626 (1987); *Richardson v. Flanery*, 316 Ark. 310, 871 S.W.2d 589 (1994).

Under subdivision (a)(6) of this rule, the trial court has some discretion in the matter, but that discretion is limited, and it may not substitute its view of the evidence for the jury's except when the verdict is clearly against the preponderance of the evidence. *Peoples Bank & Trust Co. v. Wallace*, 290 Ark. 589, 721 S.W.2d 659 (1986); *Shelton v. Shelton*, 296 Ark. 212, 752 S.W.2d 758 (1988).

Trial judge abused his discretion where jury's verdict was not clearly against the preponderance of the evidence. *Schrader v. Bell*, 301 Ark. 38, 781 S.W.2d 466 (1989).

Awarding punitive damages while denying compensatory damages, where plaintiff's testimony that she sustained pecuniary injury was not challenged, was contrary to the preponderance of evidence. *Hale v. Ladd*, 308 Ark. 567, 826 S.W.2d 244 (1992).

The test to apply in reviewing the trial court's granting of the motion is whether the judge abused his or her discretion; this standard is not to be confused with that or the review of a trial court's granting of a judgment notwithstanding the verdict, which provides that a court may set aside the jury verdict if: (1) there is no substantial evidence to support the jury's verdict, and (2) the moving party is entitled to a judgment as a matter of law. *Richardson v. Flanery*, 316 Ark. 310, 871 S.W.2d 589 (1994).

Although the trial court is granted some discretion in deciding a motion pursuant to subdivision (a)(6) of this rule that discretion is limited, and the trial court may not substitute



its view of the evidence for the jury's except when the verdict is clearly against the preponderance of the evidence. *Diamond State Towing Co. v. Cash*, 324 Ark. 226, 919 S.W.2d 510 (1996).

In a case involving a fire insurance policy, where the jury could find without clear error that insured had a motive and an opportunity to burn the house, and the jury could likewise infer that insured, or someone at her direction, intentionally set the fire, the trial judge abused his discretion in setting aside the verdict for insurer and setting the case for a new trial. *Nationwide Mut. Fire Ins. Co. v. Bryson*, 60 Ark. App. 293, 962 S.W.2d 824 (1998).

Trial court erred in denying a passenger's new trial motion under subdivision (a)(6) of this rule because the jury's verdict in an amount lower than the passenger's medical bills was against the preponderance of the evidence, given that the motorist admitted liability for such bills and the jury was properly instructed on that fact; in addition, although the motorist's counsel's opening and closing statements were not evidence, the court was not convinced that the trial court was prohibited from considering counsel's concessions concerning the liability for medical bills by the motorist. *Machost v. Simkins*, 86 Ark. App. 47, 158 S.W.3d 726 (2004).

In home buyers' action for breach of contract and fraud, the trial court did not err in denying home buyers' motion for a new trial in light of evidence that sellers assumed there was a septic system on the property because the jury could have found that the sellers did not make a false statement about the septic tank; further, the jury could have found a lack of justifiable reliance based on the fact that the buyers had obtained a professional inspection of the property, the "as-is" clause and other disclaimers, and other parts of the sale documents. *Barringer v. Hall*, 89 Ark. App. 293, 202 S.W.3d 568 (2005).

#### —Newly Discovered Evidence.

Whether to grant a motion for new trial based upon newly discovered evidence under subdivision (a)(7) of this rule is within the sound discretion of the trial court, which will not be reversed absent an abuse of that discretion. *Liggett v. Church of Nazarene*, 291 Ark. 298, 724 S.W.2d 170 (1987); *Piercy v. Wal-Mart Stores, Inc.*, 311 Ark. 424, 844 S.W.2d 337 (1993).

#### Disposition of Motion.

ARAP 4(c), by its terms, is applicable to specific civil motions including a motion for judgment notwithstanding the verdict under ARCP 50(b), a motion to amend findings of fact or to make additional findings of fact under ARCP 52(b), and a motion for a new trial under subsection (b) of this rule; how-

ever, ARAP 4(c) has been applied to criminal matters where the motion made following the judgment of conviction was analogous to a civil motion made under ARCP 50(b), ARCP 52(b), or this rule. *Fuller v. State*, 316 Ark. 341, 872 S.W.2d 54 (1994), questioned *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997).

#### Error in Assessment of Recovery.

Trial court properly granted motion for new trial after jury returned erroneous verdict of damages. *Roberts v. Simpson*, 275 Ark. 181, 628 S.W.2d 308 (1982); *Johnson v. Truck Ins. Exch.*, 285 Ark. 470, 688 S.W.2d 728 (1985); *Adams v. Parker*, 289 Ark. 1, 708 S.W.2d 617 (1986).

Appellate court will not affirm a judgment on the issue of liability and order a partial new trial on the issue of damages. *Hinkle v. Perry*, 296 Ark. 114, 752 S.W.2d 267 (1988).

In at least two cases, the Arkansas Supreme Court reversed and remanded for a partial new trial on damages, but these cases are deviations from the long standing rule that a judgment will not be affirmed on the issue of liability and remanded for a partial new trial on the issue of damages. *Smith v. Walt Bennett Ford, Inc.*, 314 Ark. 591, 864 S.W.2d 817 (1993).

Under subdivision (a)(5) of this rule, error in the assessment of the amount of recovery, whether too large or too small, is a ground for new trial even in the absence of other trial error. *Kempner v. Schulte*, 318 Ark. 433, 885 S.W.2d 892 (1994).

In an eminent domain case, a property owner was entitled to a new trial on the issue of just compensation because the jury's verdict showed that the jury relied on the testimony of an appraiser for the Arkansas State Highway Commission and such testimony was contrary to the physical facts and presented a valuation based on a faulty assumption. The appraiser assumed that the entire tract could be fully accessed from the south, which it could not, and based on such faulty assumption, he reached the conclusion that the tract had not diminished in value by the loss of access to the north. *Ark. State Highway Comm'n v. Wood*, 102 Ark. App. 348, 285 S.W.3d 256 (2008).

#### Error of Law.

Under subdivision (a)(8) of this rule, a new trial may be granted where an error of law occurred at trial and was objected to by the party making the application and that error materially affected the substantial rights of the moving party. *Nazarenko v. CTI Trucking Co.*, 313 Ark. 570, 856 S.W.2d 869 (1993); *Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 894 S.W.2d 897 (1995).

Just as it is within the trial court's discretion to decide pursuant to Evid. Rule 403 that evidence, though relevant, is to be excluded

because it is unfairly prejudicial, under subdivision (a)(8) of this rule it is within the trial court's discretion to grant a new trial on the basis of an error of law occurring at the trial and objected to by the party making the application. *Burnett v. Fowler*, 315 Ark. 646, 869 S.W.2d 694 (1994).

Where the plaintiffs did not ask the trial court to conduct an Evid. Rule 403 weighing of probative value against unfair prejudice, the trial court erred in granting a new trial based on Evid. Rule 403 because that objection was not raised either before or during the trial, and subdivision (a)(8) of this rule provides that a new trial may be granted for an "error of law occurring at the trial and objected to by the party making the application" for the new trial; when the argument is focused solely on relevance, with no consideration of prejudice because of the lack of a weighing objection, there is no support for the ruling that the evidence was not relevant. *Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 894 S.W.2d 897 (1995).

#### **Evidence Not Before Court.**

Where evidence was not before trial court originally and was, therefore, not considered in its findings of fact, such evidence cannot be used as a basis for a motion for a new trial, since a motion for a new trial cannot be used to bring into the record that which does not otherwise appear of record. *Sharp County v. Northeast Ark. Planning & Consulting Co.*, 269 Ark. 336, 602 S.W.2d 627 (1980), modified on other grounds, 275 Ark. 172, 628 S.W.2d 559 (1982).

Trial court did not err in concluding that a taxpayer's raising of a constitutional issue was untimely; at the time the taxpayer filed a motion for a new trial, the trial court had only issued its letter opinion informing the parties on how it was going to rule and, thus, the motion became effective, pursuant to subsection (b) of this rule, the day after the actual judgment was filed, and the motion raised the constitutional issue for the first time, which was not permitted. *Jones v. Double 'D' Props.*, 352 Ark. 39, 98 S.W.3d 405 (2003).

#### **Excessive Damages.**

Implicit in this rule is the trial court's power to order a new trial where the damages are excessive, unless the party in whose favor the damages were awarded agrees and consents to a remittitur. *Williams v. Charles Sloan, Inc.*, 17 Ark. App. 247, 706 S.W.2d 405 (1986); *Shepherd v. Looper*, 293 Ark. 29, 732 S.W.2d 150 (1987).

Compensatory and punitive damages are interwoven, and an error with respect to one requires a retrial of the whole case. *Shepherd v. Looper*, 293 Ark. 29, 732 S.W.2d 150 (1987).

In a wrongful death action brought by the administrator of the deceased patient's estate

against a nursing center and its parent company, the compensatory and punitive damages award, while not the result of passion or prejudice considering the reprehensibility of the nursing center's conduct in neglecting the patient, required either a new trial based on excessive damages or a remittitur of damages. *Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003), cert. denied, 540 U.S. 1012, 124 S. Ct. 532, 157 L. Ed. 424 (2003), cert. denied, 540 U.S. 1004, 124 S. Ct. 535, 157 L. Ed. 2d 409 (2003).

Where nursing facility failed to establish either that the damage awards were excessive and the result of passion or prejudice or that they shocked the conscience of the appellate court, remittitur was denied. *Northport Health Servs. v. Owens*, 356 Ark. 630, 158 S.W.3d 164 (2004).

Court finds it is impossible to say that an award of punitive damages, which the jury could have concluded was at least \$5,000 less than the profit gained by the tortfeasers in committing the wrong, exceeds what is necessary to sufficiently deter others from comparable conduct in the future. *Bronakowski v. Lindhurst*, 2009 Ark. App. 513, 324 S.W.3d 719 (2009).

Verdict granting appellees punitive damages of \$25,000 did not shock the court's conscience, given that (1) the jury could have concluded that appellants knowingly cleared four-tenths of an acre of appellees' lot, (2) testimony supported the conclusion that appellants knew the location of the property boundaries and corners, (3) the removal of trees from appellees' lot improved appellants' view of the lake, and (4) the jury could have found that the \$30,000 profit realized by appellants on the sale of their home was a direct result of their intentional wrongful clearing of appellees' property. *Bronakowski v. Lindhurst*, 2009 Ark. App. 513, 324 S.W.3d 719 (2009).

In considering appellants' claim of error regarding the denial of their motions for a new trial and remittitur, while appellants did not stipulate to the specific amount of damages they caused during earlier incidents, this was irrelevant to the court's review; the due process notice requirement for punitive damage purposes is satisfied when, prior to engaging in the conduct, the potential sanctions are known. *Bronakowski v. Lindhurst*, 2009 Ark. App. 513, 324 S.W.3d 719 (2009).

Trial court did not err in denying appellants a new trial or remittitur regarding a punitive damage award in favor of appellees, as the award was not in excess of federal due process standards, given that (1) appellees suffered economic harm, but the harm was much more than purely economic injury, as appellants cut down approximately 40 percent of appellees' future retirement homesite and the privacy



afforded by the trees was very important to appellees, (2) appellants' action forced appellees to give up their plans to retire to the property and ultimately sell it, (3) the tree cutting was intentional and not an isolated incident, (4) the profit appellants received from the sale of their property was a direct result of the tree clearing on appellees' property, (5) the award was not so grossly excessive as to have violated federal due process, (6) each of appellants were on notice of and could have been charged with a Class C felony of criminal mischief under § 5-38-203(b)(1) with, under § 5-4-201(a)(2), a potential fine of \$10,000, plus a violation of § 15-32-101(a)(1), (2) was a misdemeanor, with a potential fine and jail time, and (8) under § 18-60-102(a)(1), appellants had ample notice that their actions could result in a penalty of \$25,000 punitive damages. *Bronakowski v. Lindhurst*, 2009 Ark. App. 513, 324 S.W.3d 719 (2009).

#### **Failure to Seek Directed Verdict.**

Since a motion for a new trial may be granted under this rule where the verdict is clearly contrary to the preponderance of the evidence, and such a motion does not test the sufficiency of the evidence, the plaintiffs were not precluded by ARCP 50(e) from moving for a new trial because they had failed to move for directed verdict. *Yeager v. Roberts*, 288 Ark. 156, 702 S.W.2d 793 (1986).

In a personal injury case, plaintiff's motion for a new trial did not preserve a sufficiency of the evidence argument for appeal because he did not raise the argument in a motion for directed verdict at the close of all the evidence. *Switzer v. Shelter Mut. Ins. Co.*, 362 Ark. 419, 208 S.W.3d 792 (2005).

#### **Finality.**

The finality principles of this rule and Rule 60 of the Arkansas Rules of Civil Procedure do not apply to class rulings under Rule 23 before there is a decision on the merits. *Fraleay v. Williams Ford Tractor & Equip. Co.*, 339 Ark. 322, 5 S.W.3d 423 (1999).

#### **Form of Motion.**

Although the motion cited ARCP 50 and was entitled motion for judgment notwithstanding the verdict, it clearly stated grounds for a new trial set forth in this rule. *Cornett v. Prather*, 293 Ark. 108, 732 S.W.2d 469 (1987).

Where motion to vacate was in the nature of a motion for a new trial under this rule, it was required to be filed within ten days of judgment; since this was not done, and motion to vacate did not extend the time for filing a notice of appeal under ARAP 4(b), appeal was dismissed as untimely. *Jackson v. Arkansas Power & Light Co.*, 309 Ark. 572, 832 S.W.2d 224 (1992).

Where motion to vacate was couched in terms of a motion under this rule for a new trial on the basis that the verdict was con-

trary to the preponderance of the evidence, motion to vacate was not in reality a Rule 60 motion to prevent a miscarriage of justice. *Jackson v. Arkansas Power & Light Co.*, 309 Ark. 572, 832 S.W.2d 224 (1992).

Trial court had jurisdiction to modify the amount of a child support arrearage owed by a father because the modification was entered 86 days after the entry of the original order, which was within the time frame under Ark. R. Civ. P. 60; the father's motion was not one seeking a new trial under this rule. In his motion, the father did not ask for a new trial, but rather requested that a trial court enter an order reducing his balance; this request did not require the taking of additional evidence, but rather an application of the social security benefits received by the child against the father's total child-support arrearage. *Office of Child Support Enforcement v. Dickens*, 2009 Ark. App. 195, 300 S.W.3d 122 (2009).

#### **Inadequacy of Damages.**

No new trial held called for due to inadequacy of damages. *Waterfield v. Quimby*, 277 Ark. 472, 644 S.W.2d 241 (1982); *Freeman v. Anderson*, 279 Ark. 282, 651 S.W.2d 450 (1983).

Where the jury was instructed as to both compensatory and punitive damages, but was not told that compensatory damages must be awarded before punitive damages could be allowed and the jury returned a verdict for the plaintiff and awarded punitive damages, but did not award plaintiff any compensatory damages, a new trial should have been ordered under subdivision (a)(5) of this rule. *Takeya v. Didion*, 294 Ark. 611, 745 S.W.2d 614 (1988).

Where the primary issue is the alleged inadequacy of the jury's award, the appellate court will sustain the trial court's denial of the motion for new trial unless there is a clear abuse of discretion. *Garrett v. Brown*, 319 Ark. 662, 893 S.W.2d 784 (1995).

In an action arising from a motor vehicle accident, the trial judge did not commit a manifest abuse of discretion in granting a new trial to the plaintiffs where there was evidence of over \$300,000 in damages, but the jury awarded only \$10,000. *Garnett v. Crow*, 70 Ark. App. 97, 14 S.W.3d 531 (2000).

In a medical malpractice action arising from damage caused to the plaintiff's femoral nerve during a hernia operation, the trial court did not abuse its discretion in granting a new trial with regard to the claim by the plaintiff's wife for loss of consortium where the court also granted a new trial to the plaintiff based on a finding that there was a fundamental error in the assessment of his damages. *Tirado v. O'Hara*, 70 Ark. App. 152, 15 S.W.3d 715 (2000).

The trial court's granting of a new trial to the plaintiff was not such a manifest abuse of

discretion, exercised thoughtlessly and without due consideration, so as to warrant reversal where (1) the jury found the defendant negligent in an automobile accident, but awarded no damages, (2) the plaintiff sought medical treatment several weeks after the accident because of persistent headaches, neck and back pain and soreness, commencing the night of the accident, (3) her physician noted swelling and persistent muscle spasms in the plaintiff's neck and lower back, and diagnosed a whiplash-type muscular and ligamentous injury, and (4) the physician testified that a muscle spasm is an objective finding, that a person can not fake a muscle spasm, and that the plaintiff's degenerative disc disease did not play a significant role in her injury. *Hogan v. Holliday*, 72 Ark. App. 67, 31 S.W.3d 875 (2000).

There was substantial evidence to support the jury's verdict because the amount the jury awarded appellant was close to the amount he claimed for past medical expenses and lost wages, but there was no way of knowing how the jury intended to distribute the amount across different categories of damages since the jury was given only a general-verdict form for damages; however, even if the jury did decline to award damages for future pain and suffering, that did not automatically require the verdict to be set aside. *Blake v. Shellstrom*, 2012 Ark. App. 28, — S.W.3d —, 2012 Ark. App. LEXIS 24 (Jan. 4, 2012).

### Issues.

The possibility of a compromise in the jury room links the two issues of damages and liability inseparably together; this is so in spite of the language of this rule suggesting that a trial court may grant a new trial on "all or part of the issues." *Smith v. Walt Bennett Ford, Inc.*, 314 Ark. 591, 864 S.W.2d 817 (1993).

### Jurisdiction.

Pursuant to ARCP 60(b), the trial court loses jurisdiction to rule on the motion for a new trial 90 days after the judgment is filed with the clerk. *Mullen v. Couch*, 288 Ark. 231, 703 S.W.2d 866 (1986).

When a motion under this rule is timely made, the trial court must decide the motion within 30 days of its filing and enter that decision of record; otherwise, the trial court loses jurisdiction to grant the relief requested in the motion. *Upton v. Estate of Upton*, 308 Ark. 677, 828 S.W.2d 827 (1992).

Where appellee's August 9 motion for j.n.o.v. or a new trial was timely filed within 10 days of the August 5 judgment, but the trial court neither granted nor denied the motion within 30 days of its filing, so that the motion was deemed denied as of the 30th day, September 8, the trial court's failure to act on appellee's motion within 30 days of its filing

resulted, by operation of law, in that court's loss of jurisdiction to decide the motion; therefore, the September 23 order purporting to grant appellee's j.n.o.v. motion was void and of no effect. *Farm Bureau Mut. Ins. Co. v. Sudrick*, 49 Ark. App. 84, 896 S.W.2d 452 (1995).

### Juror Affidavit.

Ark. R. Evid. 606(b) and case law prohibited the trial court from considering a juror's affidavit submitted by a party in support of a new trial motion under this rule; because the party had not alleged that some outside influence affected the jury's deliberations, the court could not consider the juror's affidavit or its allegations that the jury was confused when it awarded the party only a certain amount in damages. *Machost v. Simkins*, 86 Ark. App. 47, 158 S.W.3d 726 (2004).

In a condemnation case, the trial court properly struck juror affidavits as being barred by Ark. R. Evid. 606(b) and denied appellants' motion for new trial based on jury misconduct; the trial court properly refused to consider the affidavits because they referred to events occurring during the internal deliberations of the jury and, without the juror affidavits, appellants could not prove jury misconduct. *D.B.&J. Holden Farms, Ltd. P'ship v. Ark. State Highway Comm'n*, 93 Ark. App. 202, 218 S.W.3d 355 (2005).

### Jury Misconduct.

When a jury returns a general verdict, and special interrogatories concerning liability or damages are not requested, such a verdict could be based on a finding of no liability, no damages, or both, and the court will not speculate on the basis for the jury's verdict. *Esry v. Carden*, 328 Ark. 153, 942 S.W.2d 846 (1997).

In an action to recover damages for injuries sustained by the plaintiff at the hands of security guards at a nightclub, the nightclub was not entitled to a new trial on the basis of evidence that, on the evening the trial concluded, the son of a juror, who had been twice thrown out of the nightclub, was in the nightclub and boasted that his mom had voted against the nightclub as there is no evidence of the son's age, whether or not he lived with his mother, that the mother knew that her son had been ejected from the nightclub, or even that she knew he went there. *Kristie's Katering v. Ameri*, 72 Ark. App. 102, 35 S.W.3d 807 (2000).

Although a trial court improperly considered parts of affidavits that referred to the internal deliberations of the jury on matters not relating to extraneous information thereby violating Ark. R. Evid. 606, the trial court's order awarding appellee a new trial pursuant to subdivision (a)(2) of this rule in appellant's personal injury action against ap-



pellee was affirmed because it was not manifest abuse of discretion for the trial court to conclude that the jury failed to follow its instructions and considered evidence not introduced into evidence. *Campbell v. Hankins*, 2009 Ark. App. 479, 324 S.W.3d 358 (2009).

Circuit court did abuse its discretion in denying appellant's motion for new trial due to jury misconduct because alleged juror statements about insurance could not have impugned a fact presented by any party concerning insurance coverage since the issue of health insurance was never introduced at trial; even if the alleged juror statements concerning health insurance were assumed to be true and considered to be extraneous, they were insufficient to show a reasonable possibility of prejudice. *Blake v. Shellstrom*, 2012 Ark. App. 28, — S.W.3d —, 2012 Ark. App. LEXIS 24 (Jan. 4, 2012).

Circuit court did err in denying appellant's motion for new trial due to jury misconduct because there was no evidence of juror misconduct upon which to grant a new trial; Ark. R. Evid. 606 prohibited the circuit court from considering appellant's affidavits because if the unnamed jurors referred to in appellant's affidavits did make the statements attributed to them, they did not violate any court instruction in doing so, and, in fact, could be seen as following the circuit court's instruction to consider all of the evidence in light of their own observations and life experiences. *Blake v. Shellstrom*, 2012 Ark. App. 28, — S.W.3d —, 2012 Ark. App. LEXIS 24 (Jan. 4, 2012).

### Misconduct.

Motion for new trial properly granted for jury misconduct. *Zimmerman v. Ashcraft*, 268 Ark. 835, 597 S.W.2d 99 (1980) (involved in litigation); *Moody Equip. & Supply Co. v. Union Nat'l Bank*, 273 Ark. 319, 619 S.W.2d 637 (1981) (flirting with witness).

The length of time of jury deliberation is not, of itself, a ground for a new trial. *Wingfield v. Page*, 278 Ark. 276, 644 S.W.2d 940 (1983).

Subdivision (a)(2) and subsection (c) of this rule are the proper provisions under which motion for new trial should be presented to the trial court where motion alleges that trial court erred in denying motion for mistrial or for continuance because of alleged bias of juror. *Franklin v. Estate of Griffith*, 11 Ark. App. 124, 666 S.W.2d 723 (1984).

Misconduct of the "prevailing party" includes misconduct of the prevailing party's attorney. *Hacker v. Hall*, 296 Ark. 571, 759 S.W.2d 32 (1988).

### New Trial Improper.

Motion for new trial held properly denied. *Taylor v. Boswell*, 272 Ark. 354, 614 S.W.2d 505 (1981); *Johnson v. Cross*, 281 Ark. 146,

661 S.W.2d 386 (1983); *Arkansas Kraft Corp. v. Coble*, 15 Ark. App. 25, 688 S.W.2d 319 (1985); *Cox v. Farrell*, 292 Ark. 177, 728 S.W.2d 954 (1987); *Dedman v. Porch*, 293 Ark. 571, 739 S.W.2d 685 (1987); *Knoles v. Salazar*, 298 Ark. 281, 766 S.W.2d 613 (1989); *Reddish v. Goseland*, 301 Ark. 527, 785 S.W.2d 205 (1990); *Weber v. Bailey*, 302 Ark. 175, 787 S.W.2d 690 (1990); *Olmstead v. Moody*, 311 Ark. 163, 842 S.W.2d 26 (1992); *Arkansas Dep't of Human Servs. v. Couch*, 38 Ark. App. 165, 832 S.W.2d 265 (1992); *Bell v. Darwin*, 327 Ark. 298, 937 S.W.2d 665 (1997).

One who is surprised by his adversary's testimony is not entitled to a new trial on that ground if, rather than asking for a postponement to secure necessary evidence, he reserves his plea of surprise as a "masked battery in the effort for a new trial." *Thorne v. Magness*, 34 Ark. App. 39, 805 S.W.2d 95 (1991).

The fact that new information has been discovered which might merely impeach or otherwise test the credibility of a witness is not sufficient reason to warrant a new trial. *Piercy v. Wal-Mart Stores, Inc.*, 311 Ark. 424, 844 S.W.2d 337 (1993).

The fact that appellant failed to call a witness at trial is not an adequate ground under subsection (a) of this rule for granting a new trial. *O'Flarity v. O'Flarity*, 42 Ark. App. 5, 852 S.W.2d 150 (1993).

The verdict was not clearly contrary to the preponderance of the evidence for each of the possible findings. *Marvel v. Parker*, 317 Ark. 232, 878 S.W.2d 364 (1994).

Where substantial evidence supported the jury's verdicts, the verdicts were not contrary to the law, and there was no abuse of discretion in the denial of a motion for new trial based on juror misconduct, the trial court did not err in denying the motion for new trial. *Griffin v. Woodall*, 319 Ark. 383, 892 S.W.2d 451 (1995).

Where party's nonappearance at trial was the result of his own failure to keep himself informed of the progress of the action, he did not demonstrate entitlement to a new trial under any of the reasons listed in this rule. *White v. White*, 50 Ark. App. 240, 905 S.W.2d 485 (1995).

The party bearing the burden of proof in a negligence case held not entitled to a judgment notwithstanding the verdict or a new trial where the other party presented substantial evidence to support the jury's verdict. *Russell v. Colson*, 326 Ark. 112, 928 S.W.2d 794 (1996).

Where both parties' counsels were vigorously and professionally advocating the interests of their clients and the trial court maintained a firm control over the proceeding in accordance with the civil procedure rules, there was no showing of prejudice against

plaintiff's rights to a fair trial resulting from the actions of defendant's attorney; absent any showing that defense counsel's conduct prevented plaintiff from having a fair trial, the trial court's action in ordering a new trial for that reason was a manifest abuse of discretion. *Suen v. Greene*, 329 Ark. 455, 947 S.W.2d 791 (1997).

Court erred in granting a new trial to plaintiffs on the basis of surprise where they did not show that they were prejudiced by the testimony of the witness called, and where they did not object to the testimony or request a curative instruction. *Jones Rigging & Heavy Hauling, Inc. v. Parker*, 347 Ark. 628, 66 S.W.3d 599 (2002).

New trial based on the moving parties' surprise, under subdivision (a)(3) of this rule, was erroneously granted because the moving parties did not object to the surprising testimony when it was given and did not move for a continuance; the moving parties were responsible for introducing the surprising evidence, they did not establish that their right to a fair trial was materially affected, and they did not show the surprise could have been prevented through the exercise of ordinary prudence. *Jones Rigging & Heavy Hauling, Inc. v. Parker*, 347 Ark. 628, 66 S.W.3d 599 (2002).

In a medical malpractice action, the trial court properly denied the patient's motion for new trial as the evidence was substantial to support the verdict in favor of the surgeon; there was extensive testimony on both sides and substantial evidence for the jury to find in the surgeon's favor. *Webb v. Bouton*, 350 Ark. 254, 85 S.W.3d 885 (2002).

Trial court did not err when it denied individual's motion for a new trial because it was well settled that the weight and value of testimony was a matter that was in the exclusive province of the jury; hence, while it was clear from the evidence that there was an accident, that the driver's vehicle struck the individual's vehicle, and that the individual suffered injuries, where the jury declined to find the company and the driver negligent under the facts and law given to them, there was substantial evidence to support the jury's finding. *Dovers v. Stephenson Oil Co.*, 354 Ark. 695, 128 S.W.3d 805 (2003).

Where the separate answers to interrogatories rendered by the jury were not conflicting, it was an abuse of discretion for the trial court to set aside the jury verdict. *Randles v. Cole*, 80 Ark. App. 334, 96 S.W.3d 768 (2003).

Trial court did not err by denying bank's motion for a new trial because, pursuant to the doctrine of election of remedies, the jury should only have been instructed on one of bank's theories of recovery as the damages

and injury claimed on both were the same. *Regions Bank v. Griffin*, 364 Ark. 193, 217 S.W.3d 829 (2005).

Circuit court did not err in denying buyer's motion for a new trial where there was substantial evidence to support the jury's verdict; the jury was presented with five theories of liability, however, it determined that buyer failed to meet her burden of proof on all of them. *Thomas v. Olson*, 364 Ark. 444, 220 S.W.3d 627 (2005).

Administratrix was not entitled to a new trial under subdivision (a)(5) of this rule where, although the health care corporation was found negligent for allowing a sexual assault of the victim by another resident to occur, the jury did not award damages for the assault; the administratrix did not allege an assault action but, rather, pled and tried the case as a negligence action against the corporation, and there was testimony from which the jury could have reasonably concluded that the victim did not suffer any injury as a result of the incident with the other resident. *Fritz v. Baptist Mem. Health Care Corp.*, 92 Ark. App. 181, 211 S.W.3d 593 (2005).

Daughter's motion for a new trial was properly denied where the daughter did not argue that she was forced to accept a new juror who should have been excused for cause; as for her argument that the trial court should have conducted an inquiry into the venireman's answers on voir dire, she did not ask the court to do so, nor did she ask the court to allow her to probe further into the venireman's responses or lack thereof. *Scott v. Cent. Ark. Nursing Ctrs., Inc.*, 101 Ark. App. 424, 278 S.W.3d 587 (2008).

Court did not abuse its discretion in refusing to reopen the record or in denying the motion for new trial, because while § 9-12-315(a)(1) required that property be valued at the time of the divorce, it did not require the trial court to reopen the record or set aside a decree and hold an additional hearing for the purpose of receiving the most up-to-date evidence. *Dew v. Dew*, 2012 Ark. App. 122, — S.W.3d —, 2012 Ark. App. LEXIS 233 (Feb. 8, 2012).

### New Trial Proper.

Order granting new trial affirmed. *Carr v. Woods*, 294 Ark. 13, 740 S.W.2d 145 (1987); *Worthington v. Roberts*, 304 Ark. 551, 803 S.W.2d 906 (1991).

Trial court's denial of motion for new trial reversed. *Fisher Trucking, Inc. v. Fleet Lease, Inc.*, 304 Ark. 451, 803 S.W.2d 888 (1991).

The trial court properly ruled that the jury's finding in favor of the defendant in a car accident personal injury case was clearly against the preponderance of the evidence and properly granted plaintiff's motion for a new trial. *Bristow v. Flurry*, 320 Ark. 51, 894 S.W.2d 894 (1995).



Appellant, against whom a default judgment was entered, held entitled to a new trial on the ground that its attorney was allowed to withdraw from the case in violation of ARCP 64. *Jones-Blair Co. v. Hammett*, 326 Ark. 74, 930 S.W.2d 335 (1996).

In a tort suit arising from an automobile accident, the trial court did not abuse its discretion in granting a motion for a new trial when the evidence did not support the jury's apportionment of liability among the drivers; the trial court may grant a new trial when a miscarriage of justice has occurred. *Carlew v. Wright*, 356 Ark. 208, 148 S.W.3d 237 (2004).

Trial court did not err in granting the bank's motion for a new trial where the trial court previously excluded evidence based on its mistaken determination that neither the date of filing nor the first day of trial should be included in the 14-day notice period pursuant to § 16-46-108. *Phelan v. Discover Bank*, 361 Ark. 138, 205 S.W.3d 145 (2005).

#### **Newly Discovered Evidence.**

Appellant's discovery, that a hearing was held, that appellant's former attorney failed to inform the appellant of the hearing date, and that the hearing took place in their absence, did not constitute "newly discovered evidence." *Winans v. Winans*, 55 Ark. App. 272, 934 S.W.2d 546 (1996).

Summary judgment was improperly vacated more than 7 months after it was entered because none of the conditions under Ark. R. Civ. P. 60(c) were met; an individual was not constructively served, there was no misprision of the clerk based on the fact that there was no mistake apparent on the record, there was no fraud or misrepresentation, and there was no grounds for a new trial based on newly discovered evidence. *New Holland Credit Co. v. Hill*, 362 Ark. 329, 208 S.W.3d 191 (2005).

Trial court did not abuse its discretion in granting a new trial under subdivision (a)(7) of this rule to an owner who was injured in an accident arising out of a well-drilling based on the well driller's employee's post-trial recollection that some of his trial testimony had been inaccurate, because the evidence was not merely impeaching. *W.E. Pender & Sons, Inc. v. Lee*, 2010 Ark. 52, — S.W.3d —, 2010 Ark. LEXIS 74 (Feb. 4, 2010).

#### **Prejudice.**

When a new trial is requested because of juror misconduct under the rubric of subsection (a) of this rule, the moving party must show that the party's rights have been materially affected by demonstrating that a reasonable possibility of prejudice has resulted from the misconduct; prejudice, in such instances, is not presumed. *Diemer v. Dischler*, 313 Ark. 154, 852 S.W.2d 793 (1993), limited *Druckenmiller v. Cluff*, 316 Ark. 517, 873 S.W.2d 526 (1994).

In a medical malpractice case, where the jury returned a verdict absolving defendant of medical malpractice, the trial court improperly granted a new trial; the court's decision was based on side-bar comments by defendant's counsel, and its determination that it had erred in not striking the testimony of one expert witness and that it had erred in refusing to declare a mistrial after another witness for defendant gave unresponsive answers in testimony, but these irregularities did not meet the standard set forth in this rule in that they did not materially affect, or show a reasonable possibility of prejudice to, plaintiff's right to a fair trial. *Suen v. Greene*, 329 Ark. 455, 947 S.W.2d 791 (1997).

#### **Response to Motion.**

This rule does not require a response to a motion for a new trial, and there is no civil provision or precedent which would allow a new trial by default. *Transit Homes, Inc. v. Bellamy*, 282 Ark. 453, 671 S.W.2d 153 (1984), overruled *Peters v. Pierce*, 314 Ark. 8, 858 S.W.2d 680 (1993).

Where trial court did not rule on a motion for a new trial within 30 days, it was deemed denied pursuant to operation of law. *Olmstead v. Moody*, 311 Ark. 163, 842 S.W.2d 26 (1992).

It is within the trial court's discretion whether to allow a reply to a response to a motion for a new trial. *Adams v. HLC Hotels, Inc.*, 328 Ark. 108, 941 S.W.2d 424 (1997).

#### **Standard of Review.**

When the trial court grants a motion for a new trial, finding the verdict to be contrary to the preponderance of the evidence, the test on review is whether the trial court abused its discretion; but when the trial court denies the motion for a new trial, the test is whether the verdict is supported by substantial evidence, giving the verdict the benefit of all reasonable inferences permissible under the proof. *Ferrell v. Whittington*, 271 Ark. 750, 610 S.W.2d 572 (1981); *Landis v. Hastings*, 276 Ark. 135, 633 S.W.2d 26 (1982); *Schaeffer v. McGhee*, 286 Ark. 113, 689 S.W.2d 537 (1985); *Lamons v. Croft*, 290 Ark. 341, 719 S.W.2d 426 (1986); *Schuster's, Inc. v. Whitehead*, 291 Ark. 180, 722 S.W.2d 862 (1987); *Scott v. McClain*, 296 Ark. 527, 758 S.W.2d 409 (1988).

Appellate court will not reverse a trial court's denial of a motion for a new trial if the decision is supported by substantial evidence. *Service Communications, Inc. v. Wells*, 279 Ark. 378, 651 S.W.2d 100 (1983).

On appeal, when the motion for a new trial has been denied, the appellate court will affirm if there is substantial evidence to support the verdict; in determining whether substantial evidence exists, the evidence is viewed in the light most favorable to the appellee. *Johnson v. Cross*, 281 Ark. 146, 661

S.W.2d 386 (1983); *Schaeffer v. McGhee*, 286 Ark. 113, 689 S.W.2d 537 (1985); *Schuster's, Inc. v. Whitehead*, 291 Ark. 180, 722 S.W.2d 862 (1987); *Ray v. Green*, 310 Ark. 571, 839 S.W.2d 515 (1992).

The granting of a new trial addresses itself to the sound discretion of the trial court, and appellate court will not reverse unless it appears that the trial court abused its discretion. *Franklin v. Estate of Griffith*, 11 Ark. App. 124, 666 S.W.2d 723 (1984); *Adams v. Parker*, 289 Ark. 1, 708 S.W.2d 617 (1986); *Bryant v. Sorrells*, 293 Ark. 276, 737 S.W.2d 450 (1987).

The test on review, where the motion is denied, is whether the verdict is supported by substantial evidence. It is only where there is no reasonable probability that the incident occurred according to the version of the prevailing party or where fair-minded men can only draw a contrary conclusion that a jury verdict should be disturbed. *Pineview Farms, Inc. v. A.O. Smith Harvestore, Inc.*, 298 Ark. 78, 765 S.W.2d 924 (1989).

When the primary issue is the alleged inadequacy of the award, rather than a question of liability, the supreme court will sustain the trial judge's denial of a new trial unless there is a clear and manifest abuse of discretion. *Smith v. Pettit*, 300 Ark. 245, 778 S.W.2d 616 (1989).

In a review of the trial court's discretion in denying a new trial because of alleged inadequacy, an important consideration is whether a fair-minded jury might reasonably have fixed the award at the challenged amount. *Smith v. Pettit*, 300 Ark. 245, 778 S.W.2d 616 (1989).

On appellate review of a trial court's denial of a motion to set aside a jury verdict, where the verdict concerns the issue of liability, the standard of review is whether the verdict is supported by substantial evidence. *Harper v. Clark Equip. Co.*, 300 Ark. 413, 779 S.W.2d 175 (1989).

If the trial judge denies the motion for a new trial, appellate court will affirm if there is any substantial evidence to support the verdict. If the trial judge grants the motion for a new trial, appellate court will affirm if he did not abuse his discretion in finding that the verdict was clearly against the preponderance of the evidence. *Schrader v. Bell*, 301 Ark. 38, 781 S.W.2d 466 (1989).

When the primary issue on a motion for new trial is the alleged miscalculation of the damages and not a question of liability, we sustain the trial judge's denial of a new trial unless there is a clear and manifest abuse of discretion. *Fisher Trucking, Inc. v. Fleet Lease, Inc.*, 304 Ark. 451, 803 S.W.2d 888 (1991).

When reviewing a trial court's refusal to set aside a jury verdict on liability, the evidence is

viewed in the light most favorable to the appellee, and will be affirmed if there is substantial evidence to support the verdict. Substantial evidence is evidence of sufficient force and character to compel a conclusion one way or the other with reasonable and material certainty; it must force the mind to pass beyond suspicion or conjecture. *Minerva Enters., Inc. v. Howlett*, 308 Ark. 291, 824 S.W.2d 377 (1992).

The test on review of a motion for a new trial, where the motion is denied, is whether the verdict is supported by substantial evidence, giving the verdict the benefit of all reasonable inferences permissible under the proof. *Piercy v. Wal-Mart Stores, Inc.*, 311 Ark. 424, 844 S.W.2d 337 (1993); *Gilbert v. Shine*, 314 Ark. 486, 863 S.W.2d 314 (1993).

When a motion for a new trial is made to the trial court, the test applied is whether the judgment is against the preponderance of the evidence; the test on review is whether the judgment is supported by substantial evidence, giving the judgment the benefit of all reasonable inferences permissible under the proof. *Harper v. Shackelford*, 41 Ark. App. 116, 850 S.W.2d 15 (1993).

The decision to grant a new trial based on newly discovered evidence is a decision within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Roetzel v. Brown*, 321 Ark. 187, 900 S.W.2d 185 (1995).

Where state had been ordered to refund child support payments, and trial court refused to grant state's motion for a new trial, supreme court would review the proceedings to determine if the decision of the trial court was clearly contrary to the preponderance of the evidence or was contrary to law, under subdivision (a)(6) of this rule. *State v. Phillippe*, 323 Ark. 434, 914 S.W.2d 752 (1996).

In reviewing the trial court's granting of a motion for new trial, the test is whether the judge abused his or her discretion; this standard requires a showing of "clear" abuse or "manifest" abuse by acting improvidently or thoughtlessly without due consideration. *Young v. Honeycutt*, 324 Ark. 120, 919 S.W.2d 216 (1996).

The test that the supreme court applies in reviewing the trial court's granting of the motion is whether the trial court abused its discretion; a showing of abuse of discretion is more difficult when a new trial has been granted because the party opposing the motion will have another opportunity to prevail. *Diamond State Towing Co. v. Cash*, 324 Ark. 226, 919 S.W.2d 510 (1996).

Generally, where the primary issue on appeal is the alleged inadequacy of the jury's award, the appellate court will affirm the denial of a motion for new trial absent a clear



and manifest abuse of discretion, and will affirm if a fair-minded jury could have reasonably fixed the award at the challenged amount. *Depew v. Jackson*, 330 Ark. 733, 957 S.W.2d 177 (1997).

When a motion for new trial is made on the ground that the verdict was clearly against the preponderance of the evidence and is denied by the trial court (see subdivision (a)(6) of this rule), the appellate court will affirm if there is substantial evidence; in examining whether evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty to support the verdict exists, the verdict is given the benefit of all reasonable inferences permissible in accordance with the proof. *Depew v. Jackson*, 330 Ark. 733, 957 S.W.2d 177 (1997).

#### **Timeliness.**

Where trial was held on October 3, 1995, and the appellant filed a motion for a new trial on October 12, 1995, but the decree was filed on November 2, 1995, the notice of appeal was due on December 4; although the chancellor denied the motion for new trial on November 14, 1995, the motion filed before the decree was untimely and ineffective, and thus the notice of appeal from the November 2 decree and the November 14 denial, filed on December 11, was untimely. *Breckenridge v. Ashley*, 55 Ark. App. 242, 934 S.W.2d 536 (1996).

Where appellant failed to file her motion for rehearing within the ten-day period provided in this section, the motion failed to extend her time to file a notice of appeal under RAP-Civ 4(c). *Benedict v. National Bank of Commerce*, 329 Ark. 590, 951 S.W.2d 562 (1997).

The timeliness provisions of the rule did not apply to an appeal by the Department of Human Services from an order in an action in which it was not a party. *Arkansas Dep't of Human Servs. v. R.P.*, 333 Ark. 516, 970 S.W.2d 225 (1998).

Reversal was not required where (1) the appellant's abstract reflected only that a motion for a new trial was timely filed with the clerk and that the appellee filed a response after the 30 days in which the trial court had to act on the motion had passed, (2) there was no indication in the abstract or in the appellant's argument that he did more than simply file the motion, at a time when he knew the trial judge had recused, and (3) there was no indication that the appellant ever called the motion to the attention of any judge or requested that any action be taken on it. *Whisnant v. Whisnant*, 68 Ark. App. 298, 6 S.W.3d 808 (1999).

ARCP 6 provides that a party may not obtain an extension of time from the trial court to file a posttrial motion under subsection (b) of this rule; consequently the time in

which a notice of appeal must be filed is also not extended. *Moon v. City*, 344 Ark. 500, 42 S.W.3d 459 (2001).

Circuit court was without jurisdiction to hold a hearing and to enter an order on January 5, 2006, on accident victim's motion for new trial because the order was entered thirty-one days after the motion was filed; therefore, the appellate court lacked jurisdiction to consider the issues, and the appeal was dismissed. *Cincinnati Ins. Co. v. Johnson*, 367 Ark. 468, 241 S.W.3d 264 (2006).

Because seller failed to file a timely motion for judgment notwithstanding the verdict and a new trial in purchaser's fraud action against it, the time to file its notice of appeal was not extended under Ark. R. App. P. Civ. 4(b), and the failure to file a notice of appeal within 30 days of the August 3, 2005, judgment required the appellate court to dismiss the appeal because it lacked jurisdiction to consider it. *River Valley Motors, Inc. v. Ramey*, 96 Ark. App. 180, 239 S.W.3d 555 (2006).

#### **Untimely Request.**

A request for findings of fact and conclusions of law filed after an order has become final cannot be used as a means of resurrecting a claim already barred by finality. *Majors v. Pulaski County Election Comm'n*, 287 Ark. 208, 697 S.W.2d 535 (1985).

Where appellant's attorney assumed responsibility for not verifying that the judgment and commitment order had been filed prior to the untimely filing of the motion for new trial, the appellate court treated the motion for rule on the clerk as a motion for belated appeal, which it granted. *Webster v. State*, 320 Ark. 393, 896 S.W.2d 890 (1995).

Circuit court was without jurisdiction to enter an order granting an adoption petition because the circuit court erred in granting a motion filed by a mother and stepfather under Ark. R. Civ. P. 60(a) to vacate a prior order denying the petition and to grant the adoption based on an erroneous finding of fact in its original order when a motion for a new trial under this rule, not a motion under Rule 60, was the relief the mother and stepfather were seeking; because the motion for reconsideration was in fact a motion for a new trial under this rule the motion was not timely since it was not filed within ten days of the entry of the order denying the adoption petition, and the failure of the mother and stepfather to file their motion within ten days meant that the circuit court was without jurisdiction to enter the subsequent order. *Stickels v. Heckel*, 2009 Ark. App. 829, — S.W.3d —, 2009 Ark. App. LEXIS 1038 (2009).

#### **Written Record.**

If parties plan to base their arguments on the timeliness of the notice of appeal from the

denial of a new trial motion upon a “written record” that a hearing has been set or held, the “written record” must be filed and made an official record of the court within 30 days from the making of the motion for a new trial. *Brittenum & Assocs. v. Mayall*, 286 Ark. 427, 692 S.W.2d 248 (1985).

**Cited:** *McDonald v. Treat*, 268 Ark. 52, 593 S.W.2d 462 (1980); *Arkansas State Hwy. & Transp. Dep’t v. Magnolia Leasing Corp.*, 269 Ark. 871, 601 S.W.2d 267 (1980); *Taylor v. Funk*, 270 Ark. 912, 606 S.W.2d 605 (1980); *Funk v. Deavers*, 3 Ark. App. 56, 621 S.W.2d 882 (1981); *Russell v. Russell*, 275 Ark. 193, 628 S.W.2d 315 (1982); *Bass v. Koller*, 276 Ark. 93, 632 S.W.2d 410 (1982); *First State Bank v. Shaver*, 279 Ark. 30, 648 S.W.2d 453 (1983); *Twin City Bank v. Isaacs*, 283 Ark. 127, 672 S.W.2d 651 (1984); *Saber Mfg. Co. v. Thompson*, 286 Ark. 150, 689 S.W.2d 567 (1985); *Reynolds v. Spotts*, 286 Ark. 335, 692 S.W.2d 748 (1985), criticized *Monk v. Farmers Ins. Co.*, 290 Ark. 38, 716 S.W.2d 201 (1986); *Lamons v. Croft*, 290 Ark. 341, 719 S.W.2d 426 (1986); *Gibson v. Crain*, 19 Ark. App. 57, 716 S.W.2d 782 (1986); *Telcoe Credit Union v. Eackles*, 293 Ark. 149, 732 S.W.2d 477 (1987); *Bell v. McManus*, 294 Ark. 275, 742 S.W.2d 559 (1988); *Newberry v. Johnson*, 294 Ark. 455, 743 S.W.2d 811 (1988); *Wilson v. Kobera*, 295 Ark. 201, 748 S.W.2d 30 (1988); *Duncan v. Mitchell*, 296 Ark. 113, 752 S.W.2d 43 (1988); *Garrett v. Allstate Ins. Co.*, 26 Ark. App. 199, 762 S.W.2d 3 (1988); *Hill v. Wal-Mart Stores, Inc.*, 303 Ark. 174, 792 S.W.2d 614 (1990); *Fisher Trucking, Inc. v. Fleet Lease, Inc.*, 304 Ark. 451, 803 S.W.2d 888 (1991); *Crain Indus., Inc. v. Cass*, 305 Ark. 566, 810 S.W.2d 910 (1991); *Kratzke v. Nestle-Beich, Inc.*, 307 Ark. 158, 817 S.W.2d 889 (1991); *Phillips Constr. Co. v. Cook*, 34 Ark. App. 224, 808 S.W.2d 792 (1991); *Larimore v. State*, 309 Ark. 414, 833 S.W.2d 358 (1992); *Spires v. Compton*, 310 Ark. 431, 837 S.W.2d 459 (1992); *Mikkelsen v. Willis*, 38 Ark. App. 33, 826 S.W.2d 830 (1992); *Kimble v. Gray*, 40 Ark. App. 196, 842 S.W.2d 473 (1992), *aff’d* 313 Ark. 373, 853 S.W.2d 890 (1993); *Hall v. State*, 315 Ark. 385, 868 S.W.2d 453 (1993); *Swindle v. Lumbermens Mut. Cas. Co.*, 315 Ark. 415, 869 S.W.2d 681 (1993); *Parks Leasing, Inc. v. Bray Corp.*, 43 Ark. App. 74, 861 S.W.2d 116 (1993); *Smith v. Babin*, 317 Ark. 1, 875 S.W.2d 500 (1994); *Mikel v. Hubbard*, 317 Ark. 125, 876 S.W.2d 558 (1994); *American Health Care Providers, Inc. v. O’Brien*, 318 Ark. 438, 886 S.W.2d 588 (1994); *Wiswanathan v. Missis-*

*issippi County Community College Bd. of Trustees*, 318 Ark. 810, 887 S.W.2d 531 (1994), *cert. denied* 516 U.S. 815, 116 S. Ct. 70, 133 L. Ed. 2d 30 (1995); *Oglesby v. Baptist Medical Sys.*, 319 Ark. 280, 891 S.W.2d 48 (1995); *Tucker v. Lake View Sch. Dist.*, 321 Ark. 618, 906 S.W.2d 295 (1995), *appeal dismissed* 323 Ark. 693, 917 S.W.2d 530 (1996); *Patterson v. Odell*, 322 Ark. 394, 909 S.W.2d 648 (1995); *Smith v. State*, 49 Ark. App. 73, 896 S.W.2d 450 (1995), *appeal denied* 320 Ark. 658, 898 S.W.2d 468 (1995); *Jones-Blair Co. v. Hammett*, 51 Ark. App. 112, 911 S.W.2d 263 (1995), *superseded* 326 Ark. 74, 930 S.W.2d 335 (1996); *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), *cert. denied* 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997); *Schaeffer v. City of Russellville*, 52 Ark. App. 184, 916 S.W.2d 134 (1996); *Pennington v. Rhodes*, 55 Ark. App. 42, 929 S.W.2d 169 (1996); *Steward v. Wurtz*, 327 Ark. 292, 938 S.W.2d 837 (1997); *Fisher v. Valco Farms*, 328 Ark. 741, 945 S.W.2d 369 (1997); *Steward v. McDonald*, 330 Ark. 837, 958 S.W.2d 297 (1997); *Alamo v. Coie*, 56 Ark. App. 97, 938 S.W.2d 873 (1997); *Bearden v. J.R. Grobmyer Lumber Co.*, 331 Ark. 378, 961 S.W.2d 760 (1998); *Dodson v. Charter Behavioral Health Sys.*, 335 Ark. 96, 983 S.W.2d 98 (1998); *Richison v. Boatmen’s Ark., Inc.*, 64 Ark. App. 271, 981 S.W.2d 112 (1998); *State Auto Property & Cas. Ins. Co. v. Swaim*, 338 Ark. 49, 991 S.W.2d 555 (1999); *Osburn v. Busbee*, 338 Ark. 805, 1 S.W.3d 441 (1999); *Lloyd’s of London v. Warren*, 66 Ark. App. 370, 990 S.W.2d 589 (1999); *McNamara v. Bohn*, 69 Ark. App. 337, 13 S.W.3d 185 (2000); *Barnett v. Howard*, 353 Ark. 756, 120 S.W.3d 564 (2003); *Metzgar v. Rodgers*, 83 Ark. App. 354, 128 S.W.3d 5 (2003); *Koch v. Northport Health Servs. of Ark., LLC*, 361 Ark. 192, 205 S.W.3d 754 (2005); *Winkler v. Bethell*, 362 Ark. 614, 210 S.W.3d 117 (2005); *Murchison v. Safeco Ins. Co.*, 367 Ark. 166, 238 S.W.3d 11 (2006); *Shipp v. Shipp*, 94 Ark. App. 351, 230 S.W.3d 305 (2006); *DFH/PJH Enters., LLC v. Caldwell*, 373 Ark. 412, 284 S.W.3d 66 (2008); *Howard v. Howard*, 2009 Ark. App. 592, — S.W.3d —, 2009 Ark. App. LEXIS 729 (2009); *Forever Green Ath. Fields, Inc. v. Lasiter Constr., Inc.*, 2011 Ark. App. 347, — S.W.3d —, 2011 Ark. App. LEXIS 390 (May 11, 2011); *Horton v. Horton*, 2011 Ark. App. 361, — S.W.3d —, 2011 Ark. App. LEXIS 385 (May 11, 2011); *Jewell v. Fletcher*, 2012 Ark. 132, — S.W.3d —, 2012 Ark. LEXIS 153 (Mar. 29, 2012).

## Rule 60. Relief from judgment, decree or order.

(a) *Ninety-Day Limitation.* To correct errors or mistakes or to prevent the miscarriage of justice, the court may modify or vacate a judgment, order or



decree on motion of the court or any party, with prior notice to all parties, within ninety days of its having been filed with the clerk.

(b) *Exception; Clerical Errors.* Notwithstanding subdivision (a) of this rule, the court may at any time, with prior notice to all parties, correct clerical mistakes in judgments, decrees, orders, or other parts of the record and errors therein arising from oversight or omission. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(c) *Grounds for Setting Aside Judgment, Other Than Default Judgment, After Ninety Days.* The court in which a judgment, other than a default judgment [which may be set aside in accordance with Rule 55(c)] has been rendered or order made shall have the power, after the expiration of ninety (90) days of the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order:

(1) By granting a new trial where the grounds therefor were discovered after the expiration of ninety (90) days after the filing of the judgment, or, where the ground is newly discovered evidence which the moving party could not have discovered in time to file a motion under Rule 59(b), upon a motion for new trial filed with the clerk of the court not later than one year after discovery of the grounds or one year after the judgment was filed with the clerk of the court, whichever is the earlier; provided, notice of said motion has been served within the time limitations for filing the motion.

(2) By a new trial granted in proceedings against defendants constructively summoned, and who did not appear, upon a motion filed within two years after the filing of the judgment with the clerk of the court, or within one year after a certified copy of the judgment has been served upon the defendant, whichever shall be the earlier, upon security for costs being given; provided notice of the filing of said motion has been served upon the adverse party within the time limitations for filing the motion.

(3) For misprisions of the clerk.

(4) For misrepresentation or fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party.

(5) For erroneous proceedings against an infant or person of unsound mind where the condition of such defendant does not appear in the record, nor the error in the proceedings.

(6) For the death of one of the parties before the judgment in the action.

(7) For errors in a judgment shown by an infant within twelve (12) months after reaching the age of eighteen (18) years, upon a showing of cause.

(d) *Valid Defense to Be Shown.* No judgment against a defendant, unless it was rendered before the action stood for trial, shall be set aside under this rule unless the defendant in his motion asserts a valid defense to the action and, upon hearing, makes a prima facie showing of such defense.

(e) *Valid Cause of Action to Be Shown.* No judgment, unless it was rendered before the action stood for trial, shall be set aside on the motion of a plaintiff unless the plaintiff makes a prima facie showing of a valid cause of action.

(f) *Defendant Constructively Summoned — Restoration of Property.* When a judgment is set aside on the motion of a defendant constructively summoned, the court may order the plaintiff in the action to restore to the defendant any money of the defendant paid under the judgment or any

property of the defendant obtained by the plaintiff under it and yet remaining in his possession and pay to the defendant the value of any property which may have been taken under an attachment in the action or under the judgment and not restored. The title of purchasers in good faith to any property sold under an attachment or judgment shall not be affected by a new trial under subsection (c)(2) of this rule, except the title of property obtained by the plaintiff and not bought of him in good faith by others.

(g) *Exception for Divorce Decrees.* No judgment granting a divorce, except as it relates to alimony, shall be set aside under subsection (c)(2) of this rule.

(h) *Premature Judgment.* Rendering judgment prior to the time fixed for filing an answer shall be deemed a clerical misprision. No misprision of the clerk shall be ground for appeal until relief has been sought in the circuit court and action taken there.

(i) *Motion to Vacate or Modify May Be Heard First.* The circuit court may first try and decide upon the grounds for vacating or modifying a judgment before trying or deciding the validity of the defense or cause of action.

(j) *Injunction Pendente Lite.* The party seeking to vacate or modify a judgment may obtain an injunction suspending proceedings, on the whole or in part, upon showing by affidavit or exhibition of the record that it is probable that he is entitled to have such judgment, decree or order vacated or modified; however, such a showing shall not be required if the judgment, decree or order was rendered before the action stood for trial.

(k) *Independent Action to Set Aside Judgment — Writs Abolished.* A motion under this rule does not affect the finality of a judgment or decree or suspend its operation, except as provided herein. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment who was not actually personally served with process or to set aside a judgment or decree for fraud upon the court. Writs of coram nobis in civil cases, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules or by an independent action. (Amended July 9, 1984, effective September 1, 1984; amended December 10, 1990, effective February 1, 1991; amended January 27, 2000; amended May 24, 2001, effective July 1, 2001.)

**Reporter's Notes to Rule 60:** 1. This rule is substantially different from FRCP 60. Its purpose is to substantially retain existing Arkansas law on the subject. The Court feels that the adoption of FRCP 60 would detract from the stability of final judgments and that the changes which would be made in Arkansas law are highly undesirable. The distinction between intrinsic and extrinsic fraud as a basis for relief from a judgment is considered an important and desirable one.

2. This rule would make the same provision for relatively unlimited control of judgments by circuit courts as that made for chancery courts by *Ark. Stat. Ann.* § 22-406.1 et seq. (Repl. 1962). This makes for uniformity not only as between the two courts but also as among judgments in a particular court, regardless of the time elapsed between entry of the judgment and expiration of a term of court.

3. Under prior Arkansas law, the trial court lost jurisdiction to set aside or modify a judgment after term time except on those grounds specified in superseded *Ark. Stat. Ann.* § 29-506 (Repl. 1962). *Davis v. McBride*, 247 Ark. 895, 448 S.W. 2d 37 (1969); *Hardin v. Hardin*, 237 Ark. 237, 372 S.W. 2d 260 (1973). Under prior Arkansas law, the trial court had the power to correct, in certain instances, its judgment even after an appeal had been docketed in the Arkansas Supreme Court. Superseded *Ark. Stat. Ann.* § 27-2129.1 (Repl. 1962). Under this rule, however, once the appeal is docketed, a change can be made only with leave of the Supreme Court.

4. In subsection (c)(1) the one year limitation follows the recommendation of the Committee in its proposed Rule 60.

5. Subsection (k) follows Section (b) of FRCP 60 by permitting a court to entertain an independent action to relieve a party from a



judgment. *Bankers Mortgage Co. v. United States*, 423 F.2d 73 (C.C.A. 5th, 1970), cert. den., 90 S.Ct. 2242. Arkansas has previously recognized the power of an equity court to review a judgment from a court of law, although such power is severely limited. *Cotton v. Hamblin*, 233 Ark. 65, 342 S.W.2d 478 (1961).

6. Section (k) provides for the abolition of writs of error and bills of review. While these have not been common under prior Arkansas law, they have been permitted under Article 7, Section 4, of the Arkansas Constitution. However, any relief which could be granted by a court of equity under a bill of review can also be afforded under this rule; hence, it should have little effect on Arkansas practice and procedure.

**Addition to Reporter's Notes, 1984**

**Amendment:** Rule 60(b) is modified to remove the references to the law prior to January 1, 1970, and to replace it with language from cases describing the broad power of a court to modify or set aside its judgment during the term of court in which it was entered. See, *Karoley v. A.R. & T. Electronics*, 235 Ark. 609, 363 S.W.2d 120 (1962), and the cases cited in that opinion.

Rule 60(c)(5) is amended to remove "married women" from the classes of persons to which the Rule applies.

The caption of the Rule is amended to include "Modification."

**Addition to Reporter's Notes, 1990**

**Amendment:** Rule 60 has been amended to eliminate any overlap with Rule 55. Under former subdivision (c)(7) of Rule 60, a trial court could set aside a judgment "[f]or unavoidable casualty or misfortune preventing the party from appearing or defending." The 1990 amendment deletes this provision, which has been cited in default judgment cases. *E.g.*, *McGee v. Wilson*, 275 Ark. 466, 631 S.W.2d 292 (1982). Moreover, the new opening language of paragraph (c) specifically states that Rule 60 does not apply to default judgments, "which may be set aside in accordance with Rule 55(c)."

**Addition to Reporter's Notes, 2000**

**Amendment:** Subdivisions (a) and (b) of the rule have been revised in response to case law. In addition, subdivision (c) has been amended by changing the cross-reference in paragraph (1) from Rule 59(c) to Rule 59(b), and by revising paragraph (4).

As originally adopted, subdivision (a) provided that the trial court could "at any time" correct clerical mistakes and errors "arising from oversight or omission." Under subdivision (b), the trial court could "correct any error or mistake or to prevent the miscarriage of justice" by modifying or setting aside a judgment, decree or order within 90 days of its having been filed with the clerk. Despite

this apparent dichotomy, the Supreme Court held that the 90-day limitation in subdivision (b) also applied to subdivision (a). See, *e.g.*, *Ross v. Southern Farm Bureau Cas. Ins. Co.*, 333 Ark. 227, 968 S.W.2d 622 (1998); *Phillips v. Jacobs*, 305 Ark. 365, 807 S.W.2d 923 (1991). The Supreme Court subsequently held in *Lord v. Mazzanti*, 335 Ark. 25, 2 S.W.3d 76 (1999), that "clerical mistakes" under subdivision (a) can be corrected at any time, and overruled any language to the contrary in *Phillips and Ross*.

This amendment is consistent with *Lord v. Mazzanti*, supra. As amended, subdivision (a) is a slightly modified version of former subdivision (b). It states the general rule that the court may, with prior notice to all parties, modify a judgment, decree or order within 90 days of its filing with the clerk to "correct errors or mistakes or to prevent the miscarriage of justice." Revised subdivision (b) expressly states an exception for "clerical mistakes" and errors "arising from oversight or omission," which may be corrected at any time with prior notice to all parties.

Amended paragraph (4) of subdivision (c) allows a judgment, decree or order to be modified or set aside "[f]or misrepresentation or fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party." This language, taken in part from Rule 60(b)(3) of the Federal Rules of Civil Procedure, eliminates the distinction between intrinsic and extrinsic fraud, a distinction that has been described as "shadowy, uncertain, and somewhat arbitrary." *Howard v. Scott*, 125 S.W. 1158, 1166 (Mo. 1909). See also *C. Wright & A. Miller*, Federal Practice & Procedure § 2861 (1995) (distinction is "very troublesome and unsound").

Under the prior rule, only extrinsic fraud was a ground for setting aside or modifying a judgment. This has resulted in unfairness. See, *e.g.*, *Ward v. McCord*, 61 Ark. App. 271, 966 S.W.2d 925 (1998) (husband's concealment of bank account from wife during negotiations leading to property settlement in divorce action was not extrinsic fraud); *Office of Child Support Enforcement v. Mitchell*, 61 Ark. App. 54, 964 S.W.2d 218 (1998) (mother's failure to mention in affidavit filed in paternity case that a man other than defendant could have been the father of her child was not extrinsic fraud); *Office of Child Support Enforcement v. Offutt*, 61 Ark. App. 207, 966 S.W.2d 275 (1998) (conduct of attorney in preparing precedent containing findings not made by the court and mailing it to the judge with a letter requesting that he sign the order if no objection was received from opposing counsel did not constitute extrinsic fraud).

**Addition to Reporter's Notes, 2001**

**Amendment:** The references to "trial court" in subdivisions (h) and (i) have been replaced

with “circuit court.” Constitutional Amendment 80 established the circuit courts as the “trial courts of original jurisdiction” in the state and abolished the separate chancery and probate courts.

**Cross References.** Commencement of new action or filing mandate after nonsuit, arrest or reversal of judgment, § 16-56-126.

Vacation and modification of orders of probate court, § 28-1-115.

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### ANALYSIS

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### In General.

If a change is to be made in a judgment, decree, or order under subsection (b) of this rule, it is the responsibility of counsel or the court itself to see to it that any modification, whether agreed to by counsel or simply directed by the court, is entered within 90 days. Cigna Ins. Co. v. Brisson, 294 Ark. 504, 744 S.W.2d 716 (1988).

Although motion was filed on the 89th day and thus was timely, any power by the court to act on the motion lapsed with the expiration of 90 days. City of Little Rock v. Ragan, 297 Ark. 525, 763 S.W.2d 87 (1989).

Subsection (k) of this rule did not apply where plaintiff's counsel sought newspaper photographs of accident scene because there was not a judgment entered in this case and, should the newspaper have waited for a judgment, they would not be affected by the judgment of the underlying lawsuit; the function of this rule is to protect non-parties who have been adversely affected by a judgment, and the newspaper's injury stems solely from the potential copyright infringement should the



newspaper be required to create and produce photographic prints for use in a lawsuit to which it was not a party without reasonable compensation. *Ark. Democrat-Gazette, Inc. v. Brantley*, 359 Ark. 75, 194 S.W.3d 748 (2004).

Where the only newly discovered evidence relied upon by the Arkansas Department of Human Services was the fact that the father was convicted in October 2001, but that conviction was based upon the same conduct originally presented to the Office of Appeals and Hearings during the July 2000 hearing, this was not considered to be newly discovered evidence. *Ark. Dep't of Human Servs. v. Campbell*, 87 Ark. App. 206, 189 S.W.3d 495 (2004).

### Construction.

The "miscarriage of justice" referred to in subsection (b) of this rule is a reference to those clerical errors or mistakes described in subsection (a) of this rule. *Ingram v. Wirt*, 314 Ark. 553, 864 S.W.2d 237 (1993).

This rule may not be used to breathe life into an otherwise defunct ARCP 59 motion. *United S. Assurance Co. v. Beard*, 320 Ark. 115, 894 S.W.2d 948 (1995).

A trial court may modify or set aside its order beyond the ninety-day limitation contained in subsection (b) of this rule only if the specifically enumerated conditions listed in subsection (c) of this rule exist. *Slaton v. Slaton*, 330 Ark. 287, 956 S.W.2d 150 (1997).

The 30-day deadline of RAP-Civ 4(a) for filing a notice of appeal is not extended under RAP-Civ 4(b) by the filing of a motion under this rule. *Criswell v. Holliday*, 330 Ark. 762, 957 S.W.2d 181 (1997).

Section 9-9-216 provides a maximum one-year time limit after which any action to set aside an adoption order is barred, but does not affect the 90-day limit set forth in this rule and only serves to limit the time in which a probate court could act to set aside an order pursuant to this rule. *Blackwood v. Floyd*, 342 Ark. 498, 29 S.W.3d 694 (2000); *Mayberry v. Flowers*, 69 Ark. App. 307, 12 S.W.3d 652 (2000).

Because the Arkansas Supreme Court amended subdivision (c)(4) of this rule to supply a new or more appropriate remedy to enforce an existing right and obligation in order to avoid unjust results, the amendment was remedial in nature and was appropriately applied retroactively by the trial court; thus, the trial court did not err in setting aside or modifying the parties' divorce decree where the ex-wife only showed intrinsic fraud. *Dickson v. Fletcher*, 361 Ark. 244, 206 S.W.3d 229 (2005).

### Purpose.

This rule was intended to retain Arkansas law in effect at the time the rules were adopted. *Burgess v. Burgess*, 286 Ark. 497, 696

S.W.2d 312 (1985); *Davis v. Davis*, 291 Ark. 473, 725 S.W.2d 845 (1987).

### Applicability.

This rule applies when the moving party attacks the service of process, presents evidence of a meritorious defense, and seeks to have a trial. *Green v. Yarbrough*, 299 Ark. 175, 771 S.W.2d 760 (1989).

This rule is not applicable where the court simply attempts to correct the record to more accurately reflect its original ruling. *Ford v. Ford*, 30 Ark. App. 147, 783 S.W.2d 879 (1990).

The Rules of Appellate Procedure are clear that the failure to act within the 30-day period results in loss of jurisdiction in the circuit court to consider a post-trial motion; nor does the reference to certain miscarriages of justice in subsection (b) of this rule invest the trial court with jurisdiction to act on an ARCP 59 motion beyond the 30-day period. *Reis v. Yates*, 313 Ark. 300, 854 S.W.2d 335 (1993).

Arkansas Rule of Civil Procedure 6(b) is not applicable to actions under subsection (b) of this rule. *Edwards v. Szabo Food Serv., Inc.*, 317 Ark. 369, 877 S.W.2d 932 (1994).

Subsection (b) of this rule applies to child custody cases. *Blackwood v. Floyd*, 342 Ark. 498, 29 S.W.3d 694 (2000).

Because the Arkansas District Court Rules do not specifically address matters of procedure involving motions to vacate or modify, this rule applies to and governs the filing of such motions in a county court. *Barnett v. Howard*, 363 Ark. 140, 211 S.W.3d 494 (2005).

Subsection (a) of this rule could not be used to apply a different statute of limitations period to a child support enforcement proceeding brought by the Office of Child Support Enforcement (OCSE) in an action against the father for back child support when the OCSE had not raised the issue concerning the application of the Texas limitations period with the trial court and had stipulated that a shorter limitations period applied. *Office of Child Support Enforcement v. Pyron*, 89 Ark. App. 161, 201 S.W.3d 28 (2005).

Trial court erred in granting mother's motion to transfer a custody action because there was evidence that the father never established a residence outside of the first county, as contemplated by § 9-10-102(f)(1)(B)(i); thus, on father's motion to vacate, the trial court should have vacated the transfer under § 9-10-115(a) rather than grant the father a directed verdict under subsection (a) of this rule. *Stephens v. Miller*, 91 Ark. App. 253, 209 S.W.3d 452 (2005).

In a murder case, defendant's appeal from the denial of his petition for postconviction relief pursuant to this rule was dismissed as defendant could not prevail on appeal from the denial order, and this rule did not apply in

criminal matters. *McArty v. State*, 364 Ark. 517, 221 S.W.3d 332 (2006).

Subsection (a) of this rule does not apply to criminal proceedings. *State v. Rowe*, 374 Ark. 19, 285 S.W.3d 614 (2008).

Trial court had the authority to set aside a *nolle prosequi* entered in a case seeking the revocation of a suspended sentence because there was a mistake on the part of a prosecutor in seeking the order, and the trial court had the inherent power to correct an erroneous judgment, particularly since defendant was fully aware of the nature of the proceedings. The theory behind this rule had been applied in criminal cases because the Arkansas Supreme Court recognized a trial court's power to correct a judgment to make it speak the truth. *Gholson v. State*, 2009 Ark. App. 373, 308 S.W.3d 189 (2009).

"Final" order in a partition action was the order directing the commissioner to execute a deed; accordingly, this rule was not applicable and did not limit the circuit court from reconsidering a preliminary order of partition any time prior to the entry of the final judgment. Because the final order had not been entered at the time that the initial order of partition was reconsidered, the circuit court was within its authority to amend the initial order and enter an amended order. *Vaughn v. Bates*, 2010 Ark. App. 98, — S.W.3d —, 2010 Ark. App. LEXIS 104 (Feb. 3, 2010).

#### **Absence of Counsel.**

Illness of a party's counsel, so severe as to prevent him from appearing on behalf of his client, is an appropriate ground for vacating a default judgment provided the party litigant did not know of it in time to retain other counsel or was prevented in some way from doing so; otherwise, such illness of counsel is not grounds for setting aside the judgment. *Meisch v. Brady*, 270 Ark. 652, 606 S.W.2d 112 (1980).

Appellant, against whom a default judgment was entered, held entitled to a new trial on the ground that its attorney was allowed to withdraw from the case in violation of ARCP 64. *Jones-Blair Co. v. Hammett*, 326 Ark. 74, 930 S.W.2d 335 (1996).

#### **Acquittal.**

The state could not challenge a judgment of acquittal under subsection (b) of this rule where the state was not requesting an appeal to correct an error or mistake in the judgment itself, but instead to change the circuit court's actual order to make it speak what it did not speak but ought to have spoken. *State v. Dawson*, 343 Ark. 683, 38 S.W.3d 319 (2001).

Bail bondsman was not entitled to set aside a judgment of bail forfeiture under subsection (c) of this rule because he failed to seek to set aside the bond-forfeiture judgment until after 90 days had expired and his arguments re-

garding newly discovered evidence and fraud were not made to the circuit court. Ark. R. Civ. P. 55, relief from default, had no application in a bail forfeiture proceeding because the bail was deposited in the registry of the court. *Buddy York Bail Bonds, Inc. v. State*, 2012 Ark. App. 252, — S.W.3d —, 2012 Ark. App. LEXIS 355 (Apr. 11, 2012).

#### **Appeals.**

The filing of a motion under this rule does not extend the time for filing a notice of appeal. *Shivey v. Shivey*, 337 Ark. 262, 987 S.W.2d 719 (1999).

The trial court did not have jurisdiction to vacate an order and issue a new identical order in order to give the appellant a chance to file a timely appeal; instead, the court should have extended the time to file an appeal pursuant to RAP-Civ 4(b)(3). *Oak Hill Manor v. Arkansas Health Servs. Agency*, 72 Ark. App. 458, 37 S.W.3d 681 (2001).

Appellate court ordered that appellant's appeal be held in suspension while the trial court entertained her motion for a new trial based on newly discovered evidence pursuant to subdivision (c)(1) of this rule where the new trial motion would be filed within one year after the judgment, the period in which the trial court had discretion to grant a new trial and no appellate briefs had been submitted. *Belcher v. Belcher*, 80 Ark. App. 86, 91 S.W.3d 108 (2002).

Where the appellant did not raise an issue challenging the propriety of the changes made by a *nunc pro tunc* order, but argued the merits of the court's decision to set aside the deed, an issue that arose from the circuit court's original order, he could not challenge the original order by filing a notice of appeal from the order *nunc pro tunc*. *Kelly v. Morrison*, 83 Ark. App. 125, 118 S.W.3d 155 (2003).

Where railroad found complaining passenger's counsel eavesdropping on jury deliberations after the liability phase of personal injury trial but did not report the incident until after a verdict was returned unfavorable to the railroad, the railroad's motion for a mistrial was properly denied because the railroad failed to preserve the argument for appeal. *Union Pac. R.R. Co. v. Barber*, 356 Ark. 268, 149 S.W.3d 325 (2004), cert. denied 543 U.S. 940, 125 S. Ct. 320, 160 L. Ed. 2d 249 (2004).

Although circuit court erred in finding that the law of the case doctrine kept it from considering an appeal from the denial of a motion under this rule in a road dispute, the error was harmless; there was no basis for relief under subdivision (c)(4) of this rule because the alleged fraud was not caused by an adverse party. *Barnett v. Howard*, 363 Ark. 140, 211 S.W.3d 494 (2005).

Trial court's order setting aside a divorce decree obtained by default was not a final,



appealable order where the issue of child custody was still pending. *Littleton v. Albert-Littleton*, 89 Ark. App. 325, 202 S.W.3d 563 (2005).

An award of attorney's fees to the landowners as the prevailing party under § 16-22-308 in a lease dispute, was affirmed although the judgment was reversed on appeal because a farm did not preserve its prevailing party argument made on appeal of a denial of a motion to vacate the award under subsection (a) of this rule. *Seidenstricker Farms v. Doss*, 374 Ark. 123, 286 S.W.3d 142 (2008).

Because appellant did not raise the issue that misrepresentation or fraud occurred by opposing counsel's actions in filing the motion to compel to the trial court, such as in a motion to vacate the dismissal, and there was no ruling to review. *Maguire v. Jines*, 2011 Ark. App. 359, — S.W.3d —, 2011 Ark. App. LEXIS 378 (May 11, 2011).

In an action alleging that the tobacco company breached the terms of the Master Settlement Agreement, the tobacco company did not amend its notice of appeal to include an appeal from the denial of its motion to amend or alter the judgment. Thus, its motion to amend or alter the judgment, which included its request to join indispensable parties, could not be addressed on appeal. *Vibo Corp. v. State ex rel. McDaniel*, 2011 Ark. 124, — S.W.3d —, 2011 Ark. LEXIS 122 (Mar. 31, 2011).

#### Authority of Court.

Courts have an inherent power to enter orders correcting their judgments where necessary to make them speak the truth and reflect actions accurately; this power, however, is confined to correction of the record to the extent of making it conform to the action which was in reality taken at the time and does not permit the change of a record to provide something that in retrospect should have been done but was not done. *Harrison v. Bradford*, 9 Ark. App. 156, 655 S.W.2d 466 (1983).

During the term, a judgment remains subject to the plenary control of the court and may be vacated, set aside, modified or annulled upon application or upon the court's own initiative; the power of the courts to modify or set aside a judgment during the term it was entered exists as an inherent power and outside of any rule or statute. *Blissard Mgt. & Realty, Inc. v. Kremer*, 284 Ark. 136, 680 S.W.2d 694 (1984), *aff'd*, 289 Ark. 419, 711 S.W.2d 813 (1986).

A court retains control over its judgments during the term at which they are made; when a judgment is set aside during the term, the parties are put back in the position they were in before the judgment was entered. *Blissard Mgt. & Realty, Inc. v. Kremer*, 284

Ark. 136, 680 S.W.2d 694 (1984), *aff'd*, 289 Ark. 419, 711 S.W.2d 813 (1986).

The trial court retains control over its judgments during the 90-day period provided for in subsection (b) of this rule, and when an order is set aside, the parties are put back in the position they occupied before the judgment was entered. *Loyd v. City of Russellville*, 287 Ark. 95, 696 S.W.2d 741 (1985).

Where, after the record was lodged and appellants' brief was filed with the Supreme Court, the trial court granted the appellees' motion to strike an order, the issue was not properly before the trial court and the order had to stand since neither the appellees nor the trial court sought the permission of the Supreme Court before the order was stricken. *Gipson v. Brown*, 288 Ark. 422, 706 S.W.2d 369 (1986).

While the chancellor made no findings as to the tax liability of the parties in the original decree, by retaining jurisdiction in this matter he expressly reserved the right to make any further orders regarding the decree, which includes the determination of tax liability; therefore, this rule was inapplicable. *Cox v. Cox*, 17 Ark. App. 93, 704 S.W.2d 171 (1986).

Trial court had jurisdiction to set aside or modify the judgment after the mandate of the appellate court had been returned. The action of the appellate court in affirming the judgment did nothing to alter the action of the trial court; it left the judgment undisturbed. *Davis v. Davis*, 291 Ark. 473, 725 S.W.2d 845 (1987).

While there may be possible difficulties a judge might encounter in trying a case anew, such provide no legal grounds to empower the judge to modify or vacate an order for a new trial after it had been filed more than 90 days. *Hayden v. Hayden*, 291 Ark. 582, 726 S.W.2d 287 (1987).

When court fails to modify or vacate its order within 90 days, it loses all power to act under subsection (b) of this rule; there is no authority after the term of court has expired for a trial court to revise a judgment. *Cigna Ins. Co. v. Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988); *City of Little Rock v. Ragan*, 297 Ark. 525, 763 S.W.2d 87 (1989).

A general reservation of jurisdiction will permit modification of a decree after 90 days only with respect to issues which were before the trial court in the original action. *Jones v. Jones*, 26 Ark. App. 1, 759 S.W.2d 42 (1988).

Trial court may modify or set aside its judgment, or vacate its judgment to allow a new trial, even though the judgment has been affirmed on appeal. *Garrett v. Allstate Ins. Co.*, 26 Ark. App. 199, 762 S.W.2d 3 (1988).

Under subsection (k) of this rule, the chancery court had the power and the right to correct a circuit court judgment's incorrect

property description. *Pryor v. Raper*, 46 Ark. App. 150, 877 S.W.2d 952 (1994).

A wife was barred from seeking visitation rights with her stepson or any other modification of a divorce decree where (1) the decree made no mention of the stepson and stated that there were no children born of the marriage, apparently because the parties had entered into a private visitation agreement, and (2) the wife sought to modify the decree to provide for visitation more than 90 days after the entry of the decree without establishing any of the grounds enumerated in subsection (c) of this rule. *Blackwood v. Floyd*, 342 Ark. 498, 29 S.W.3d 694 (2000).

In entering an amended foreclosure decree to correct a scrivener's error, the circuit court did not modify the foreclosure decree but merely interpreted and corrected an ambiguity in the decree, which it had inherent power to do. This rule was not applicable. *Kennedy Funding, Inc. v. Shelton*, 100 Ark. App. 84, 264 S.W.3d 555 (2007).

As parties' property-settlement agreement expressly stated their intention to divide the husband's pension benefits, from which the survivor annuity originated, and the trial court, less than 90 days after entering the original decree, entered an order which set forth the wife's right to elect a survivor annuity and expressly reserved jurisdiction to modify or "deal with any effects" of the order, the court retained jurisdiction to address the wife's survivor annuity pursuant to subsection (a) of this rule. *French v. French*, 2011 Ark. App. 612, — S.W.3d —, 2011 Ark. App. LEXIS 648 (Oct. 12, 2011).

### **Characterization of Motion.**

Owner's motion, claiming that a miscarriage of justice occurred when judgment was entered against her because she did not receive notice of the trial, legitimately invoked this rule and was, therefore, timely, as the owner did not complain of any errors occurring during trial nor did she challenge the sufficiency of the evidence at trial; thus, the motion was a motion under this rule and not a motion for a new trial. *Cent. Ark. Found. Homes, LLC v. Choate*, 2011 Ark. App. 260, — S.W.3d —, 2011 Ark. App. LEXIS 272 (Apr. 6, 2011).

### **Clerical Error.**

The omission of a provision dividing the husband's retirement plan from a divorce decree was not a "clerical error" within the meaning of subsection (a) of this rule. *Tyer v. Tyer*, 56 Ark. App. 1, 937 S.W.2d 667 (1997).

Subsection (a) of this rule does not govern a nunc pro tunc judgment entered to make the original written judgment in a criminal case conform to sentence announced in court. *McCuen v. State*, 338 Ark. 631, 999 S.W.2d 682 (1999).

This rule permits the correction of clerical mistakes, and the power may be exercised at any time, either on motion or on the court's own initiative, so the judgment or record will be made to speak the truth but not made to say something other than what originally was pronounced. *Lord v. Mazzanti*, 339 Ark. 25, 2 S.W.3d 76 (1999).

Bank's motion to vacate foreclosure documents that were allegedly filed with the wrong purchase price listed in the documents was properly denied because the bank had bid on the property, the bank's attorney had prepared the documents, and the bank's agent had failed to catch the error before approving and signing the documents; the error was more than clerical error and the court would not correct an error that essentially amounted to negligence on the part of the bank. *First Nat'l Bank of Lewisville v. Mayberry*, 89 Ark. App. 5, 199 S.W.3d 716 (2004).

Trial court did not abuse its discretion in denying appellant's motion for a nunc pro tunc order to reflect that a notice of appeal was received and filed as of the date that it was faxed to the trial clerk because it was the attorney's responsibility to follow up on the filing of the notice of appeal to determine the date on which the notice was received and file-stamped; such an error was not a "clerical error" or "misprision of the clerk" that could be cured with a motion under this rule. *Wandrey v. Etchison*, 363 Ark. 36, 210 S.W.3d 892 (2005).

Court could enter an amended judgment and commitment order nunc pro tunc in order to correct the original judgment and commitment order that had the wrong date on it. *Carter v. Norris*, 367 Ark. 360, 240 S.W.3d 124 (2006).

Mortgagee was not entitled to nunc pro tunc relief to correct mistakes in documents of a foreclosure sale because the mistake was made by counsel as to the mortgagee's bid amount and, thus, was more substantive than a mere clerical error of the type that this rule was intended to allow correction. *First Nat'l Bank of Lewisville v. Mayberry*, 368 Ark. 243, 244 S.W.3d 676 (2006).

Trial court abused its discretion when it modified a divorce decree under subsection (b) of this rule because there were no clerical errors or mistakes made relating to a division of property or prorating of a mortgage; the trial court went beyond clarifying the decree and decided issues that were not before it when it ordered a former husband to sell the wife a parcel of property, ordered him to pay his share of a mortgage, and awarded costs and attorney fees to a former wife. In addition, a reservation of jurisdiction could not have been used to avoid the jurisdictional



mandates of this rule. *Linn v. Miller*, 99 Ark. App. 407, 261 S.W.3d 471 (2007).

Trial court abused its discretion when it set aside its dismissal order pursuant to this rule, as it was outside of the 90-day limitation period and further, the error in setting the dismissal aside was not clerical in nature. *Pinto v. Sims*, 2011 Ark. App. 609, — S.W.3d —, 2011 Ark. App. LEXIS 645 (Oct. 12, 2011).

### Correction of Record.

Courts have the inherent power to correct the record to the extent of making it conform to the action which was in reality taken at the time; thus, the chancellor had the authority to modify his earlier order regarding child support payments where he simply made his earlier order say clearly what he intended it to say when he made it, even though more than 90 days had elapsed since the filing of the original order. *McGibbony v. McGibbony*, 12 Ark. App. 141, 671 S.W.2d 212 (1984).

Circuit court's order could be corrected to delete error. *Chastain v. Davis*, 294 Ark. 134, 741 S.W.2d 632 (1987).

Although subsection (a) of this rule permits trial courts to correct their judgments, this power is confined to correction of the record to make it conform to action which was actually taken at the time, and does not permit a decree or order to be modified to provide for action that court, in retrospect, should have taken, but which in fact it did not take. *Reves v. Reves*, 21 Ark. App. 177, 730 S.W.2d 904 (1987), overruled *Crow v. Crow*, 26 Ark. App. 37, 759 S.W.2d 570 (1988).

Unquestionably either party aggrieved by correction by the court of clerical mistakes, arising from oversight or omission, may bring a timely appeal, but the appeal is not from the original order, or judgment, but from the order purporting to correct it. *Kindiger v. Huffman*, 307 Ark. 465, 821 S.W.2d 33 (1991).

Rule 4(c) of the Rules of Appellate Procedure requiring action on a ARCP 59 motion within 30 days of filing does not apply to a request under subsection (a) of this rule to correct an order. *Upton v. Estate of Upton*, 308 Ark. 677, 828 S.W.2d 827 (1992).

Court granted physician's petition for a writ of certiorari in administratrix's third medical negligence and wrongful death action where trial judge's order rescinding his dismissal with prejudice of the second complaint occurred outside the 90 days allowed by this rule to correct an order and, thus, was ineffective. *Jordan v. Circuit Court*, 366 Ark. 326, 235 S.W.3d 487 (2006).

Employee's FELA suit was properly dismissed for failure to serve the employer within 120 days as required by Ark. R. Civ. P. 4(i). An alleged oral extension granted by the trial judge was ineffective because it was not entered as required by Rule 4(i), and subsection (b) of this rule did not operate to create

an order that was never entered. *Verbitski v. Union Pac. R.R. Co.*, 2011 Ark. App. 6, — S.W.3d —, 2011 Ark. App. LEXIS 1 (Jan. 5, 2011).

### Deemed Denied.

There is no deemed-denied provision in this rule. *Office of Child Support Enforcement v. Dickens*, 2009 Ark. App. 195, 300 S.W.3d 122 (2009).

### Default Judgment.

A judgment by default is just as binding and forceful as a judgment entered after a trial on the merits in a case; it is not to be discredited or regarded lightly because of the manner in which it was acquired. *Meisch v. Brady*, 270 Ark. 652, 606 S.W.2d 112 (1980).

Where a deputy sheriff served a writ of garnishment on a corporation's office manager, who was neither a corporate officer nor the designated agent for process, despite the fact that the corporation's president was in the city on the service day, there was a clear failure to comply with the statutory service requirements of § 16-58-124; accordingly, a default judgment against the corporation was properly set aside pursuant to ARCP 55(c) and this rule for lack of personal jurisdiction. *Pounders v. Chicken Country, Inc.*, 3 Ark. App. 220, 624 S.W.2d 445 (1981).

Entry of a default judgment did not constitute an unavoidable casualty or misfortune sufficient to permit setting aside the judgment when the party against whom the judgment was rendered was notified as suit but ignored the lawsuit altogether. *Diebold v. Myers Gen. Agency, Inc.*, 292 Ark. 456, 731 S.W.2d 183 (1987).

Because a default judgment without valid service of process is void, a defendant does not have to meet the requirements of this rule to set it aside. *Lawson v. Edmondson*, 302 Ark. 46, 786 S.W.2d 823 (1990).

Trial court properly dismissed a judgment debtor's lawsuit against a judgment creditor for tortious conduct and other civil causes of action, which sought an injunction against the enforcement of a default judgment that was entered against the debtor in connection with an action by the creditor to recover unpaid legal fees, as the debtor relied incorrectly on this rule as authority for filing a new lawsuit to attack a default judgment, instead of following the procedure set forth in Ark. R. Civ. P. 55 to set aside the default judgment; Rule 55 provides the exclusive basis for setting aside a default judgment. *Meadows v. Nancy E. Pryor, Inc.*, 90 Ark. App. 258, 205 S.W.3d 199 (2005).

Although styled as a motion to vacate pursuant to this rule, a husband's motion expressly stated that he did not wish to set aside the judgment of divorce, but sought only to vacate the judgment as to issues except juris-

diction and grounds. The husband's answer, although untimely, recognized the case as being in court and indicated a desire to defend, and therefore constituted an "appearance" for purposes of Ark. R. Civ. P. 55(b). *Robinson v. Robinson*, 103 Ark. App. 169, 287 S.W.3d 652 (2008).

### **Discretion of Court.**

It is within the sound discretion of the trial court to grant or deny a motion to set aside a default judgment, and the question on appeal is whether there has been an abuse of that discretion. *Cossey v. Transamerica Ins. Co.*, 25 Ark. App. 258, 757 S.W.2d 176 (1988); *Hendrix v. Hendrix*, 26 Ark. App. 283, 764 S.W.2d 472 (1989).

### **Dismissal.**

Under a former version of subsection (a) of this rule, where the order dismissing a plaintiff's case for failure to prosecute was entered in error, it was not a clerical error and the trial court was without jurisdiction to hear the plaintiff's motion for reinstatement when it was filed more than 90 days after the order. *Wal-Mart Stores, Inc. v. Taylor*, 346 Ark. 259, 57 S.W.3d 158 (2001).

### **Divorce Decree.**

Where a former wife, who did not appear at the original divorce proceeding although she had been properly served, did not apply for a new trial within the statutory time limit, did not take a timely appeal, and there was no evidence of fraud in the original divorce action, she was barred by *res judicata* from attacking the original divorce decree, which awarded custody of their children to her former husband and also awarded the proceeds of their joint savings account to her former husband. *Gideon v. Gideon*, 268 Ark. 873, 596 S.W.2d 367 (1980).

A chancery court lacked jurisdiction under this rule to modify a divorce decree 10 years after it was entered with regard to the exclusion of post-decree salary increases in the calculation of the wife's share of the husband's retirement benefits since (1) the divorce decree did not specify whether post-decree salary increases would be included in the calculation of the wife's share of the retirement benefits, (2) there were no changed circumstances since the decree was initially entered, and (3) there was no ambiguity regarding the legal effect of the language employed in the divorce decree at issue. *Holt v. Holt*, 70 Ark. App. 43, 14 S.W.3d 887 (2000).

Because evidence of fraudulent inducement by husband against wife to enter into a property settlement agreement was lacking, the trial court abused its discretion in setting aside the original divorce decree more than ninety days after its entry; a divorce decree containing an integrated property-settlement agreement may not be judicially modified in

the absence of fraudulent inducement in executing the agreement. *Joplin v. Joplin*, 88 Ark. App. 190, 196 S.W.3d 496 (2004).

Trial court abused its discretion in setting aside the original divorce decree because, even if it was assumed that the husband committed the acts in question (financed certain items in the wife's name without her knowledge and failed to pay the debt thereon when he was awarded those items), the wife failed to show that said acts induced her to enter into the property-settlement agreement; the latter issue would have been better addressed by a contempt motion, and wife's allegations regarding husband's misrepresentation as to the parties' rightful interest in two properties at issue was contradicted by her own testimony at trial. *Joplin v. Joplin*, 88 Ark. App. 190, 196 S.W.3d 496 (2004).

Subsections (a) and (c) of this rule barred the present modification of the original divorce decree where no exceptions were raised and fraud was not pled, four years had passed from the order granting the divorce to the execution of the deed, and six more years passed before the deed was filed of record. *O'Marra v. MacKool*, 361 Ark. 32, 204 S.W.3d 49 (2005).

Where ex-husband never denied that his responses to his ex-wife's discovery requests omitted some of his stock and that he failed to supplement his discovery responses and that he presented false testimony by stating his statement of worth was complete, the trial court did not err in ruling that the husband had committed fraud, and proof of constructive fraud was sufficient to reopen a divorce under subdivision (c)(4) of this rule. *Dickson v. Fletcher*, 361 Ark. 244, 206 S.W.3d 229 (2005).

Husband could not use subdivision (c)(4) of this rule to modify a divorce decree in which he acknowledged paternity of a child and was ordered to pay child support because the financial and emotional welfare of the child and the preservation of an established parent-child relationship was paramount to the husband's interest in ascertaining the child's true genetic makeup. *Martin v. Pierce*, 370 Ark. 53, 257 S.W.3d 82 (2007).

Because a divorce decree provided that the wife owed the husband \$40,000 for his interest in her business, but that sum was to be reduced by set-offs in unstated amounts, the decree was not self-executing, as it did not state with specificity the amount of money appellant was required to pay. The decree was, therefore, not a final order, and obviously so, since its omissions and lack of certainty gave rise to further litigation. *Allen v. Allen*, 99 Ark. App. 292, 259 S.W.3d 480 (2007).

Pursuant to subsection (a) of this rule, the trial court did not err in dividing the husband's monthly premium for the survivor's



benefit as an interpretation of the divorce decree; in reaching an equitable division of the husband's pension, the trial court properly utilized one of the methods set forth by the fund administrator. *Dove v. Dove*, 2009 Ark. App. 682, — S.W.3d —, 2009 Ark. App. LEXIS 840 (2009).

Trial court did not err in denying a wife's motion to vacate a divorce decree and to set aside a mediation agreement pursuant to subdivision (c)(5) of this rule because while her judgment might have been limited on occasion, she had the presence of mind to discuss the possibility of divorce and its impact on her; the witnesses who were present at the mediation testified that she never appeared unable to comprehend the nature of the mediation. *Toombs v. Toombs*, 2010 Ark. App. 858, — S.W.3d —, 2010 Ark. App. LEXIS 906 (Dec. 15, 2010).

### Final Order.

Since the order setting aside the judgment was entered more than 90 days after the judgment was entered, it was a final and appealable order. *Schueck Steel, Inc. v. McCarthy Bros. Co.*, 289 Ark. 436A, 717 S.W.2d 816 (1986); *Cigna Ins. Co. v. Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988).

The finality principles of Rule 59 and this rule of the Arkansas Rules of Civil Procedure do not apply to class rulings under Rule 23 before there is a decision on the merits. *Fraleigh v. Williams Ford Tractor & Equip. Co.*, 339 Ark. 322, 5 S.W.3d 423 (1999).

Where the trial court failed to rule on a bank's motion to vacate documents related to the foreclosure sale of property because of a clerical error, the Supreme Court of Arkansas lacked jurisdiction to hear the bank's appeal until there was a final, appealable order, and the bank's motion did not fall within the "deemed denied" provision of Ark. R. App. P. Civ. 4(b)(1) because the appeal was not filed within 10 days of the filing of the motion. *First Nat'l Bank v. Mayberry*, 366 Ark. 39, 233 S.W.3d 152 (2006).

### Form of Motion.

Where motion to vacate was couched in terms of a ARCP 59 motion for a new trial on the basis that the verdict was contrary to the preponderance of the evidence, motion to vacate was not in reality a motion under this rule to prevent a miscarriage of justice. *Jackson v. Arkansas Power & Light Co.*, 309 Ark. 572, 832 S.W.2d 224 (1992).

Where intervening party failed to assert in its motion under subsection (b) of this rule a clerical mistake, error or omission referred to in subsection (a) of this rule, the motion should have been denied by the trial court for that reason alone. *United S. Assurance Co. v. Beard*, 320 Ark. 115, 894 S.W.2d 948 (1995).

### Fraud.

This rule does not define what constitutes fraud, and trial courts have always been reluctant to define "fraud" (either actual or constructive) lest man's fertile mind invent a new scheme outside the definition but just as nefarious as previously denounced schemes. Constructive fraud or fraud at law does not necessarily consist of guilt or moral wrong but consists of legal or equitable duties owed to another party; neither actual dishonesty or intent to deceive is an element of constructive fraud. *Davis v. Davis*, 291 Ark. 473, 725 S.W.2d 845 (1987).

The law of the case doctrine does not prohibit the trial court from taking any action pursuant to subdivision (c)(4) of this rule. This rule is an exception to the law of the case doctrine. *Davis v. Davis*, 291 Ark. 473, 725 S.W.2d 845 (1987).

The fact that the trial court may have reached an erroneous conclusion is not a sufficient basis for setting aside a judgment after 90 days pursuant to subdivision (c)(4) of this rule in the absence of evidence to support a finding that the judgment was obtained through fraud, practiced on the court, by the successful party. *Smart v. Biggs*, 26 Ark. App. 141, 760 S.W.2d 882 (1988).

There is an adequate legal remedy for a judgment fraudulently obtained in probate court contained in subsection (b) and subdivision (c)(4) of this rule, which provide that a probate court may vacate an order which has been obtained by fraud. *Brown v. Kennedy Well Works, Inc.*, 302 Ark. 213, 788 S.W.2d 948 (1990); *Wilson v. Wilson*, 327 Ark. 386, 939 S.W.2d 287 (1997).

After ninety days, a court may vacate a judgment for fraud practiced by the party who obtained the judgment. *Lamb v. JFM, Inc.* 311 Ark. 89, 842 S.W.2d 10 (1992).

Mother's failure to state in her paternity action affidavit that defendant was not the only possible father of the child did not constitute fraud practiced on the court. *State Office of Child Support Enforcement v. Mitchell*, 61 Ark. App. 54, 964 S.W.2d 218 (1998).

The wife was not entitled to a new trial in a divorce proceeding on the ground that the husband committed fraud during the trial by concealing marital funds from her since any fraud that may have been committed was intrinsic, rather than extrinsic, in that it was a fraud against the wife, rather than the court. *Ward v. McCord*, 61 Ark. App. 271, 966 S.W.2d 925 (1998).

The claim of a wife that she should have obtained a better deal in the property settlement in her divorce proceeding was not grounds for relief under subdivision (c)(4) of this rule where there was little more than the wife's claim that the husband promised to be fair, but failed to give her an equal share of

the marital assets. *Mow v. Mow*, 66 Ark. App. 374, 990 S.W.2d 578 (1999).

The court abused its discretion in setting aside a judgment on the basis of fraud; although the appellee proceeded pro se and perhaps should have employed counsel to represent him, no fraud, either extrinsic or otherwise, was practiced upon the court or the appellee. *Grubbs v. Hall*, 67 Ark. App. 329, 999 S.W.2d 693 (1999).

Where a father moved to annul a 1966 adoption on grounds he was fraudulently convinced the child was his biological son, the father's contradictory testimony to his 1966 sworn statements was insufficient to show extrinsic fraud, and the motion was denied. *McAdams v. McAdams*, 353 Ark. 494, 109 S.W.3d 649 (2003).

Biological father's petition to set aside the adoption decree, which was filed more than one year after the decree was entered, was time-barred under § 9-9-216; furthermore, the biological father failed to preserve the argument, under subsection (b) of this rule, that the trial court erred in refusing to allow the biological father to go forward with proof of fraud. *Carr v. Millar*, 86 Ark. App. 292, 184 S.W.3d 470 (2004).

Circuit court improperly granted niece's petition to reopen probate of her aunt's estate under § 28-53-119(a)(1) where she failed to file the petition within the 90-day limitation period set forth in this rule or provide "other cause," such as fraud or lack of notice. *Bullock v. Barnes*, 366 Ark. 444, 236 S.W.3d 498 (2006).

Decision to vacate the judgment of dismissal was correct because a misrepresentation was made to the circuit court on the status of the case, when the law firm's counsel was served with the claimant's response to the motion to dismiss and failed to let the circuit court know. The fact that the misrepresentations were inadvertent did not alter their effect on the circuit court, as they resulted in a miscarriage of justice that this rule was designed to remedy. *Hyden v. Circuit Court*, 371 Ark. 152, 264 S.W.3d 493 (2007).

In an action involving the judicial dissolution of a law firm, the trial court did not abuse its discretion in denying partner one's motion to vacate a judgment, which determined that partner two was entitled to a sum for office expenses incurred pursuant to an oral agreement between the two partners, because the asserted link between partner two's allegedly perjured testimony and the trial court's entry of the judgment was too tenuous to support a conclusion that partner one established a prima facie showing of an affirmative defense of fraud or misrepresentation to the breach of contract claim. *Jewell v. Fletcher*, 2010 Ark. 195, — S.W.3d —, 2010 Ark. LEXIS 235 (Apr. 29, 2010).

Circuit court did not abuse its discretion in refusing to modify a divorce decree under subdivision (c)(4) of this rule on the basis of fraud as the father admitted during the divorce hearing that he questioned the mother about the paternity of the child before they were married and she admitted there was a possibility the child was not the father's child. *Hardy v. Hardy*, 2011 Ark. 82, — S.W.3d —, 2011 Ark. LEXIS 72 (Feb. 24, 2011).

Where a mother of minor children alleged that she consented to adoption of her children by her former husband's second wife due to fraud, duress, and intimidation, the trial court had jurisdiction to hear her petition to set aside the interlocutory adoption decree pursuant to § 9-9-216; the 90-day limitation in this rule was inapplicable based on the finding of fraud. *Smith v. Smith*, 2012 Ark. App. 6, — S.W.3d —, 2012 Ark. App. LEXIS 7 (Jan. 4, 2012).

Construction loan borrower was not entitled to set aside a foreclosure judgment for fraud under subdivision (c)(4) of this rule because the record did not support its expert's opinion that the lender had misrepresented its financial condition; moreover, any such misrepresentation was irrelevant because the note was a demand note that could be called at any time. *Grand Valley Ridge, LLC v. Metro. Nat'l Bank*, 2012 Ark. 121, — S.W.3d —, 2012 Ark. LEXIS 143 (Mar. 15, 2012).

#### **Garnishment Proceedings.**

The authority of a chancellor to set aside a judgment within 90 days after it is entered is found in subsection (b) of this rule; this rule applies in garnishment proceedings because, in the terms of ARCP 81(a), the garnishment statutes do not provide a specific procedure for setting such a judgment aside. *Travelodge Int'l, Inc. v. Handleman Nat'l Book Co.*, 288 Ark. 368, 705 S.W.2d 440 (1986).

#### **Grounds to Set Aside Judgment.**

Where a default judgment was entered in favor of the plaintiff landowners who had brought an action against a corporation, a contractor, and a subcontractor alleging willful trespass upon the plaintiffs' land and seeking treble damages for the loss of timber wrongfully cut down by the defendants, the trial court did not abuse its discretion in denying the subcontractor's motion to vacate the judgment where there simply was nothing to show that there was unavoidable casualty or anything which prevented the subcontractor from appearing or defending. *McGee v. Wilson*, 275 Ark. 466, 631 S.W.2d 292 (1982).

Where there was evidence that neither the defendant movant nor his counsel made any inquiry as to the status of the defendant's motion for a new trial in the 16 months between the hearing on the motion and the entry of the order denying the motion, or in



the four months between the time the order was entered and the defendant received actual notice of the order, the defendant failed to demonstrate any unavoidable casualty, because he failed to show that he was not negligent. *Puterbaugh v. Trussell*, 276 Ark. 525, 637 S.W.2d 559 (1982).

Where an attorney's failure to resist an application for a default judgment is attributable not to any fault on his part but to a misunderstanding between counsel, there is such an unavoidable casualty that the judgment should be vacated, even after the expiration of the term. *Foot v. Jitney Jungle, Inc.*, 283 Ark. 103, 671 S.W.2d 186 (1984).

The trial court had jurisdiction to grant the defendant's motion to set aside the default judgment that had been entered against him even though the 90-day period of subsection (b) of this rule had expired, because it was granted without giving the defendant, who had answered in the case, a three days' written notice of the hearing on the application for the default as required by ARCP 55(b). This constitutes sufficient grounds for setting the judgment aside under subdivision (c)(7) of this rule. *Magness v. Masonite Corp.*, 12 Ark. App. 117, 671 S.W.2d 230 (1984).

Whether or not this rule applies to an adoption proceeding, the court has inherent authority to set aside a judgment it perceives to have been entered as a result of fraud on the court. *Summers v. Mylan*, 287 Ark. 150, 697 S.W.2d 91 (1985).

Where insurance company had notice of the lawsuit and that the amount of damages sought exceeded the amount of primary coverage, the plaintiff's actions in expediting the lawsuit did not deceive the insurance company and there was no fraud on which to set aside the judgment. *RLI Ins. Co. v. Coe*, 306 Ark. 337, 813 S.W.2d 783 (1991), cert. dismissed 502 U.S. 1067, 112 S. Ct. 959, 117 L. Ed. 2d 126 (1992).

In order to have a judgment set aside under ARCP 55 or subsections (b) or (c) of this rule, a party is required to show in its motion that it has a meritorious defense. A meritorious defense is evidence, not allegations, sufficient to justify the refusal to grant a directed verdict against the party required to show a meritorious defense, and the motion itself must assert the defense. *Goston v. Craig*, 34 Ark. App. 23, 805 S.W.2d 92 (1991).

In cases where a judgment is void for lack of jurisdiction, no proof of a meritorious defense is required under that rule. *Black v. Merritt*, 37 Ark. App. 5, 822 S.W.2d 853 (1992).

Counsel's mistaken stipulation to a statute of limitations that barred child support collection did not warrant relief under subsection (a) of this rule. *Office of Child Support Enforcement v. Pyron*, 363 Ark. 521, 215 S.W.3d 637 (2005).

### Illustrative Cases.

Where the mother of a child divorced her father after he was incarcerated for sexual assault and possession of child pornography, the trial court did not err by denying the paternal grandparents' petition for visitation pursuant to § 9-13-103 and their motion to vacate the judgment pursuant to subsection (a) of this rule. The Court of Appeals of Arkansas upheld the trial court's finding that grandparents lacked the capacity to provide guidance to the child, because of their willingness to allow her to visit her biological father in prison; the grandparents also failed to rebut the presumption that the mother's denial or limitation of visitation was in the best interest of the child. *Painter v. Kerr*, 2009 Ark. App. 580, 336 S.W.3d 425 (2009).

Court of appeals lacked jurisdiction to hear an appeal because plaintiff did not file a timely appeal from the trial court's final order under Ark. R. App. P. Civ. 4(b), and the order from which plaintiff attempted to appeal, which was entered after the trial court lost jurisdiction, did not change any of the trial court's previous rulings from the final order; the trial court had lost jurisdiction under subsection (a) of this rule long before either of the subsequent orders was entered, and plaintiff never alleged, and the trial court never found, that any of the subsection (c) exceptions applied. *Global Econ. Res., Inc. v. Swaminathan*, 2011 Ark. App. 349, — S.W.3d —, 2011 Ark. App. LEXIS 387 (May 11, 2011).

Judgment against an owner, set aside by a trial court, was not a default judgment as the owner had filed a timely answer but did not appear at trial, and the trial court entered judgment based on the evidence. Since the judgment was not a default judgment, the trial court was not obligated to fulfill the requirements of Ark. R. Civ. P. 55(C) but of this rule, which governed the setting aside of judgments other than default judgments. *Cent. Ark. Found. Homes, LLC v. Choate*, 2011 Ark. App. 260, — S.W.3d —, 2011 Ark. App. LEXIS 272 (Apr. 6, 2011).

### Independent Action.

Writ of certiorari was proper, because neither exception under subsection (k) of this rule applied and the husband had no other remedy, when the court erred in denying the husband's motion to quash several subpoenas concerning his medical records; the husband was not a party to the underlying custody dispute, the husband did nothing to bring his medical condition into issue, and the husband's mental health was examined through other admissible evidence. *McKenzie v. Pierce*, 2012 Ark. 190, — S.W.3d —, 2012 Ark. LEXIS 212 (May 3, 2012).

**Injunctive Relief.**

Absent a prayer, under subsection (j) of this rule, for modification or vacation of judgment in favor of creditor, a law court had no power to grant a judgment debtor's request to enjoin a judgment creditor from enforcing its circuit court judgment against the debtor. *Taggart v. Moore*, 8 Ark. App. 160, 650 S.W.2d 590 (1983), *aff'd*, 292 Ark. 168, 729 S.W.2d 7 (1987).

Where a judgment debtor filed a complaint in the circuit court seeking to enjoin a judgment creditor from enforcing the chancery court judgment rendered against the debtor, but the complaint did not allege any facts on which the debtor intended to base his defense of extrinsic fraud or aver that the debtor had a meritorious defense as required by subsection (d) of this rule, the circuit court properly dismissed the complaint. *Taggart v. Moore*, 8 Ark. App. 160, 650 S.W.2d 590 (1983), *aff'd*, 292 Ark. 168, 729 S.W.2d 7 (1987).

**Jurisdiction.**

Where the record did not show: (a) that the motion for a new trial was presented to and taken under advisement by the trial court within the 30-day period; or (b) that the trial court set a date certain thereafter for a hearing on this motion, the court lost its jurisdiction to grant the relief sought after the expiration of 90 days from the entry of the original judgment. *State Farm Fire & Cas. Ins. Co. v. Mobley*, 5 Ark. App. 293, 636 S.W.2d 299 (1982), *questioned* *Magness v. Masonite Corp.*, 12 Ark. App. 117, 671 S.W.2d 230 (1984).

Pursuant to subsection (b) of this rule, the trial court loses jurisdiction to rule on a motion for a new trial 90 days after the judgment is filed with the clerk, unless the exceptions in subsection (c) of this rule are applicable. *Mullen v. Couch*, 288 Ark. 231, 703 S.W.2d 866 (1986); *Diebold v. Myers Gen. Agency, Inc.*, 292 Ark. 456, 731 S.W.2d 183 (1987); *Scott v. Kidd*, 293 Ark. 451, 738 S.W.2d 421 (1987).

A decree may not be modified after the expiration of the 90 days under this rule, absent statutory grounds. *Cox v. Cox*, 17 Ark. App. 93, 704 S.W.2d 171 (1986), *supp. op.*, 17 Ark. App. 95A, 705 S.W.2d 902 (1986).

Circuit court which did not set aside order of dismissal within 90 days after judgment was without jurisdiction regarding subsequent order. *Scott v. Kidd*, 293 Ark. 451, 738 S.W.2d 421 (1987).

Under subsection (b) of this rule the trial court lost jurisdiction to reinstate an action after 90 days, following an order of dismissal for failure to prosecute. *Ware v. Gardner*, 309 Ark. 148, 827 S.W.2d 657 (1992).

Not only must a modifying order be entered within 90 days of the original order, but the trial court loses the authority to modify an

original order under subsection (b) of this rule after the expiration of 90 days from the entry of that first order. *Griggs v. Cook*, 315 Ark. 74, 864 S.W.2d 832 (1993).

Where circuit judge granted appellees' motion for relief from judgment more than five months after the judgment was entered, he was without jurisdiction to do so under subsection (b) of this rule; since the appellees presented no reference to a defense in their motion or other reason that they were entitled to relief under subsection (c) of this rule, the judgment was reinstated. *Parks Leasing, Inc. v. Bray Corp.*, 43 Ark. App. 74, 861 S.W.2d 116 (1993).

In an action for an accounting where fraud was alleged, the chancery court lacked subject matter jurisdiction to review the probate court's actions. *Wilson v. Wilson*, 327 Ark. 386, 939 S.W.2d 287 (1997).

The chancery court lacked jurisdiction to act to set aside its order of confirmation of the commissioner's report of the judicial sale because it did not set aside the order within ninety days of the date of its entry as required by subsection (b) of this rule. *Strong v. Morgan*, 58 Ark. App. 272, 950 S.W.2d 466 (1997).

The court lost jurisdiction to correct its original order 90 days after it was entered, notwithstanding the contention that the appellant's attorney committed fraud when he prepared a precedent containing findings not made by the court and mailed it to the judge requesting that the judge sign the order if no objection was received from the appellee's attorney within 7 days, since the request alerted the judge to the fact that there might be an objection and was not an attempt to deceive either the judge or the appellee's attorney. *State Office of Child Support Enforcement v. Offutt*, 61 Ark. App. 207, 966 S.W.2d 275 (1998).

Heirs could not appeal circuit court's order denying their motion under this rule to vacate because the circuit court did not have subject matter jurisdiction relative to a county court's order of dismissal where the heirs' notice of appeal was not timely filed. *Barnett v. Howard*, 363 Ark. 150, 211 S.W.3d 490 (2005).

Circuit court lacked jurisdiction to enter an order on April 8, 2005, setting aside a summary judgment because, under Ark. R. App. P. Civ. 4(b)(1), the insured's motion to set aside the summary judgment was deemed denied on January 19, 2005, and the insured's notice of appeal should have been filed 30 days from that date but because it was not filed until May 5, 2005, the notice of appeal was untimely. *Murchison v. Safeco Ins. Co.*, 367 Ark. 166, 238 S.W.3d 11 (2006).

Appeal was dismissed for lack of jurisdiction because the notice of appeal was not timely filed under Ark. R. App. P. Civ. 4; the final appealable order was dated November 3,



when faxed according to Administrative Order of the Supreme Court No. 2, and not November 10, when hard copies were submitted. The November 10 order was clearly *nunc pro tunc* to correct an interest rate (a clerical order), pursuant to this rule, and only that issue was appealable and not issues in the original order from which a timely appeal could have been taken. *Francis v. Protective Life Ins. Co.*, 371 Ark. 285, 265 S.W.3d 117 (2007).

### **Law of the Case Doctrine.**

In appellants' action to establish a road that would allow a reasonable means of access to their land, the trial court erred in refusing to entertain an appeal from a county court's denial of appellants' motion under subdivision (c)(4) of this rule because the trial court's decision was solely based upon the law-of-the-case doctrine. *Barnett v. Howard*, 363 Ark. 140, 211 S.W.3d 494 (2005).

Law-of-the-case doctrine does not prohibit a trial court from taking any action pursuant to subdivision (c)(4) of this rule. Instead, subdivision (c)(4) is an exception to the law-of-the-case doctrine. *Barnett v. Howard*, 363 Ark. 140, 211 S.W.3d 494 (2005).

County court denied children's and heirs' request to build a private road; a circuit court had no jurisdiction to rule on parties' motion under this rule to vacate or set aside the county court's order because the parties' appeal to the circuit court was untimely. *Barnett v. Howard*, 363 Ark. 150, 211 S.W.3d 490 (2005).

### **Miscarriage of Justice.**

The judge's finding that a fraud had been practiced on the court allowed him to set aside the decree to prevent a miscarriage of justice under subsection (b) of this rule. *Summers v. Mylan*, 287 Ark. 150, 697 S.W.2d 91 (1985).

The "miscarriages of justice" referred to in subsection (b) of this rule are a reference to those clerical errors or mistakes described in subsection (b). *Pugh v. St. Paul Fire & Marine Ins. Co.*, 317 Ark. 304, 877 S.W.2d 577 (1994).

Trial court did not err in granting a city's motion under subsection (a) of this rule to reduce a jury's award of \$92,500 for bodily injury to a motorcyclist against a city in a negligence action involving a city-owned garbage truck to \$25,000, the maximum amount of its liability under the state's tort immunity law; subsection (a) allowed the trial court to prevent the miscarriage of justice that would have occurred if the trial court had allowed the jury verdict against the city to stand. *Fritzing v. Beene*, 80 Ark. App. 416, 97 S.W.3d 440 (2003).

This rule did not authorize the trial court to vacate its order to dismiss a suit against appellee father for back child support as a miscarriage of justice when the office of child

support enforcement's counsel stipulated to the application of a statute of limitations that effectively barred collection of child support. *Office of Child Support Enforcement v. Pyron*, 89 Ark. App. 161, 201 S.W.3d 28 (2005).

Because parents were permitted to contract regarding the religious upbringing of their children, a trial court did not err in refusing to find that an order enjoining a former husband from promoting a different faith to his children, in violation of this type of agreement, constituted a miscarriage of justice under subsection (a) of this rule. Moreover, it did not violate his First Amendment rights, the Establishment Clause, or any correlating provision of the Arkansas Constitution. *Rownak v. Rownak*, 103 Ark. App. 258, 288 S.W.3d 672 (2008).

Where a former husband sought clarification of a trial court's decision to order him to cease his contemptuous conduct relating to violating a contractual provision in a divorce decree or a modification under subsection (a) of this rule as a miscarriage of justice, he was not seeking to circumvent the time constraints of Ark. R. App. P. Civ. 4. *Rownak v. Rownak*, 103 Ark. App. 258, 288 S.W.3d 672 (2008).

In an action by a solicitor against a contractor and others, the trial court abused its discretion in denying the contractor's motion to vacate the judgment under subsection (a) of this rule because the contractor's attorney was disbarred and failed to provide the contractor with notice, and the attorney's utter abandonment of the contractor and failure to protect his interests were sufficient to establish a miscarriage of justice. Further, the contractor established a prima facie showing of a meritorious defense. *Nobles v. Tumey*, 2010 Ark. App. 731, — S.W.3d —, 2010 Ark. App. LEXIS 786 (Nov. 3, 2010).

### **Mistrial.**

Where the jury verdict found for both the plaintiff and the defendant on their respective complaints, and handwritten notations of damage amounts were written in the margin, the trial court properly exercised its discretion in declaring a mistrial and placing the matter back on the trial docket, pursuant to subsection (b) of this rule. *Blissard Mgt. & Realty, Inc. v. Kremer*, 284 Ark. 136, 680 S.W.2d 694 (1984), *aff'd*, 289 Ark. 419, 711 S.W.2d 813 (1986).

### **Modification Not Authorized.**

Where chancellor took no action in the original 1965 divorce case with regard to disposition of property, chancery court had no jurisdiction, in 1982, to modify the 1965 decree to make a disposition which should have been, but was not, made at the time. *Harrison v. Bradford*, 9 Ark. App. 156, 655 S.W.2d 466 (1983).

Motion properly denied. *Potter ex rel. Redden v. First Nat'l Bank*, 292 Ark. 74, 728 S.W.2d 167 (1987); *Big Rock, Inc. v. Missouri Pac. R.R.*, 295 Ark. 495, 749 S.W.2d 675 (1988).

Grounds for modifying decree after expiration of 90-day period were absent. *Reves v. Reves*, 21 Ark. App. 177, 730 S.W.2d 904 (1987), overruled *Crow v. Crow*, 26 Ark. App. 37, 759 S.W.2d 570 (1988).

After the expiration of the 90-day period provided for in subsection (b) of this rule, a chancellor lacks jurisdiction to distribute property not mentioned in the original decree if grounds for modifying a judgment after 90 days are absent. *Jones v. Jones*, 26 Ark. App. 1, 759 S.W.2d 42 (1988).

The fact that an amended order states that it is modifying a specific previous order and is entered "now for then" does not render the amended order valid or the appeal timely; nunc pro tunc orders may be entered to correct a misprision of the clerk, but the trial court cannot change an earlier record to correct something that should have been done but was not. *Griggs v. Cook*, 315 Ark. 74, 864 S.W.2d 832 (1993).

Where neither the mother's complaint nor the paternity and child support order in any way addressed the question of support for the period before the order, the trial court erred in modifying the order to include retroactive child support after the expiration of the 90-day period provided for in subsection (b) of this rule. *Beavers v. Vaughn*, 41 Ark. App. 96, 849 S.W.2d 6 (1993).

The trial court did not have authority under this rule to amend a divorce decree where the motion seeking such amendment was not filed until 14 months after the divorce decree was entered and the issue of children born of the marriage was not raised at the time of the divorce. *Slusher v. Slusher*, 73 Ark. App. 303, 43 S.W.3d 189 (2001).

Trial court was not permitted to change an order to provide something that in retrospect should have been done but was not done, thus, as the trial court's February 10 order provided that the father was to pay \$35 per week in child support, any changes to his support obligation had to be preceded by a motion to modify his child-support obligation. *Shipp v. Shipp*, 94 Ark. App. 351, 230 S.W.3d 305 (2006).

Court did not abuse its discretion in denying a motion under subsection (a) of this rule to correct the legal description in a consent decree, order, and commissioner's deed, because modification of the legal description would not have made the record conform to the action that was actually taken. *Scales v. Vaden*, 2010 Ark. App. 418, — S.W.3d —, 2010 Ark. App. LEXIS 429 (May 12, 2010).

### **Mootness.**

Where the circuit court withdrew its previous order requiring the Arkansas Department of Human Services (DHS) to perform a home study in Kansas, the DHS's request for a writ of prohibition to prevent enforcement of the order was moot. *Ark. Dep't of Human Servs. v. Isbell*, 360 Ark. 256, 200 S.W.3d 873 (2005).

### **Ninety-Day Limitation.**

Where appellant failed to appeal from the original order of summary judgment within 30 days as required by ARAP 4(a), her motion to modify the original order pursuant to this rule, with the resulting amended order, did not salvage the appeal, since the modification was not entered within 90 days from the time that the original order was filed with the clerk. *Griggs v. Cook*, 315 Ark. 74, 864 S.W.2d 832 (1993).

A trial court cannot vacate an order dismissing an action for failure to prosecute more than ninety days after the order of dismissal. *Story v. Spencer*, 41 Ark. App. 27, 847 S.W.2d 48 (1993).

Trial judge's decision awarding judgment to the wife in the amount of one-half of all the husband's retirement plans was not an impermissible modification of the divorce decree more than 90 days after its entry in violation of this rule, but rather an interpretation, clarification and enforcement of the decree; there was a latent ambiguity in the decree's reference to "retirement" because the husband actually had a pension plan, a 401(k) plan, and a stock ownership plan through his employer. *Abbott v. Abbott*, 79 Ark. App. 413, 90 S.W.3d 10 (2002).

Where a mother sought to set aside an order terminating her parental rights four years after it was entered, based on her assertions that the termination violated public policy and that the trial court had lacked jurisdiction over the action, such reasons did not come within the exceptions to the 90-day time limit of subsections (a) and (c) of this rule, and accordingly, the motion was time-barred. *Parker v. Seabourn*, 351 Ark. 453, 95 S.W.3d 762 (2003).

This rule is no longer applicable to default judgments and, therefore, the time limitations imposed by this rule are no longer applicable to default judgments; since the time limitations are no longer applicable to default judgments, the rationale no longer exists for the rule that an order setting aside a default judgment after 90 days is a final appealable order. *Epting v. Precision Paint & Glass, Inc.*, 353 Ark. 84, 110 S.W.3d 747 (2003).

Summary judgment was improperly vacated more than 7 months after it was entered under subsection (a) of this rule where the 90-day time period had passed and none of the conditions in subsection (c) of this rule



were met. *New Holland Credit Co. v. Hill*, 362 Ark. 329, 208 S.W.3d 191 (2005).

Where bondsman filed a motion to set aside a bond-forfeiture order more than 98 days after the forfeiture, the trial court lacked jurisdiction at the subsequent hearing to act on the motion to set aside the judgment because the 90 day period provided for under subsection (a) of this rule had elapsed. *Arvis Harper Bail Bonds, Inc. v. State*, 91 Ark. App. 95, 208 S.W.3d 809 (2005).

Where the parties intended a property agreement to settle their rights, but husband's retirement account was unintentionally left out of the property agreement, it was proper for the trial court to determine whether the parties intended for the retirement account to be included in the agreement even though the 90-day period had passed; further, because the issue of the property agreement was clearly before the trial court, its general reservation of jurisdiction was sufficient to have allowed it to retain jurisdiction over the matters related to the property agreement, even though the specific issue of the retirement account was not mentioned in the decree. *Carver v. Carver*, 93 Ark. App. 129, 217 S.W.3d 185 (2005).

After dismissing a contractor's action to gain access to a highway for want of prosecution, a trial court erred in vacating the dismissal because under subsection (a) of this rule, the trial court only had a 90-day window to vacate the dismissal; the order vacating the dismissal was entered five months after the suit was dismissed for want of prosecution. *City of Little Rock v. McGeorge Contr. Co.*, 2010 Ark. App. 765, — S.W.3d —, 2010 Ark. App. LEXIS 795 (Nov. 10, 2010).

#### **Notice.**

Alleged lack of notice to mortgagors in amending decree of foreclosure was not an irregularity in foreclosure suit, where chancellor had the authority under this rule to correct the judgment previously entered with or without notice, and the only remaining defendants, were in default and the entry of the decree required no notice. *Bohra v. Montgomery*, 31 Ark. App. 253, 792 S.W.2d 360 (1990).

The owner of mineral interests, who was never appropriately notified by personal service or warning order of a lawsuit to quiet title, should not be bound by the quiet-title decree. *Gilbreath v. Union Bank*, 309 Ark. 360, 830 S.W.2d 854 (1992).

The 180-day deadline in RAP-Civ 4(b)(3) for requesting an extension in which to file a notice of appeal cannot be extended by use of this rule to cure problems of lack of notice. *Barnett v. Monumental Gen. Ins. Co.*, 81 Ark. App. 23, 97 S.W.3d 901 (2003), appeal dismissed 354 Ark. 692, 128 S.W.3d 803 (2003).

Although subsection (b) of this rule re-

quired that notice be given to the parties before a court corrected a clerical error, appellant could not show that she was prejudiced by a nunc pro tunc judgment — even though it was from that order that she took her appeal to later learn that her appeal was untimely — because it accurately reflected a correct interest rate. *Francis v. Protective Life Ins. Co.*, 371 Ark. 285, 265 S.W.3d 117 (2007).

When a trial court dismissed a matter brought by a driver and arising out of a car accident, although the trial court failed to provide notice of the dismissal, the driver and his attorney had a duty to remain diligent as to how the case was progressing. As a result, the trial court properly denied the driver's motion pursuant to this rule. *Watson v. Connors*, 372 Ark. 56, 270 S.W.3d 826 (2008).

#### **Party at Fault.**

A party cannot invoke the aid of this court under subsection (c) of this rule when that party ignored the action and failed to stay informed. *CMS Jonesboro Rehabilitation, Inc. v. Lamb*, 306 Ark. 216, 812 S.W.2d 472 (1991).

Trial court did not err by denying wife's motion for a nunc pro tunc order because transmission of documents by fax intended to perfect her appeal did not relieve her attorney of his duty to ensure that documents which had to be timely filed were, in fact, timely received. *Wandrey v. Etchison*, 363 Ark. 36, 210 S.W.3d 892 (2005).

#### **Postconviction Proceedings.**

Where appellant was convicted on a plea of guilty to aggravated robbery and sentenced to 240 months' imprisonment, this rule did not provide an avenue for postconviction relief. *Pierce v. State*, 2009 Ark. 606, — S.W.3d —, 2009 Ark. LEXIS 798 (2009).

#### **Probate Proceedings.**

Notwithstanding the provisions of this rule, § 28-1-115(a) allows a probate court to vacate or modify its orders at any time before the time for appeal has elapsed after the final termination of the estate. *White v. Toney*, 37 Ark. App. 36, 823 S.W.2d 921 (1992).

This rule does not limit the probate court's authority to reopen the estate under § 28-53-119 because § 28-53-119 authorizes the reopening of an estate on the grounds allowed in the statute, separate and apart from the grounds for reopening a case provided under this rule. *Moore v. First Presbyterian Church of Searcy, Ark., Inc.*, 2010 Ark. App. 269, — S.W.3d —, 2010 Ark. App. LEXIS 281 (Mar. 31, 2010).

Circuit court did not err in granting a medical center, doctors, and an insurer summary judgment in an executrix's wrongful death/omalpractice action because the executrix had no standing to file a lawsuit on behalf of the estate since the probate court had closed the estate and discharged her; the

probate court lost jurisdiction to re-open the estate no later than ninety days after the estate closed, and because it had lost jurisdiction, the doctrine of concurrent jurisdiction had no application. *Prickett v. Hot Spring County Med. Ctr.*, 2010 Ark. App. 282, — S.W.3d —, 2010 Ark. App. LEXIS 285 (Mar. 31, 2010).

#### **Remand.**

Case was remanded with instructions to amend the decree by adding a more specific description of the boundary line between the parties' land, because the order lacked a specific description of the boundary between the properties, but the order clearly referenced a survey identifying the established boundary line as the fence on the south side of the road. *Boyster v. Shoemaker*, 101 Ark. App. 148, 272 S.W.3d 139 (2008).

#### **Res Judicata.**

Res judicata barred a motion to modify a divorce decree under subdivision (c)(4) of this rule because an issue concerning restraining order language had been raised on three different occasions. A former husband had the opportunity to litigate all aspects of the restraining order issue in a 2002 hearing. *Clowers v. Stickel*, — Ark. App. —, — S.W.3d —, 2012 Ark. App. LEXIS 466 (May 16, 2012).

#### **Time of Motion.**

Where original order and permanent injunction, requiring defendant to reduce height of spillway by one foot to prevent backed-up water from going on plaintiff's land, was entered in September, 1979 and, during action to determine if defendants were in contempt, the chancery court modified the original order in March, 1980, such modification did not violate the 90-day limit set forth in subsection (b) of this rule, since an injunction can be modified without regard to the lapse of the term of court. *Haberman v. Van Zandvoord*, 1 Ark. App. 203, 614 S.W.2d 242 (1981).

Petitioner had no standing to set aside an adoption decree and was procedurally barred to proceed where he waited more than four years to file his motion to set aside the decree. *Summers v. Griffith*, 317 Ark. 404, 878 S.W.2d 401 (1994), cert. denied 514 U.S. 1065, 115 S. Ct. 1696, 131 L. Ed. 2d 559 (1995).

Motion to vacate bond forfeiture order, filed 111 days after entry of the order, held untimely. *M & M Bonding Co. v. State*, 59 Ark. App. 228, 955 S.W.2d 521 (1997).

The timeliness provisions of the rule did not apply to an appeal by the Department of Human Services from an order in an action in which it was not a party. *Arkansas Dep't of Human Servs. v. R.P.*, 333 Ark. 516, 970 S.W.2d 225 (1998).

The power to correct clerical mistakes may be exercised at any time, either on motion or

on the court's own initiative. *Lord v. Mazzanti*, 339 Ark. 25, 2 S.W.3d 76 (1999).

A probate court's dismissal of an adoption petition more than 90 days after the entry of a "temporary order of adoption" was void because, pursuant to this rule, the trial court lost jurisdiction to do so. *Mayberry v. Flowers*, 69 Ark. App. 307, 12 S.W.3d 652 (2000).

A probate order may be vacated or modified at any time before a final order is entered, notwithstanding the dictates of this rule. *Snowden v. Riggins*, 70 Ark. App. 1, 13 S.W.3d 598 (2000).

The state's challenge to a judgment of acquittal was untimely where (1) the judgment of acquittal was entered on January 13, (2) almost 60 days later, the state filed its motion to vacate that order, and (3) the court did not issue its decision on the motion until almost five months and well over 90 days after the judgment was entered. *State v. Dawson*, 343 Ark. 683, 38 S.W.3d 319 (2001).

Where the trial court's judgment against the sellers was issued on December 21, 2001, the sellers filed a motion to vacate and for a new trial on November 15, 2002, and the sellers filed a notice of appeal from the July 3, 2003, denial of the motion to vacate on July 31, 2003, the appeal from the July 3 order was timely; the motion to vacate was timely filed within one year of the judgment in accordance with subdivision (c)(1) of this rule, and notice of appeal from the order denying the motion was properly filed within 30 days of the order as required under RAP-Civ 4(a). *Hunter v. Video Real Estate Agency, Inc.*, 355 Ark. 387, 137 S.W.3d 389 (2003).

Circuit court improperly granted niece's petition to reopen probate of her aunt's estate under § 28-53-119(a)(1) where she failed to file the petition within the 90-day limitation period set forth in this rule or provide "other cause," such as fraud or lack of notice. *Bullock v. Barnes*, 366 Ark. 444, 236 S.W.3d 498 (2006).

If this rule applied to a prisoner's motion for reconsideration of the circuit court's alleged denial of his petition for writ of habeas corpus, the prisoner's petition for writ of mandamus seeking to compel a circuit judge to issue a ruling on the motion for reconsideration was moot; under this rule, the circuit court lost jurisdiction to provide relief 90 days after its original order. More than 90 days had expired since the circuit's court's original ruling, and the prisoner pled no basis for any of the exceptions to the 90-day limitation in the rule. *Henson v. Wyatt*, 373 Ark. 315, 283 S.W.3d 593 (2008).

Trial court had jurisdiction to modify the amount of a child support arrearage owed by a father because the modification was entered 86 days after the entry of the original order, which was within the time frame under this



rule; the father's motion was not one seeking a new trial under Ark. R. Civ. P. 59. In his motion, the father did not ask for a new trial, but rather requested that a trial court enter an order reducing his balance; this request did not require the taking of additional evidence, but rather an application of the social security benefits received by the child against the father's total child-support arrearage. *Office of Child Support Enforcement v. Dickens*, 2009 Ark. App. 195, 300 S.W.3d 122 (2009).

#### **Valid Defense.**

Movant failed to allege and prove a valid defense. *Meisch v. Brady*, 270 Ark. 652, 606 S.W.2d 112 (1980); *Wilkins v. Ford*, 275 Ark. 469, 631 S.W.2d 298 (1982); *Bunker v. Bunker*, 17 Ark. App. 7, 701 S.W.2d 709 (1986); *Hargis v. Hargis*, 292 Ark. 487, 731 S.W.2d 198 (1987); *Farmers Union Mut. Ins. Co. v. Mockbee*, 21 Ark. App. 252, 731 S.W.2d 239 (1987); *Hendrix v. Hendrix*, 26 Ark. App. 283, 764 S.W.2d 472 (1989).

In a mortgage foreclosure action, the trial court did not abuse its discretion when, after it had entered a decree for the mortgagor bank, it allowed the mortgagee, in its motion for a new trial or modification of the decree, to raise the defense of tender, which had not been pled prior to the entry of the decree. *First State Bank v. Gamble*, 14 Ark. App. 53, 685 S.W.2d 173 (1985).

Appellant must make a prima facie showing that he has a valid or meritorious defense to the action before he is entitled to have the judgment set aside; the motion itself must assert this defense. The only time that a valid defense need not be shown is when the judgment is void, not voidable, such as when the appellant has received no notice whatsoever, actual or constructive. *Bunker v. Bunker*, 17 Ark. App. 7, 701 S.W.2d 709 (1986).

On collateral attack, judgments will not be vacated unless a meritorious defense is alleged and proved. *Hargis v. Hargis*, 292 Ark. 487, 731 S.W.2d 198 (1987).

In order to prevail under this rule, a party is required to show that it has a meritorious defense, and the motion itself must assert this defense. *Farmers Union Mut. Ins. Co. v. Mockbee*, 21 Ark. App. 252, 731 S.W.2d 239 (1987).

A meritorious defense has been defined as evidence (not allegations) sufficient to justify the refusal to grant a directed verdict against the party required to show the meritorious defense. *Farmers Union Mut. Ins. Co. v. Mockbee*, 21 Ark. App. 252, 731 S.W.2d 239 (1987).

In order to prevail under either ARCP 55 or subsections (b) or (c) of this rule, a party is required to show that it has a meritorious defense, the motion itself must assert this defense. *Hendrix v. Hendrix*, 26 Ark. App. 283, 764 S.W.2d 472 (1989).

#### **Void Judgment.**

In cases where judgments are void, no proof of a meritorious defense is necessary to set aside judgment. *Cole v. First Nat'l Bank*, 304 Ark. 26, 800 S.W.2d 412 (1990).

#### **Waiver.**

Where bank entered appearance on day after the jury returned its verdict made no request for a new trial or to present evidence in the matter and did nothing in the time period after it entered its appearance and before the judgment was entered, bank waived its right to seek a new trial for the purpose of presenting evidence in the case, and trial court abused its discretion by granting a new trial in these circumstances. *Arkansas State Hwy. Comm'n v. Johns*, 302 Ark. 291, 789 S.W.2d 450 (1990).

#### **Written Record.**

If parties plan to base their arguments on the timeliness of the notice of appeal from the denial of a motion for a judgment n.o.v. or a new trial motion upon a "written record" that a hearing has been set or held, the "written record," a transcript of the hearing or other record of its having been held must be filed and made an official record of the court within 30 days from the making of the motion for judgment n.o.v. or for a new trial. *Brittenum & Assocs. v. Mayall*, 286 Ark. 427, 692 S.W.2d 248 (1985).

**Cited:** *Smith v. Smith*, 272 Ark. 199, 612 S.W.2d 736 (1981); *O'Leary v. Commercial Nat'l Bank*, 1 Ark. App. 266, 614 S.W.2d 682 (1981); *Tucker v. Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982), overruled *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998); *Peddicord v. Peddicord*, 278 Ark. 164, 644 S.W.2d 582 (1983); *Alexander v. First Nat'l Bank*, 278 Ark. 406, 646 S.W.2d 684 (1983); *SD Leasing, Inc. v. RNF Corp.*, 278 Ark. 530, 647 S.W.2d 447 (1983); *Brown v. Meekins*, 282 Ark. 186, 666 S.W.2d 710 (1984); *Webb v. Webb*, 285 Ark. 164, 685 S.W.2d 514 (1985); *Arkansas Medical Soc'y v. Arkansas Medical Soc'y*, 287 Ark. 9, 695 S.W.2d 827 (1985); *LLLL Constr. Co. v. Mehlburger, Tanner, Renshaw & Assocs.*, 16 Ark. App. 267, 702 S.W.2d 29 (1985); *Gibson v. Crain*, 19 Ark. App. 57, 716 S.W.2d 782 (1986); *Taggart v. Moore*, 292 Ark. 168, 729 S.W.2d 7 (1987); *Cigna Ins. Co. v. Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988); *Sevenprop Assocs. v. Harrison*, 295 Ark. 35, 746 S.W.2d 51 (1988); *Bridges v. Bridges*, 24 Ark. App. 147, 750 S.W.2d 412 (1988); *Womack v. Newman Fixture Co.*, 27 Ark. App. 117, 766 S.W.2d 949 (1989); *Ozark Acoustical Contractors v. National Bank of Commerce*, 301 Ark. 472, 786 S.W.2d 813 (1990); *May v. Bob Hankins Distrib. Co.*, 301 Ark. 494, 785 S.W.2d 23 (1990); *Carter v. Carter*, 303 Ark. 70, 792 S.W.2d 597 (1990); *Egg City of Ark., Inc. v.*

Rushing, 304 Ark. 562, 803 S.W.2d 920 (1991); Brantley v. Davis, 305 Ark. 68, 805 S.W.2d 75 (1991); Robinson v. Buie, 307 Ark. 112, 817 S.W.2d 431 (1991); Acme Brick Co. v. Missouri Pac. R.R., 307 Ark. 363, 821 S.W.2d 7 (1991); Phillips Constr. Co. v. Cook, 34 Ark. App. 224, 808 S.W.2d 792 (1991); Hood v. Arkansas Sch. Bd. Ins. Coop., 35 Ark. App. 1, 811 S.W.2d 1 (1991); First Nat'l Bank v. Higginbotham Funeral Serv., Inc., 36 Ark. App. 65, 818 S.W.2d 583 (1991); Phillips v. Commonwealth Sav. & Loan Ass'n, 308 Ark. 654, 826 S.W.2d 278 (1992); Burns v. Burns, 309 Ark. 602, 832 S.W.2d 251 (1992); Cigainero v. State, 310 Ark. 504, 838 S.W.2d 361 (1992); Mikkelsen v. Willis, 38 Ark. App. 33, 826 S.W.2d 830 (1992); McDonald's Corp. v. Hawkins, 315 Ark. 487, 868 S.W.2d 78 (1994); Martin v. National Bank of Commerce, 316 Ark. 83, 870 S.W.2d 738 (1994); Young v. Young, 316 Ark. 456, 872 S.W.2d 856 (1994); Watkins Motor Lines v. Hedrick, 316 Ark. 683, 873 S.W.2d 814 (1994); Dougan v. Gray, 318 Ark. 6, 884 S.W.2d 239 (1994); Arkansas Dep't of Human Servs. v. Bailey, 318 Ark. 374, 885 S.W.2d 677 (1994); McCourt Mfg. Co. v. Credit Bureau, 319 Ark. 23, 888 S.W.2d 650 (1994); Fazeli v. Barnes, 47 Ark. App. 99, 885 S.W.2d 908 (1994); Rossi v. Rossi, 319 Ark. 373, 892 S.W.2d 246 (1995); Cash v. Lim, 322 Ark. 359, 908 S.W.2d 655 (1995); National Enters., Inc. v. Union Planters Nat'l Bank, 322 Ark. 590, 910 S.W.2d 691 (1995); International Resource Ventures, Inc. v. Diamond Mining Co. of Am., 326 Ark. 765, 934 S.W.2d 218 (1996); Bradford v. Bradford, 52 Ark. App. 81, 915 S.W.2d 723 (1996); Steward v. Wurtz, 327 Ark. 292, 938 S.W.2d 837 (1997); Brown v. Cleveland, 328 Ark. 73, 940

S.W.2d 876 (1997); Gooden v. State, 329 Ark. 485, 950 S.W.2d 461 (1997), cert. denied 523 U.S. 1028, 118 S. Ct. 1317, 140 L. Ed. 2d 481 (1998); Skaggs v. Cullipher, 57 Ark. App. 50, 941 S.W.2d 443 (1997); State Office of Child Support Enforcement v. Secrest, 334 Ark. 20, 970 S.W.2d 814 (1998); Ouachita Trek & Dev. Co. v. Rowe, 341 Ark. 456, 17 S.W.3d 491 (2000); Taylor v. Zanone Props., 342 Ark. 465, 30 S.W.3d 74 (2000); May Constr. Co. v. Riverdale Dev. Co., LLC, 345 Ark. 239, 45 S.W.3d 815 (2001); In re Implementation of Amendment 80: Amendments to Rules of Civ. Procedure & Inferior Court Rules, — Ark. —, — S.W.3d —, 2001 Ark. LEXIS 707 (May 24, 2001); Sims v. First State Bank of Plainview, 73 Ark. App. 325, 43 S.W.3d 175 (2001); Holt Bonding Co. v. State, 353 Ark. 136, 114 S.W.3d 179 (2003); Barnett v. Monumental Gen. Ins. Co., 354 Ark. 692, 128 S.W.3d 803 (2003); Swindle v. Benton County Circuit Court, 363 Ark. 118, 211 S.W.3d 522 (2005); DFH/PJH Enters., LLC v. Caldwell, 373 Ark. 412, 284 S.W.3d 66 (2008); Reeve v. Carroll County, 373 Ark. 584, 285 S.W.3d 242 (2008); Howard v. Howard, 2009 Ark. App. 592, — S.W.3d —, 2009 Ark. App. LEXIS 729 (2009); Evans v. Evans, 2009 Ark. App. 626, — S.W.3d —, 2009 Ark. App. LEXIS 791 (2009); Sunbelt Business Brokers of Ark., Inc. v. James, 2009 Ark. App. 659, — S.W.3d —, 2009 Ark. App. LEXIS 820 (2009); Arnold v. State, 2011 Ark. 395, — S.W.3d —, 2011 Ark. LEXIS 482 (Sept. 29, 2011); Casto v. Casto, 2011 Ark. App. 684, — S.W.3d —, 2011 Ark. App. LEXIS 721 (Nov. 9, 2011); Hill v. Hill, 2012 Ark. App. 11, — S.W.3d —, 2012 Ark. App. LEXIS 16 (Jan. 4, 2012).

## Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

**Reporter's Notes to Rule 61:** 1. Rule 61 is identical to FRCP 61. The philosophy behind this rule is that proceedings should not be disturbed because of a technical error which resulted in no prejudice. *Gutshall v. Wood*, 123 F.2d 174 (C.A., 1942). While there is no corollary under prior Arkansas law, this rule does appear to express the Arkansas attitude towards harmless error.

2. The first paragraph of superseded *Ark. Stat. Ann.* § 27-1901 (Repl. 1962) relative to

new trials provided that a verdict or decision could be vacated and a new trial granted for the grounds stated therein which materially affected the substantial rights of the party. Implicit in that statute was the requirement that the error be prejudicial in order to justify the granting of a new trial. Also, Rule 103(a) of the Federal Rules of Evidence and of the Uniform Rules of Evidence recognizes that error may not be predicated upon a ruling which admits or excludes evidence unless a



substantial right of the party is affected. This is simply another way of saying that the error must be other than harmless to afford any basis for complaint.

3. While this rule governs practice in trial courts, the appellate courts also should follow the same test. *Box v. Swindle*, 306 F.2d 882 (C.C.A. 5th, 1962); *Keaton v. Atchison T. &*

*S.F. Ry.*, 321 F. 2d 317 (C.C.A. 7th, 1963). Ultimately, the determination of whether an error is prejudicial rests with the appellate court. The Arkansas Supreme Court has consistently held that harmless error affords no basis for complaint and this rule simply confirms the settled rule of law in this State.

## RESEARCH REFERENCES

**Ark. L. Rev. Note**, Default Judgments in Arkansas, 43 Ark. L. Rev. 921.

## CASE NOTES

### ANALYSIS

Admission of illegal evidence.

Appeal of both sides.

Error not harmless.

Prejudice.

Reduction of award.

Reversal of tort judgment.

### Admission of Illegal Evidence.

Even though the list of allegedly obscene magazines offered for sale should not have been admitted against the bookstore owner because they were illegally seized, the evidence, in the form of the two obscene magazines that he sold to a police officer, was so overwhelming that the error, even if it was of constitutional proportions, was harmless beyond a reasonable doubt. *Baird v. State*, 12 Ark. App. 71, 671 S.W.2d 191 (1984), cert. denied 471 U.S. 1004, 105 S. Ct. 1865, 85 L. Ed 2d 159 (1985).

### Appeal of Both Sides.

There is no case or rule which requires the trial court to grant a new trial simply because both sides give notice of appeal; the fact that appellees designated their appeal as a "protective appeal" was of no significance. *Transit Homes, Inc. v. Bellamy*, 282 Ark. 453, 671 S.W.2d 153 (1984), overruled *Peters v. Pierce*, 314 Ark. 8, 858 S.W.2d 680 (1993).

### Error Not Harmless.

Circuit court's error in resubmitting a negligence case on special-interrogatory verdict forms without allowing the individual the opportunity to argue to the jury the effects of the answers to the interrogatories pursuant to § 16-64-122(d) was not harmless error where the jury apportioned each party 50 percent fault, even the slightest tipping of those percentages in favor of the individual would have resulted in a judgment against the owner of the electrical wire, the jury had been deadlocked at one point, six to six, only the minimum number of jurors needed for a verdict were in agreement, and the error was particularly injurious because the individual

could not have known at closing arguments that special-interrogatory forms would be used. *Campbell v. Entergy Ark., Inc.*, 363 Ark. 132, 211 S.W.3d 500 (2005).

Where parties in a medical malpractice case failed to comply with Ark. R. Civ. P. 4 by naming the incorrect party on the summons and complaint, there was no basis for finding that the error did not effect the substantial rights of the parties. *Shotzman v. Berumen*, 363 Ark. 215, 213 S.W.3d 13 (2005).

### Prejudice.

Court would not reverse for error which did not result in prejudice. *Robinson v. Abbott*, 292 Ark. 630, 731 S.W.2d 782 (1987).

No longer is it presumed that simply because an error is committed it is prejudicial error. *Smith v. State*, 307 Ark. 223, 818 S.W.2d 945 (1991).

Submission of comparative fault special-interrogatory verdict forms to the jury by the circuit court during deliberations without allowing victim the opportunity to argue to the jury the effects of answers to those interrogatories violated § 16-64-122(d); further, the error was not harmless, pursuant to this rule, as victim's inability to argue the effects of the jury's answers to the interrogatories was prejudicial. *Campbell v. Entergy Ark., Inc.*, 363 Ark. 132, 211 S.W.3d 500 (2005).

### Reduction of Award.

Where trial court reduced excessive property and medical awards to the maximum amount at proof in the trial and sustained the award for pain and suffering which, under the circumstances, was not excessive, the procedure used by the trial court was proper and, as required by this rule, did not prejudice the rights of the counter-defendant. *Mustang Elec. Servs., Inc. v. Nipper*, 272 Ark. 263, 613 S.W.2d 397 (1981).

### Reversal of Tort Judgment.

Where a tort judgment in favor of the plaintiffs was reversed, but where, during pendency of the appeal, the judgment was not

superseded and the plaintiffs collected \$7,681.41 by garnishments, on remand the trial judge was right in treating defendant's motion for restitution as a motion for judgment and granting relief, and there was no reason for the trial judge to delay the award until a retrial merely to permit a possible

setoff against any judgment that might be recovered by the plaintiffs. *Lowe v. Morrison*, 270 Ark. 668, 606 S.W.2d 569 (1980).

**Cited:** *Schaffer v. Tenneco Oil Co.*, 278 Ark. 511, 647 S.W.2d 446 (1983); *Lindell Square Ltd. Partnership v. Savers Fed. Sav. & Loan Ass'n*, 27 Ark. App. 66, 766 S.W.2d 41 (1989).

## **Rule 62. Stay of proceedings to enforce a judgment.**

(a) *Automatic Stay; Exceptions.* Except as otherwise ordered by the court, no execution or enforcement proceedings shall issue on any judgment or decree until after the expiration of ten (10) days from the entry thereof. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring or granting of an injunction during the pendency of an appeal.

(b) *Stay on Motion for New Trial or for Judgment.* In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) *Injunction Pending Appeal.* When an appeal is taken from an interlocutory or final judgment granting, dissolving or denying an injunction, the court from which the appeal is taken, in its discretion, may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(d) *Stay Upon Appeal.* When an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule, and except as to child custody orders and similar orders. The bond may be given at or after the time of filing the notice of appeal. After an appeal has been docketed in the appellate court, application for leave to file a bond may be made only in such court.

(e) *Stay in Favor of State or an Agency Thereof.* When an appeal is taken by the State of Arkansas or an officer or agency thereof and the operation or enforcement of the judgment is stayed, no bond, obligation or other security shall be required from the appellant.

(f) *Power of Appellate Court Not Limited.* The provisions of this rule do not limit any power of the appellate court to stay proceedings during the pendency of an appeal, or to suspend, modify, restore or grant an injunction during the pendency of any appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(g) *Stay of Judgment as to Multiple Claims or Parties.* When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary



to secure the benefit thereof to the party in whose favor the judgment is entered. (Amended November 11, 1991, effective January 1, 1992.)

**Reporter's Notes to Rule 62:** 1. With the exception of minor wording changes and the omission of certain provisions which are inapplicable to state practice, Rule 62 is substantially the same as FRCP 62.

2. Section (a) omits the reference in FRCP 62 to patent disputes and combines the language of superseded *Ark. Stat. Ann.* § 30-102 (Repl. 1962) and that of the Federal Rule. This rule does not change prior Arkansas practice concerning the enforcement of judgments. Under both Arkansas and federal law, execution or other enforcement of a judgment or decree is automatically stayed for a ten day period unless specifically directed by the trial court. *Whetstone v. Atlas Drilling & Production Co.*, 241 Ark. 387, 409 S.W. 2d 322 (1966) and *FDIC v. Steinman*, 53 F. Supp. 644 (D.C. Pa., 1943). Under the Federal Rule, the ten day stay is more or less mandatory and the trial court is given little discretion to waive such period. The Committee recognized that there are situations, however, where execution or other enforcement should not be delayed; therefore, Rule 62 was drafted so as to retain the trial court's discretion to waive this ten day period.

3. Section (a) does work one minor change in prior Arkansas practice. Under superseded *Ark. Stat. Ann.* § 30-102 (Repl. 1962), no action could be taken within ten days after *rendition* of the judgment unless otherwise ordered by the court. Such language permitted the execution on a judgment even before it was actually filed. Under Rule 62, no action can be taken until ten days after the entry or filing of the judgment or decree unless ordered by the court.

4. The portion of Section (a) dealing with stays and appeals in cases involving interlocutory orders and injunctions is substantially the same as superseded *Ark. Stat. Ann.* § 27-2102 (Repl. 1962). Under that statute and the Federal Rule, such proceedings are not stayed unless otherwise ordered by the court.

5. Section (b) is identical to its counterpart in FRCP 62. There was no specific provision under prior Arkansas law to stay an execution or other enforcement proceedings during the pendency of post-judgment motions and it was doubtful that a trial court had the power to stay execution beyond the ten-day period normally allowed. *Taylor v. O'Kane*, 185 Ark. 782, 49 S.W.2d 400 (1932). Thus, this rule confers upon the trial court power which it did not apparently have under prior law.

6. With the exception of the omission of the last sentence in FRCP 62(c), Rule 62 is otherwise identical to the former. The omitted provision simply has no applicability to state practice. There was no specific authority under prior Arkansas law which permitted an injunction during an appeal and this rule does add such authority. This authority is discretionary, however, and generally requires a finding that the applicant is likely to succeed on appeal; that irreparable harm will result unless it is granted and that no substantial harm is likely to result to the other party. *Belcher v. Birmingham Trust Nat. Bank*, 395 F.2d 685 (C.C.A. 5th, 1968), *Bauer v. McLaren*, 332 F. Supp. 723 (D.C. Iowa, 1971).

7. Section (d) is a modified version of FRCP 62(d) and basically follows prior Arkansas law as codified in superseded *Ark. Stat. Ann.* § 27-2119, et seq. (Repl. 1962) and should not work any changes in Arkansas practice and procedure.

8. Section (e) is revised from the Federal Rule so as to make it compatible with state practice. This section follows prior Arkansas law which did not require the posting of a bond or other security in order to stay proceedings pending an appeal prosecuted by the State of Arkansas. Superseded *Ark. Stat. Ann.* § 34-215 (Repl. 1962). It is, however, incumbent upon the State, or its officers or agents, to cause the trial court to specifically stay the proceedings even though security is not required.

## CASE NOTES

### Supersedeas Bond.

Where no supersedeas or stay was issued under ARAP 8 or this rule, city had authority and responsibility to furnish services to annexed area and collect franchise taxes during pendency of appeal of annexation order. *Jackson v. City of Little Rock*, 274 Ark. 51, 621 S.W.2d 852 (1981).

A supersedeas order relates back to the filing of a valid supersedeas bond and retroactively effects a stay during the period of

time between the filing of the supersedeas bond and the filing of the supersedeas order. *Ryder Truck Rental, Inc. v. Sutton*, 305 Ark. 374, 807 S.W.2d 909 (1991).

Writs of garnishment issued between the date the supersedeas bond was filed and the date the supersedeas order was filed were not valid as a retroactive stay was in effect from the date of the filing of the bond. *Ryder Truck Rental, Inc. v. Sutton*, 305 Ark. 374, 807 S.W.2d 909 (1991).

Where property is pledged for a supersedeas bond, the fair market method of valuation is appropriate for determining value of the property. *Ryder Truck Rental, Inc. v. Sutton*, 305 Ark. 374, 807 S.W.2d 909 (1991).

Rule 8 of the Rules of Appellate Procedure provided sufficient latitude for court to accept an unsecured pledge of property as a valid supersedeas bond. *Ryder Truck Rental, Inc. v. Sutton*, 305 Ark. 374, 807 S.W.2d 909 (1991).

Other than the 10-day automatic stay provided by subsection (a) of this rule, a party has no other protection from the enforcement of an order unless such party files a supersedeas bond and requests a stay pending appeal under subsection (d) of this rule, or a court otherwise stays the execution of an order pending a motion for a new trial or to alter or amend a judgment under subsection (b) of this rule. *In re Sugarloaf Props.*, 286 B.R. 705 (Bankr. E.D. Ark. 2002).

Where father filed a petition in the Arkansas Supreme Court for a writ of prohibition or mandamus or a stay, arguing that the trial

court was acting in excess of its jurisdiction in seeking to hold him in contempt, given that he had posted a supersedeas bond, the resulting stay did not invalidate the trial court's contempt orders for the father's failure to pay child support. *Rogers v. Rogers*, 80 Ark. App. 430, 97 S.W.3d 429 (2003).

Where the remainder beneficiaries appealed a judgment in a trust suit allowing the lifetime beneficiary to invade the trust for her expenses, the court did not err when it required appellants to post a bond in the amount of \$181,792.28; the court properly took into account the costs and damages to which the lifetime beneficiary would be entitled if she prevailed on appeal and the trust assets did not replace the need for a supersedeas bond. *Bailey v. Delta Trust & Bank*, 359 Ark. 424, 198 S.W.3d 506 (2004).

**Cited:** *Taggart v. Moore*, 8 Ark. App. 160, 650 S.W.2d 590 (1983), *aff'd*, 292 Ark. 168, 729 S.W.2d 7 (1987); *Taggart v. Moore*, 292 Ark. 168, 729 S.W.2d 7 (1987).

### Rule 63. Disability of a judge.

If for any reason, including resignation or removal from office, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are announced or filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but, if such judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may, in his discretion, grant a new trial.

**Reporter's Notes to Rule 63:** 1. Rule 63 is substantially identical to FRCP 63. The applicability of this rule is limited to those situations where a trial judge, for any reason, becomes unable to perform his duties under these rules during the period after a decision or verdict has been given and before the appellate court obtains jurisdiction. Although this rule gives the succeeding judge the authority to grant a new trial if he cannot satisfactorily perform the duties required of

him, the decisions previously made by the former judge and the jury are presumed to be correct and the burden is on the moving party to show to the contrary. *Miller v. Penn R. Co.*, 161 F. Supp. 633 (D.C., 1958).

2. Because of its limited applicability, FRCP 63 has caused little or no controversy since its adoption and it has never been amended. Accordingly, it is not believed that Rule 63 will have any significant impact upon Arkansas practice and procedure.

## ARTICLE VIII. COUNSEL; PROVISIONAL AND FINAL REMEDIES; SUITS IN FORMA PAUPERIS

### Rule 64. Addition and withdrawal of counsel.

(a) When additional counsel is employed to represent any party in a case, said counsel shall immediately cause the clerk to enter his name as an attorney of record in the case and shall also immediately notify the court and opposing counsel that he has been employed in the case.



(b) A lawyer may not withdraw from any proceeding or from representation of any party to a proceeding without permission of the court in which the proceeding is pending. Permission to withdraw may be granted for good cause shown if counsel seeking permission presents a motion therefor to the court showing he (1) has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel; (2) has delivered or stands ready to tender to the client all papers and property to which the client is entitled; and (3) has refunded any unearned fee or part of a fee paid in advance, or stands ready to tender such a refund upon being permitted to withdraw. (Adopted July 9, 1984, effective September 1, 1984; amended July 6, 1987, effective September 21, 1987.)

**Reporter's Notes to Rule 64:** Prior to 1984, there was no Rule 64. The Rule was adopted in 1984 to state the procedural requirements for withdrawal of counsel which had been addressed in Rule 9 of the Uniform Rules for Circuit and Chancery Courts. The new Rule is based upon DR2-2110 of the Code of Professional Conduct [superseded].

**Addition to Reporter's Notes, 1987**

**Amendment:** As adopted in 1984, Rule 64 dealt only with withdrawal of counsel, a topic also covered by Rule 9 of the Uniform Rules for Circuit and Chancery Court. The 1987 amendment addresses the employment of additional counsel, an issue heretofore covered by Rule 8 of the Uniform Rules. The amendment makes no change in existing law.

## RESEARCH REFERENCES

**Ark. L. Notes.** Watkins, Recent Amendments to the Arkansas Rules of Civil and Appellate Procedure, 1988 Ark. L. Notes 47.

**U. Ark. Little Rock L.J.** Survey — Civil Procedure, 11 U. Ark. Little Rock L.J. 137.

## CASE NOTES

### ANALYSIS

In general.

Compliance required.

Good cause shown.

Notice of withdrawal.

Permission to withdraw.

### In General.

Subsection (b) of this rule is aimed at protecting the client's interests; the trial court must look at a motion to withdraw from the point of view of the client, not the attorney. *Jones-Blair Co. v. Hammett*, 326 Ark. 74, 930 S.W.2d 335 (1996).

Subsection (b) of this rule is aimed at protecting the client's interests when deciding if an attorney violated the rule, thereby prejudicing his clients' rights to a fair trial. *Dean v. Williams*, 339 Ark. 439, 6 S.W.3d 89 (1999).

Appellate court would not consider a claim that a trial court erred in denying claimant's motion to proceed in a civil action on a pro se basis after discharging his attorney because the claimant was not happy with the way the attorney was handling the case, and in allowing the attorney to later sign and submit a motion to dismiss the case based on a settlement; claimant had not presented a record of any proceeding in the trial court that would

allow a proper review of the claim, nor had the claimant presented any authority in support of his argument that this rule and Ark. Model R. Prof. Conduct 1.16 gave the claimant an absolute right to discharge his attorney without the permission of the trial court. *Holcombe v. Marts*, 352 Ark. 201, 99 S.W.3d 401 (2003).

### Compliance Required.

A bare assertion by an attorney that a client is uncooperative does not justify granting a motion to withdraw; even if a client is uncooperative or hard to communicate with, neither the attorney nor the court is relieved from insuring that this rule is followed. *Jones-Blair Co. v. Hammett*, 326 Ark. 74, 930 S.W.2d 335 (1996).

Appellant, against whom a default judgment was entered, held entitled to a new trial on the ground that its attorney was allowed to withdraw from the case in violation of this rule. *Jones-Blair Co. v. Hammett*, 326 Ark. 74, 930 S.W.2d 335 (1996).

### Good Cause Shown.

Requirements of subsection (b) of this rule met where evidence at the hearing, and in client's response to attorney's motion to withdraw, showed that the client had become

hostile toward attorney and his representation of the client. *Rush v. Fieldcrest Cannon, Inc.*, 326 Ark. 849, 934 S.W.2d 512 (1996).

#### Notice of Withdrawal.

Appellants did not receive adequate notice of their counsel's withdrawal from representation where the withdrawal was accomplished only seven calendar days before a hearing, counsel stated that he mailed certified letters to the appellants notifying them of his withdrawal, but never received any green cards back acknowledging the receipt of the letters, and the appellants testified that they never received notice. *Snowden v. Riggins*, 70 Ark. App. 1, 13 S.W.3d 598 (2000).

Where an attorney moved to withdraw but failed to advise his client, where the attorney failed to refund any unearned fee and return any client papers, and where the client's answer was subsequently struck in pending litigation because of the failure of his legal representative to appear at a pretrial conference, the order authorizing the withdrawal could not serve to shield the attorney from his client's subsequent legal malpractice claim, and the trial court erred in granting summary

judgment in favor of the attorney. *Lee v. Mansour*, 104 Ark. App. 91, 289 S.W.3d 170 (2008), rehearing denied — Ark. App. —, — S.W.3d —, 2008 Ark. App. LEXIS 909 (Dec. 17, 2008), review denied — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 450 (Apr. 30, 2009).

In a divorce and custody case, the trial court erred in granting the wife's attorney's motion to withdraw as counsel because reasonable notice was not given to the wife where the motion was granted only 13 days prior to a trial date unknown to the wife and, while the wife did not provide an accurate mailing address, the motion and notices were merely mailed via regular mail to the wife's last known address and were returned as undeliverable. *Duncan v. Duncan*, 2010 Ark. App. 62, — S.W.3d —, 2010 Ark. App. LEXIS 61 (Jan. 20, 2010).

#### Permission to Withdraw.

Permission to withdraw should not be granted summarily. *Diebold v. Myers Gen. Agency, Inc.*, 292 Ark. 456, 731 S.W.2d 183 (1987).

**Cited:** *Allison v. Dufresne*, 340 Ark. 583, 12 S.W.3d 216 (2000).

### Rule 65. Injunctions and temporary restraining orders.

#### (a) *Preliminary Injunction.*

(1) *Notice.* The court may issue a preliminary injunction only on notice to the adverse party.

(2) *Consolidating the Hearing with the Trial on the Merits.* Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

#### (b) *Temporary Restraining Order.*

(1) *Issuing Without Notice.* The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) *Contents; Expiration.* Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.



(3) *Expediting the Preliminary-Injunction Hearing.* If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) *Motion to Dissolve.* On 2 days' notice to the party who obtained the order without notice or on shorter notice set by the court the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) *Security.* The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. Neither the State of Arkansas, its officers, nor its agencies are required to give security.

(d) *Contents and Scope of Every Injunction and Restraining Order.*

(1) *Contents.* Every order granting an injunction and every restraining order must:

- (A) state the reasons why it issued;
- (B) state its terms specifically; and
- (C) describe in reasonable detail — and not by referring to the complaint or other document — the act or acts restrained or required.

(2) *Persons Bound.* The order binds only the following who receive actual notice of it by personal service or otherwise:

- (A) the parties;
- (B) the parties' officers, agents, servants, employees, and attorneys; and
- (C) other persons who are in active concert or participation with the parties and the parties' officers, agents, servants, employees, and attorneys.

(e) *Form and Scope of Injunction or Restraining Order.* Every order granting an injunction or restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained or mandated; and it is binding only upon the parties to the action, their officers, agents, servants, employees and attorneys and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(f) *Contempt.* Disobedience of an injunction or restraining order may be punished by the Court as a contempt. (Amended June 2, 2011, effective July 1, 2011.)

**Reporter's Notes to Rule 65:** 1. Rule 65 marks a significant departure from FRCP 65. Whereas the latter makes a distinction between preliminary injunctions and temporary restraining orders, this rule treats them equally insofar as the procedures are concerned for obtaining either remedy. Thus, where it appears from affidavit or verified complaint that irreparable harm will or might result, the court has the authority to issue a preliminary injunction or temporary restraining order without notice to the opposing party. Under FRCP 65, notice is always a requirement for the issuance of a preliminary injunction.

2. This rule (a)(1) is generally in accord with prior Arkansas law. Superseded *Ark. Stat. Ann.* § 32-201 (Repl. 1962) provided that the court could direct that reasonable notice be given to the party against whom an injunction was sought. Superseded *Ark. Stat. Ann.* § 32-202 (Repl. 1962) required mandatory notice when a defendant had already answered and superseded *Ark. Stat. Ann.* § 32-103 (Repl. 1962) provided for the issuance of a temporary injunction without notice in certain instances as where irreparable harm was threatened. However, superseded *Ark. Stat. Ann.* § 32-203 (Repl. 1962) provided that in a number of specific instances,

notice was required on an application for a preliminary injunction. This rule (a)(1) is designed to simplify prior Arkansas law by providing for the issuance of a preliminary injunction or temporary restraining order without notice only where it appears that irreparable harm or injury will or might result. In all other instances, notice of such application is required. Rule (a)(2) requires prior notice and a bond before a preliminary restraining order or injunction may be effective as against designated businesses.

3. Section (b) is designed to afford a hearing to the person against whom an injunction or temporary restraining order has been issued without notice. Substantial rights are often affected and for this reason, such hearings should be heard as expeditiously as possible. Where the hearing is held on the right of the applicant to have an injunction or restraining order issued, the court may delay the hearing until the entire case can be heard on the merits. Where harm may result, however, from such delay, the better practice is to proceed with the hearing on such application.

4. Section (d) deviates substantially from the security provisions of the Federal Rule and also changes prior Arkansas law. Under this rule, the trial court is vested with discretion to determine when security is required and the amount of such security when required. Both FRCP 65 and superseded *Ark. Stat. Ann.* § 32-206 (Repl. 1962) require the posting of adequate security as a condition precedent to the issuance of a preliminary injunction; therefore, this section does modify prior Arkansas law. Under this rule, preliminary injunctions and temporary restraining orders are placed on equal footing and since the trial court is in the best position to know whether security should be required, it is given the discretion to make such a determination.

5. Section (e) is identical to FRCP 65(d) and is designed to insure specificity in the drafting of injunctions and restraining orders. The intent is to insure that there is no doubt or confusion as to the conduct enjoined or restrained. Likewise, this section makes clear the identity of all persons who are bound by the injunction or order. This provision should have little effect on Arkansas practice and procedure.

6. Section (e) of FRCP 65 is omitted and Section (f) is added to this rule. The latter section simply provides that disobedience of any injunction or order may be treated as a

contempt by the court. Prior Arkansas law in this area was codified as superseded *Ark. Stat. Ann.* § 32-401 (Repl. 1962) although it is doubtful that specific statutory authority was necessary to enable the court to punish one for violating the terms of an injunction or restraining order.

**Addition to Reporter's Notes, 2011 Amendment:** Rule 65 has been completely rewritten and is now substantially identical to Federal Rule 65 as amended in 2009. Rule 65 as adopted in 1979 departed significantly from the corresponding federal rule. Contrary to the approach of the federal rule and that of most states, the original Arkansas Rule 65 treated preliminary injunctions and temporary restraining orders as equivalent, allowing issuance of either without notice to the adverse party. Subsections (a) and (b) of the amended rule provide for issuance of a temporary restraining order without notice to the adverse party but require notice to the adverse party prior to issuance of a preliminary injunction.

The amendment eliminates former subsection (a)(2) that limited the availability of ex parte injunctive relief in some circumstances. The revised rule provides a number of enhanced procedural protections for persons or entities against whom ex parte injunctive relief is sought, including: that an affidavit or verified complaint state specific facts showing the harm that will result to the movant before the adverse party can be heard; that the movant's attorney certify in writing any efforts made to give notice and why notice should not be required; that a temporary restraining order issued without notice describe the circumstances underlying its issuance; that the temporary restraining order must expire not later than 14 days after entry unless for good cause or with the adversary's consent it is extended; and that the hearing on the temporary restraining order be set for the earliest possible time and take precedence over other matters. In addition, the party against whom the order is issued may appear and move to dissolve or modify the order upon 2 days' notice to the party who obtained the temporary restraining order without notice.

In subsection (c) the amended rule conditions issuance of a preliminary injunction or temporary restraining order on the movant's giving security determined by the court and section (d)(1) prescribes the contents of the injunction or restraining order. Subsection (d) specifies the persons bound by the order.



## RESEARCH REFERENCES

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**U. Ark. Little Rock L.J.** Sullivan, The Need for a Business or Payroll Records Affidavit for Use in Child Support Matters, 11 U. Ark. Little Rock L.J. 651.

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## CASE NOTES

## ANALYSIS

Allegation of irreparable harm.

Appellate review.

Bond.

Hearing.

Irreparable harm not shown.

Jurisdiction.

Legal description.

Mandatory injunction.

Notice.

Security.

Setting forth reasons for issuance.

**Allegation of Irreparable Harm.**

When a hearing is held on the question whether a preliminary injunction should issue, with notice to the defendant, the party requesting the injunction must have made allegations of irreparable harm which stand un rebutted by the defendant or must show that absent the injunction he or she will suffer irreparable harm. *Paccar Fin. Corp. v. Hummell*, 270 Ark. 876, 606 S.W.2d 384 (1980).

Physician's loss of \$100,000 yearly salary, possibility that he might be forced to move to another community to find suitable employment and harm to his professional reputation did not constitute irreparable harm warranting issuance of temporary restraining order to prevent termination of physician's employment. *Kreutzer v. Clark*, 271 Ark. 243, 607 S.W.2d 670 (1980).

Preliminary injunction denied where appellants made no attempt to prove irreparable harm. *Wilson v. Pulaski Ass'n of Classroom Teachers*, 330 Ark. 298, 954 S.W.2d 221 (1997).

Finding against the oil companies was improper where the circuit court abused its discretion in concluding that there was irreparable harm to the landowners and in refusing to modify the temporary restraining order. *AJ&K Operating Co. v. Smith*, 355 Ark. 510, 140 S.W.3d 475 (2003).

Where defendant brought into Arkansas elk that had come through a state with docu-

mented cases of chronic wasting disease in the elk population, there was real and imminent danger to Arkansas wildlife warranting a permanent injunction for the removal or destruction of the elk. *Delancy v. State*, 356 Ark. 259, 151 S.W.3d 301 (2004).

Attorney general was not required to prove the elements in this rule where the state was seeking to protect the public interest; the trial court's findings that the company's trade practices could harm the public was sufficient for purposes of imposing a preliminary injunction. *Mercury Mktg. Techs. of Del., Inc. v. State ex rel. Beebe*, 358 Ark. 319, 189 S.W.3d 414 (2004).

Trial court did not err in granting doctors' request for a preliminary injunction based on its finding that the doctors had a likelihood of success on their tortious interference claim and that the doctors would be irreparably harmed without injunctive relief from the company's policy that denied privileges to any doctor that owned an interest in a competing hospital; by adopting such a policy, the company intended to disrupt the business expectancies arising out of the doctors' relationships with their patients and with referring physicians with whom they have established patterns of referral. *Baptist Health v. Murphy*, 365 Ark. 115, 226 S.W.3d 800 (2006).

In enjoining landowners from making improvements on their property, a trial court did not abuse its discretion in finding a risk of irreparable harm to a city claiming jurisdiction over the property because without an injunction, the landowners would continue to develop the property and gain a vested right in a nonconforming use, preventing the city from enforcing its regulations against the property. *Potter v. City of Tontitown*, 371 Ark. 200, 264 S.W.3d 473 (2007).

In dispute among a hotel management corporation, a hotel, and various other corporations, notice should have been given before an injunction and order to inspect were granted because no affidavit was filed showing that

irreparable harm would result. *IBAC Corp. v. Becker*, 371 Ark. 330, 265 S.W.3d 755 (2007).

When a trial court entered a temporary restraining order setting aside a writ of execution previously entered by the court, it was error for the court to rely on an unverified petition because subdivision (a)(1) of this rule required an affidavit or verified complaint. *Tiner v. Tiner*, 2011 Ark. App. 478, — S.W.3d —, 2011 Ark. App. LEXIS 509 (June 29, 2011).

### **Appellate Review.**

Because this was a case in equity involving the issuance of an injunction, the court's review was *de novo*. *Bilo v. El Dorado Broad. Co.*, 101 Ark. App. 267, 275 S.W.3d 660 (2008).

### **Bond.**

A bond as a prerequisite to the issuance of the injunction was not required where no party enjoined alleged damages occasioned by the issuance of the injunction. *Weathersbee v. Wallace*, 14 Ark. App. 174, 686 S.W.2d 447 (1985).

Even though subdivision (a)(2) of this rule requires filing a "bond with the clerk, together with good and sufficient securities to be approved by the clerk," subsection (d) of this rule specifically exempts the state from posting security. *Southeast Ark. Landfill, Inc. v. State*, 313 Ark. 669, 858 S.W.2d 665 (1993).

Trial court did not err by granting a preliminary injunction and then continuing it for 110 days without requiring the state to post bond. *Southeast Ark. Landfill, Inc. v. State*, 313 Ark. 669, 858 S.W.2d 665 (1993).

### **Hearing.**

The trial judge was in error in issuing a temporary restraining order without setting an expeditious hearing to determine whether the temporary restraining order should be dissolved, as required by subsection (b) of this rule; moreover, various hearings to be conducted by the Arkansas Transportation Commission do not satisfy the requirements of this rule. *Midwest Buslines v. Munson*, 274 Ark. 108A, 622 S.W.2d 187 (1981).

Where an injunction was not issued until the trial court had heard from four witnesses and considered a number of documents, the two-day notice of the hearing given the party being enjoined, while somewhat short, was not so inadequate as to void the proceedings; a temporary injunction may issue without any hearing where there are affidavits or a verified complaint alleging irreparable harm without relief. *Fort Smith Symphony Orchestra, Inc. v. Fort Smith Symphony Ass'n*, 285 Ark. 284, 686 S.W.2d 418 (1985).

### **Irreparable Harm Not Shown.**

Circuit court failed to comply with subsection (e) of this rule by granting a preliminary injunction in favor of appellee doctors without making findings on the issue of the likelihood

of success on the merits; thus, the appellate court was unable to determine whether the circuit court abused its discretion in granting the preliminary injunction and remanded the case for further findings. *Baptist Health v. Murphy*, 362 Ark. 506, 209 S.W.3d 360 (2005).

### **Jurisdiction.**

Chancellor had jurisdiction to decide request for injunctive relief. *Springdale Bd. of Educ. v. Bowman*, 294 Ark. 66, 740 S.W.2d 909 (1987).

Judge possessed authority to vacate chancellor's temporary restraining order even though it had been entered for more than ninety days. *West v. Belin*, 314 Ark. 40, 858 S.W.2d 97 (1993).

Where all the necessary parties were before the court in Louisiana where appellants first sought a declaratory judgment, it was immaterial that the subject oil wells of a disputed lease were located in Arkansas; accordingly, company failed to demonstrate that it would suffer irreparable harm if the Arkansas court did not grant an order restraining and enjoining appellants from proceeding further in their suit in Louisiana. *Three Sisters Petroleum v. Langley*, 348 Ark. 167, 72 S.W.3d 95 (2002).

Circuit court exceeded its jurisdiction in granting parents' request for a temporary restraining order preventing school district from expelling two students. The parents were not entitled to injunctive relief, because there had been no final action by the school board on the superintendent's expulsion recommendation and the parents failed to exhaust their administrative remedies before the school board. *Helena-West Helena Sch. Dist. #2 v. Circuit Court*, — Ark. —, 247 S.W.3d 823, 2007 Ark. LEXIS 209 (2007).

### **Legal Description.**

Although the landowner argued that the trial court should have provided a legal description of that part of his land that he was enjoined from filling, case law held that a trial court's order had to provide a legal description when locating boundary lines or easements, and the landowner cited no persuasive authority that these holdings were to be applied in a case that did not involve a dispute over property lines or ownership. *Bilo v. El Dorado Broad. Co.*, 101 Ark. App. 267, 275 S.W.3d 660 (2008).

### **Mandatory Injunction.**

The chancellor may require a person to do a specific act by the issuance of a mandatory injunction; if he had so desired, the chancellor in a divorce action could have required the wife to sign the joint income tax return or pay one-half of the increased tax. *Cox v. Cox*, 17 Ark. App. 93, 704 S.W.2d 171 (1986).



**Notice.**

Although this rule provides for relief without written or oral notice to the adverse party or his attorney where the requisite proof of emergency is shown, the better practice is to give oral notice to the adverse party's attorney, if known and available to receive such notice, prior to submission of the ex parte request. *Jones v. Jones*, 51 Ark. App. 24, 907 S.W.2d 745 (1995), rev'd 326 Ark. 481, 931 S.W.2d 767 (1996).

**Security.**

Subsection (d) of this rule clearly provides a court with discretion to require the giving of an adequate security as a condition precedent to the issuance of a preliminary injunction; that discretion is given the trial court in such matters because that court is in the best position to know whether security should be required. *Galloway v. Arkansas State Hwy. & Transp. Dep't*, 318 Ark. 303, 885 S.W.2d 17 (1994).

**Setting Forth Reasons for Issuance.**

Subsection (e) of this rule did not prohibit a trial court from incorporating by reference its rulings from the bench in an order for preliminary injunction; where rulings from the bench were incorporated in the abstract, subsection (e) was satisfied because it was possible to determine the trial court's basis for concluding that a party would ultimately prevail at trial, and whether the trial court had abused its discretion. *Potter v. City of Tontitown*, 371 Ark. 200, 264 S.W.3d 473 (2007).

**Cited:** *Henricks v. Burton*, 1 Ark. App. 159, 613 S.W.2d 609 (1981); *American Trucking Ass'n v. Gray*, 280 Ark. 258, 657 S.W.2d 207 (1983); *Coyne v. Coyne*, 9 Ark. App. 80, 654 S.W.2d 584 (1983); *Tate v. Sharpe*, 300 Ark. 126, 777 S.W.2d 215 (1989); *Brown v. SEECO, Inc.*, 316 Ark. 336, 871 S.W.2d 580 (1994); *Custom Microsystems, Inc. v. Blake*, 344 Ark. 536, 42 S.W.3d 453 (2001).

**Rule 65.1. Security: proceedings against sureties.**

Whenever these rules require or permit the giving of security by a party and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the sureties if their addresses are known.

**Reporter's Notes to Rule 65.1:** 1. With the exception of the deletion of the references to admiralty and maritime claims, Rule 65.1 is otherwise identical to FRCP 65.1. This rule does not work any changes in Arkansas law as the substance of the rule has heretofore been in effect. Superseded *Ark. Stat. Ann.* § 27-2107.3 (Repl. 1962), which governed superse-

deas bonds was almost verbatim with this and FRCP 65.1.

2. With reference to bonds which were posted in order to obtain injunctive relief, superseded *Ark. Stat. Ann.* § 32-310 (Repl. 1962) provided essentially the same procedure for reducing a claim against a surety to judgment.

**Rule 66. Receivers.**

(a) *Appointment.* Circuit courts may appoint receivers for any lawful purpose when such appointment shall be deemed necessary and proper. The receiver shall give bond, with sufficient security, in an amount to be approved by the court, for the benefit of all persons in interest. The receiver shall likewise take an oath to faithfully perform the duties reposed in him by the court.

(b) *Reports.* The receiver shall make a report of his proceedings and actions every six (6) months or at such other times as directed by the court. All moneys or property collected by the receiver shall be accounted for and deposited into court or otherwise be subject to the orders of the court.

(c) *Employment of Others.* Subject to the approval of the court, the receiver shall have power to employ an attorney, an accountant or such

other persons as may be necessary to conduct the business or affairs entrusted to the receiver. The wages or fees paid by the receiver shall be paid as an expense from the assets collected by him.

(d) *Removal.* Receivers may be removed at any time by the court for good cause. Substitute receivers shall be subject to the same requirements as the previous receiver.

(e) *Dismissal of Action.* No action wherein a receiver has been appointed shall be dismissed except by order of the court. (Amended March 13, 2003.)

**Publisher's Notes.** A proposed amendment to Rule 66 has been published by the Supreme Court of Arkansas for comment from the bench and bar. The proposed amendment to Rule 66 would change the reference to "courts of equity" in subsection (a) to "circuit courts" in light of Constitutional Amendment 80.

**Reporter's Notes to Rule 66:** 1. Rule 66 varies substantially in form from FRCP 66. Whereas the latter attempts to incorporate by reference existing federal statutes dealing with receiverships, this rule attempts to define the procedures used in receiverships.

2. Receiverships were formerly governed by superseded *Ark. Stat. Ann.* § 36-101, et seq. (Repl. 1962). The procedure remains essentially the same under Rule 66 as it did under prior Arkansas law. No attempt has been made to define and identify those situations in which the appointment of a receiver is proper; accordingly, resort must still be made to traditional equitable grounds for the ap-

pointment of a receiver. This rule is not intended to cover receivers appointed pursuant to *Ark. Stat. Ann.* § 66-4805 (Repl. 1966) for insolvent insurance companies. The latter involves the insurance commissioner as the statutory receiver and the insurance code contains specific provisions for such receiverships.

3. Following the example of superseded *Ark. Stat. Ann.* § 36-104 (Repl. 1962), no attempt has been made to define the powers of a receiver. The extent of such powers must be determined by reference to traditional equitable principles. This power is largely determined by the court which should exercise close supervision and control over the receiver's actions.

**Addition to Reporter's Notes, 2003 Amendment:** In light of Constitutional Amendment 80, the reference to "courts of equity" in subdivision (a) has been replaced with "circuit courts."

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Arkansas Law Survey, Templeton, Miscellaneous, 9 U. Ark. Little Rock L.J. 189.

## CASE NOTES

### ANALYSIS

Appeal.  
Discretion of court.  
Fiduciary.

### Appeal.

The appointment of a receiver is a significant step and can affect the substantial rights of the parties. Review of the propriety of such an appointment is provided by permitting interlocutory appeals of such orders. *Boeckmann v. Mitchell*, 322 Ark. 198, 909 S.W.2d 308 (1995).

### Discretion of Court.

Chancellors have inherent discretion to appoint receivers when they find it necessary to accomplish a proper end. *Chapin v. Stuckey*, 286 Ark. 359, 692 S.W.2d 609 (1985).

A chancellor did not abuse his discretion in determining that the appointment of a receiver was appropriate to oversee the dissolution and liquidation of a bank's not-for-profit corporation on the grounds of insolvency even though there was no base or ancillary proceeding since the only concern was whether the appointment constituted an abuse of discretion. *Union Planters Nat'l Bank v. East Cent. State Economic Dev. Corp.*, 340 Ark. 706, 13 S.W.3d 578 (2000).

Where the evidence showed that the facilities of a public water authority were in a state of disrepair, there were no funds to make improvements, and there was contamination of the water, the trial court did not abuse its discretion by appointing a receiver; moreover, a claim of self-interest of a particular receiver



was rejected. *Williams v. Brushy Island Pub. Water Auth.*, 368 Ark. 219, 243 S.W.3d 903 (2006).

Trial court did not abuse its discretion in not appointing a receiver in appellants' action against a county fair and livestock show association challenging the association's purchase of property and the relocation of its fairground as the association's board did not violate § 4-28-412(2); there was no showing that the estimates obtained by the association were not reasonable or accurate. *Dunaway v. Garland County Fair & Livestock Show Ass'n*, 97 Ark. App. 181, 245 S.W.3d 678 (2006).

#### **Fiduciary.**

A receiver is a fiduciary representing the court and all parties in interest. *First Nat'l Bank v. Quality Chem. Corp.*, 36 Ark. App. 215, 821 S.W.2d 53 (1991).

Where a duly appointed receiver also had rights as a secured creditor, it was not allowed to personally benefit from its position as receiver, to the detriment of other creditors, by using that which had been delivered to the debtor, without payment. *First Nat'l Bank v. Quality Chem. Corp.*, 36 Ark. App. 215, 821 S.W.2d 53 (1991).

### **Rule 67. Deposit in court.**

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money or property paid into court under this rule shall not be withdrawn except upon the express, written order of the court and shall be delivered only to the person determined by the court to be entitled thereto.

**Reporter's Notes to Rule 67:** 1. Rule 67 is a slightly modified version of FRCP 67. The only variation is found in the last sentence and this change is designed to safeguard the money or object on deposit by insuring that it shall not be released without the express, written order of the court and only then to the person whom the court has determined to be entitled to possession.

2. Prior Arkansas law was codified as superseded *Ark. Stat. Ann.* § 27-1601 (Repl. 1962). Under this rule, however, a party must initiate the deposit as opposed to having the court take the initiative. The deposit must be with leave of the court and upon notice to the opposing party.

### **Rule 68. Offer of judgment.**

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment exclusive of interest from the date of offer finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability. For purposes of this rule, the term "costs" is

defined as reasonable litigation expenses, excluding attorney's fees. (Amended November 21, 1988, effective January 1, 1989.)

**Reporter's Notes to Rule 68:** 1. With the exception of one minor change, Rule 68 is otherwise identical to FRCP 68. This change simply provides for the entry of judgment where an offer of judgment has been accepted as opposed to the provision found in FRCP 68 which authorizes the clerk to enter judgment. This rule is not concerned with the mechanics of preparing and entering the judgment and resort to Rule 58 is necessary to find the procedure for preparing and entering judgment.

2. This rule is substantially the same as superseded *Ark. Stat. Ann.* § 27-1501, et seq. (Repl. 1962). It does, however, follow the provision of FRCP 68 concerning the time for accepting an offer of settlement. Thus, a party is given ten days to accept such an offer as opposed to the five day period allowed under prior Arkansas law. The purpose behind this rule and FRCP 68 is to encourage the early settlement of claims and to protect the party who is willing to settle from the expense and burden of costs which subsequently accrue.

*Stafford v. Lake Cent. Airlines, Inc.*, 47 F.R.D. 218 (D.C., Ohio, 1969).

**Addition to Reporter's Notes, 1988 Amendment:** The amendment broadens the definition of the term "costs" for purposes of this rule. In *Darragh Poultry & Livestock Equip. Co. v. Piney Creek Sales, Inc.*, 294 Ark. 427, 743 S.W.2d 804 (1988), the Supreme Court held that, as used in this rule, the term "costs" is limited to costs authorized by statute, a result consistent with prior cases adopting a narrow definition of the term in other contexts. However, a broader approach is warranted with respect to this rule, which is designed to encourage early settlement. The amended rule thus permits assessment of not only those costs authorized by statute, but also reasonable expenses typically incurred in the course of litigation. As a result, expenses disallowed under *Darragh* — e.g., meals and lodging — are now available under the amended rule. Attorney's fees, however, are expressly excluded from the new definition.

## RESEARCH REFERENCES

**ALR.** Construction of state offer of judgment rule — Issues of time. 112 ALR 5th 47.

Construction of state offer of judgment rule — Issues concerning revocation and succession. 116 ALR 5th 433.

Construction of state offer of judgment rule — Sufficiency of offer and contract formation issues. 118 ALR 5th 91.

Allowance and determination of attorney's fees under state offer of judgment rule. 119 ALR 5th 121.

State offer of judgment rule — Construction, operation, and effect of acceptance and resulting judgment. 120 ALR 5th 559.

Disallowance of award under state offer of judgment rule due to lack of good faith. 121 ALR 5th 325.

Application of state offer of judgment rule — Apportionment issues in multiple party setting. 125 ALR 5th 193.

Application and construction of state offer of judgment rule — Determining whether offeror is entitled to award. 2 ALR 6th 279.

Recoverable Costs Under State Offer of Judgment Rule. 34 ALR 6th 431.

**Ark. L. Notes.** Watkins, Procedural Notes from All Over, 1989 Ark. L. Notes 65.

**Ark. L. Rev. Note.** Delta Air Lines, Inc. v. August: The Agony of Victory and the Thrill of Defeat, 35 Ark. L. Rev. 604.

**U. Ark. Little Rock L.J.** Survey — Civil Procedure, 12 U. Ark. Little Rock L.J. 135.

## CASE NOTES

### ANALYSIS

In general.

Constitutionality.

Construction.

Attorney's fees.

Costs incurred after offer.

Discretion of court.

Unallocated offer of judgment.

### In General.

This rule is not applicable where a defendant makes an offer of settlement that is less

than the minimum amount that the plaintiff can recover. *Jones v. Abraham*, 67 Ark. App. 304, 999 S.W.2d 698 (1999), aff'd, 341 Ark. 66, 15 S.W.3d 310 (2000), overruled in part, *Lamontagne v. Ark. Dep't of Human Servs.*, 2010 Ark. 190, — S.W.3d — (2010).

This rule is not applicable where a defendant makes an offer of settlement that is no greater than the minimum amount that the plaintiff can recover. *Jones v. Abraham*, 341 Ark. 66, 15 S.W.3d 310 (2000).



**Constitutionality.**

Parents and their son were not denied equal protection under the United States and Arkansas Constitutions by this rule after costs greater than the jury verdicts for the parents and their son were awarded to the defendant, whose offers of settlement in amounts higher than the verdicts were rejected before trial. While this rule allowed a defendant to make an enforceable offer of judgment but did not extend the same privilege to a plaintiff, the policy of this rule in encouraging settlements was neutral, favoring neither plaintiffs nor defendants, and plaintiffs and defendants were not similarly situated since plaintiffs were parties by choice while defendants were not. *Lafont v. Mixon*, 2010 Ark. 450, — S.W.3d —, 2010 Ark. LEXIS 551 (Nov. 18, 2010).

**Construction.**

Where injured person rejected driver's offer and a jury later found the driver zero percent at fault, the appellate court held the driver's offer of one dollar was not a bona fide or good faith offer as required to trigger an award of costs under this rule and the trial court erred in granting driver's post-trial motion for costs; however, because the law regarding what kind of offer was required to trigger costs was not settled at the time driver made the offer of judgment, injured person's motion for sanctions under Ark. R. Civ. P. 11 was properly denied. *Warr v. Williamson*, 359 Ark. 234, 195 S.W.3d 903 (2004).

**Attorney's Fees.**

Defendants who tendered a judgment larger than the plaintiffs ultimately received, were not entitled to be paid the cost of the lawsuit as attorney's fees are not included in the term "costs" as stated in this rule. *Clawson v. Rye*, 281 Ark. 8, 661 S.W.2d 354 (1983).

The trial court is not required to award costs to a prevailing party when no offer of judgment is made. *Hankins v. Department of Fin. & Admin.*, 330 Ark. 492, 954 S.W.2d 259 (1997).

**Costs Incurred After Offer.**

Trial court had authority to award the costs incurred after making of offer, but only such costs as were authorized by statute. *Darragh Poultry & Livestock Equip. Co. v. Piney Creek Sales, Inc.*, 294 Ark. 427, 743 S.W.2d 804 (1988).

The provisions of ARCP 54(d) relating to the recovery of costs by the prevailing party in a lawsuit are not mutually exclusive with the provisions of this rule, which allow a defen-

dant to recover his post-offer costs if the defendant makes a settlement offer that is rejected and the plaintiff receives an award at trial that is less than the amount of the offer; therefore, while the trial court did not err in granting a request for post-offer costs by a defendant in a personal injury action whose pretrial offer was rejected, the plaintiff was also entitled to an award of pre-offer costs because the jury found for the plaintiff. *Bell v. Bershears*, 351 Ark. 260, 92 S.W.3d 32 (2002).

Granting of a driver's motion for a new trial in an action stemming from an automobile accident was improper because the evidence was conflicting and the jury resolved the evidence in the other driver's favor; the verdict was not clearly against the preponderance of the evidence. Because the judgment was not more favorable to the appellee driver than the appellant driver's offer, this rule mandated that appellee was to be liable for the costs incurred after appellant's offer was made. *Bailey v. McRoy*, 99 Ark. App. 185, 258 S.W.3d 388 (2007).

In a divorce action, the trial court did not err in refusing to credit the husband's offer of his entire business to the wife because even if she had accepted the offer, the trial court would have been required to determine the value of the asset so as to effect an equal and equitable division of property; thus, no litigation expenses would have been saved. *Cummings v. Cummings*, 104 Ark. App. 315, 292 S.W.3d 819 (2009).

**Discretion of Court.**

Trial judge has no discretion but must order offeree to pay authorized costs incurred after making of a bona fide offer, if judgment, exclusive of interest, is not more favorable than offer. *Darragh Poultry & Livestock Equip. Co. v. Piney Creek Sales, Inc.*, 294 Ark. 427, 743 S.W.2d 804 (1988).

**Unallocated Offer of Judgment.**

Trial court erred in awarding costs to a neighbor as this rule did not apply to an unallocated offer of judgment such as the joint offer of judgment made by the neighbor and a utility company. *Pope v. Overton*, 2011 Ark. 11, — S.W.3d —, 2011 Ark. LEXIS 14 (Jan. 20, 2011).

This rule does not apply to an unallocated offer of judgment. *Pope v. Overton*, 2011 Ark. 11, — S.W.3d —, 2011 Ark. LEXIS 14 (Jan. 20, 2011).

**Cited:** *Boyd v. Connell*, 293 Ark. 531, 739 S.W.2d 536 (1987); *Grimes v. M.H.M., Inc.*, 299 Ark. 560, 776 S.W.2d 336 (1989); *Farm Bureau Mut. Ins. Co. v. David*, 324 Ark. 387, 921 S.W.2d 930 (1996).

**Rule 69. Execution discovery.**

In aid of a judgment or execution, a judgment creditor or his successor in

interest, when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules. (Adopted July 9, 1984, effective September 1, 1984.)

**Reporter's Notes to Rule 69:** Prior to 1984, there was no Rule 69. The Rule was adopted in 1984 to make the discovery procedures available to parties pursuing execution. The Rule is not intended to supersede the

independent action for discovery found in Ark. Stat. Ann. §§ 30-901 through 30-908 (Repl. 1979), however, it supersedes Ark. Stat. Ann. § 30-906 (Repl. 1979), as it is to an extent duplicative of that section.

## **Rule 70. Judgment for specific acts: vesting title.**

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the jurisdiction of the court, in lieu of directing a conveyance thereof, it may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

**Reporter's Notes to Rule 70:** 1. With the exception of minor wording changes to adapt FRCP 70 to state practice, Rule 70 is substantially the same as the Federal Rule. This rule applies only after judgment has been entered, *DeBeers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 65 S. Ct. 1130 (1945), and gives the trial court power to deal with parties who refuse to obey and comply with orders to do specific acts. The acts contemplated by this rule have traditionally been ordered by equity courts and it is likely that such courts will have more occasion to exercise the authority conferred by this rule. The rule is not limited, however, to equity cases and under proper circumstances, law courts may well exercise the authority conferred therein.

2. This rule does not purport to grant additional authority to a trial court to affect title to property outside the jurisdiction of the court. It simply recognizes the traditional jurisdictional limits of courts and in no way attempts to enlarge such limits.

3. This rule does not affect Ark. Stat. Ann. § 29-128 (Repl. 1962) which requires that any decree which orders a conveyance or passing of title to real property be recorded in the county wherein the real property is located within one year from the entry of the decree.

4. This rule recognizes the inherent power of the court to adjudge a party in contempt for disobedience to its order and judgment. This power has also been recognized in Ark. Stat. Ann. § 34-901(3) (Repl. 1962).

## **RESEARCH REFERENCES**

**Ark. L. Notes.** Brill, Equity and the Restitutionary Remedies: Constructive Trust, Equitable Lien, and Subrogation, 1992 Ark. L. Notes 1.



## CASE NOTES

## ANALYSIS

Dismissal.  
 Executory order.  
 Mandatory injunction.

**Dismissal.**

The rule does not provide a mechanism for dismissal. *Ouachita Trek & Dev. Co. v. Rowe*, 341 Ark. 456, 17 S.W.3d 491 (2000).

**Executory Order.**

Where court of appeals determined that the title to certain stocks and certificates of deposit were in the estate rather than in the decedent's daughter and remanded to the probate court, the order of the probate judge directing that the documents be changed to

reflect ownership in the estate was purely executory under this rule so that the issue of jurisdiction was moot and could not be relitigated by appeal to the Supreme Court. *McDermott v. McAdams*, 273 Ark. 20, 616 S.W.2d 476 (1981).

**Mandatory Injunction.**

The chancellor may require a person to do a specific act by the issuance of a mandatory injunction; if he had so desired, the chancellor in a divorce action could have required the wife to sign the joint income tax return or pay one-half of the increased tax. *Cox v. Cox*, 17 Ark. App. 93, 704 S.W.2d 171 (1986).

**Rule 71. Process in behalf of and against persons not parties.**

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

**Reporter's Notes to Rule 71:** 1. Rule 71 is identical to FRCP 71. The Federal Rule has remained unchanged since its adoption and has provoked little controversy. It does not attempt to say when an order can be made in favor of or against a person not a party. Rather it merely provides that when this can be done, non-parties have recourse to, and are subject to, process in the same manner as parties. *Wright & Miller, Federal Practice and Procedure*, Section 3031.

2. Prior Arkansas law contained no comparable provision. Normally, under prior law, a judgment, order or decree was ineffective

against a person not a party to the action. Superseded *Ark. Stat. Ann.* § 29-107 (Repl. 1962). There are situations, however, where even without specific statutory authority, the Arkansas courts have permitted a non-party to enforce an order or to enforce an order against a non-party, i.e., where an assignee of a purchaser at a judicial sale obtains a writ of assistance or where an injunction is enforced against a non-party who has knowledge of the provisions of the order. *Hudkins v. Ark. State Bd. of Optometry*, 208 Ark. 577, 187 S.W.2d 538 (1945); *Hickinbotham v. Williams*, 228 Ark. 46, 305 S.W.2d 841 (1957).

## CASE NOTES

**Partial Supersession of Statute.**

The reporter's notes to this rule suggest that A.S.A. § 29-107 (now A.C.A. §§ 16-65-108, 16-90-103) is superseded, but if so, it is only to the extent necessary "for enforcing obedience" to orders of the court, and is expressly not superseded with respect to judg-

ments by default. *Tucker v. Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982), overruled *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998). But see *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998).

**Rule 72. Suits in forma pauperis.**

(a) Every indigent person who shall have a cause of action against another may petition the court in which the action is pending, or in which it is intended to be brought, for leave to prosecute the suit *in forma pauperis*.

(b) All such petitions shall be accompanied by an assertion of indigency, verified by a supporting affidavit. The affidavit form is set out below. Any

petition not in compliance with this provision will be returned to the petitioner. There shall be attached to the petition a copy of the complaint or proposed complaint.

(c) The court shall make a finding regarding indigency based on the affidavit. In making its determination, the court may consider the current federal poverty guidelines which may be obtained from the Administrative Office of the Courts. If satisfied from the facts alleged that the petitioner has a colorable cause of action, the court may by order allow the petitioner to prosecute the suit *in forma pauperis*. Every person permitted to proceed *in forma pauperis* may prosecute the suit without paying filing fees and other fees charged by the clerk and shall not be prevented from prosecuting the suit by reason of being liable for the costs of a former suit brought against the same defendant.

(d) No person shall be permitted to prosecute any action of slander, libel or malicious prosecution *in forma pauperis*.

(e) The form of the affidavit shall be as follows:

IN THE \_\_\_\_\_ COURT \_\_\_\_\_, COUNTY,  
ARKANSAS

IN RE PETITION OF \_\_\_\_\_  
TO PROCEED IN FORMA PAUPERIS

NO. \_\_\_\_

AFFIDAVIT IN SUPPORT OF  
REQUEST TO PROCEED IN FORMA PAUPERIS

I, \_\_\_\_\_, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes \_\_\_\_ No \_\_\_\_

(a) If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer.

(b) If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any money from any of the following sources?

(a) Business, profession or any form of self-employment?

Yes \_\_\_\_ No \_\_\_\_

(b) Rent payments, interest or dividends?

Yes \_\_\_\_ No \_\_\_\_

(c) Pensions, annuities or life insurance payments?

Yes \_\_\_\_ No \_\_\_\_



(d) Gifts or inheritances?

Yes \_\_\_\_ No \_\_\_\_

(e) Any other sources?

Yes \_\_\_\_ No \_\_\_\_

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months.

3. Do you own any cash, or do you have money in a checking or savings account?

Yes \_\_\_\_ No \_\_\_\_

If the answer is yes, state the total amount in each account.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

Yes \_\_\_\_ No \_\_\_\_

If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

[6. TO BE COMPLETED ONLY IF PETITIONER IS INCARCERATED IN THE ARKANSAS DEPARTMENT OF CORRECTION OR ANY OTHER PENAL INSTITUTION.

Do you have any funds in the inmate welfare funds?

Yes \_\_\_\_ No \_\_\_\_

If the answer is yes, state the total amount in such account and have the certificate found below completed by the authorized officer of the institution.]

I understand that false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

\_\_\_\_\_  
Signature of Petitioner

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

Petitioner, \_\_\_\_\_, being first duly sworn under oath, presents that he/she has read and subscribed to the above and states that the information therein is true and correct.

SUBSCRIBED AND SWORN to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

[(To be completed by authorized officer of penal institution)]

## CERTIFICATE

I hereby certify that the petitioner herein, \_\_\_\_\_, has the sum of \$ \_\_\_\_\_ on account to his/her credit at the \_\_\_\_\_ institution where he/she is confined.

I further certify that petitioner likewise has the following securities to his/her credit according to the records of said institution:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
Authorized Officer of Institution]

(Amended December 21, 1987, effective March 14, 1988; amended February 23, 2012.)

**Reporter's Notes.** New Rule 72 tracks, with some changes, the former statutory provisions governing suits by indigents. A similar rule was proposed in 1986 but was withdrawn by the Supreme Court prior to its effective date. The former statutes, Ark. Stat. Ann. §§ 27-401, 27-403 — 27-406 (Repl. 1979), were repealed by Act 208, 75th General Assembly, in 1985. Section 27-402 [Ark. Code Ann. § 16-58-133 (1987)], adopted in 1981 to replace an earlier provision, was not repealed; however, it is superseded by this rule, which contains in paragraph (b) the requirements of § 27-402. The new rule departs from the former statutes and the rule previously proposed by the Court in two ways. First, the rule

does not require that the trial court assign counsel, without fee, for the petitioner. Second, the rule does not include the statutory provision allowing the trial court, in its discretion, to annul the *in forma pauperis* order in the event of "improper conduct" or "wilful or unnecessary delay" on the part of the petitioner. The Rules of Civil Procedure contain adequate sanctions that the court may employ in the event of such misconduct.

**Publisher's Notes.** A former rule concerning suits in forma pauperis was adopted by per curiam of July 7, 1986, to be effective on Sept. 15, 1986, but was rescinded by per curiam of Sept. 15, 1986.

This rule supersedes § 16-58-133.

## RESEARCH REFERENCES

**Ark. L. Notes.** Watkins, Recent Amendments to the Arkansas Rules of Civil and Appellate Procedure, 1988 Ark. L. Notes 47.

**U. Ark. Little Rock L.J.** Survey — Civil Procedure, 11 U. Ark. Little Rock L.J. 137.

Sullivan, The Need for a Business or Payroll Records Affidavit for Use in Child Support Matters, 11 U. Ark. Little Rock L.J. 651.

**Rules 73 — 76. [Reserved.]**

**Publisher's Notes.** Since the corresponding Federal Rules have been repealed, no Arkansas rules were adopted.

**ARTICLE IX. CIRCUIT COURTS AND CLERKS****Rule 77. Courts and clerks.**

(a) *Court Hours.* Courts shall be deemed open as specified in subsection (c) hereof for the purpose of filing any pleading or other paper; of issuing and



returning process; and of making and directing all interlocutory motions, orders and rules. Pleadings and other papers may be filed with the judge as provided in Rule 5(d).

(b) *Trials and Hearings.* All trials and hearings shall be public except as otherwise provided by law, such as, for example, Ark. Code Ann. § 16-13-318.

(c) *Clerk's Office and Orders of Clerk.* The clerk's office with the clerk or deputy in attendance shall be open during business hours on all days except Saturdays, Sundays and legal holidays. All motions and applications in the clerk's office for issuing mesne or final process and for any other proceedings which do not require allowance or order of the court are grantable of course by the clerk, but his action may be suspended, altered or rescinded by the court upon good cause shown. (Amended November 11, 1991, effective January 1, 1992.)

**Reporter's Notes to Rule 77:** 1. Rule 77 varies substantially from FRCP 77 and attempts to track prior Arkansas procedure. Overall, this rule does not make any significant changes in prior Arkansas law.

2. Under FRCP 77(a), the court is always considered open for the purpose of filing papers. This is consistent with FRCP 5(e), which permits the filing of papers with the judge personally, regardless of whether it is during the usual office hours of the court.

3. Although Ark. Stat. Ann. §§ 22-312 and 22-407 (Repl. 1962) seem to suggest that circuit and chancery courts are always open as provided in FRCP 77, the meaning is not the same. Under Arkansas law, the term "court always open" is intended to signify that a court remains in session continuously from the beginning of its term until the end thereof. Under the Federal Rule, a court is always open in the sense that papers can

always be filed with the judge or clerk, regardless of whether the clerk's office is open. *Casaldue v. Diaz*, 117 F.2d 915, cert. denied, 314 U.S. 639, 62 S. Ct. 74 (1941).

4. Section (b) differs from FRCP 77(b) and simply provides that unless otherwise provided by law, all hearings and trials shall be held in public.

5. Section (c) does not attempt to define the holidays when the clerk's office may be open or closed. Reference to Rule 6(a) is necessary to find the definition of a legal holiday.

6. FRCP 77(d) is deemed unnecessary under Arkansas practice. Since the clerk does not prepare the judgment, there does not appear to be any necessity for the clerk to serve notice that a judgment has been entered. This is particularly true since counsel normally prepares the judgment and opposing counsel is afforded an opportunity to approve same.

## **Rule 78. Motion day and hearings on motions.**

(a) *Motion Day.* Unless local conditions make it impracticable, each court shall establish regular times, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the court at any time and on such notice as is reasonable, may make orders for the advancement, conduct and hearing of such motions.

(b) *Motions, Responses, and Replies.* The form and content of motions, responses, and replies are governed by Rule 7(b). The timing of motions, responses, and replies is governed by Rule 6(c).

(c) *Hearing; Waiver.* The court, upon notice to all parties, may hold a hearing on a motion only after the time for reply has expired; however, the court may hear a proper ex parte motion at any time. Unless a hearing is requested by counsel or is ordered by the court, a hearing will be deemed waived and the court may act upon the matter without further notice after the time for reply has expired.

(d) *Mandamus and Prohibition.* Upon the filing of petitions for writs of mandamus or prohibition in election matters, it shall be the mandatory duty

of the circuit court having jurisdiction to fix and announce a day of court to be held no sooner than 2 and no longer than 7 days thereafter to hear and determine the cause. (Amended July 9, 1984, effective September 1, 1984; amended November 13, 1995; amended February 1, 2001; amended May 24, 2001, effective July 1, 2001; amended January 24, 2002.)

**Reporter's Notes to Rule 78:** 1. Rule 78 differs considerably from FRCP 78. Under the latter, the federal courts are given broad discretion to formulate their own local rules concerning the disposition of motions. Thus, there is no requirement of uniformity of rules. This rule, however, tracks prior Arkansas law in an attempt to insure uniformity in the method of hearing and deciding motions.

2. Under this rule, courts are not required to conduct motion days if local conditions make them impractical. This is a change from prior law as superseded *Ark. Stat. Ann.* § 27-1724 (Repl. 1962) required a motion day to be held on the first day of each term. Motion days are thus permissive under this rule whereas they were mandatory under prior Arkansas law.

3. Sections (b) and (c) of this rule are slightly modified versions of sections (b), (c), (d) and (e) of Rule 2 of the Uniform Rules for Circuit and Chancery Courts in this State. The idea is to have uniformity in the area of motions and Rule 2 of the Uniform Rules largely achieved this goal. Hence, its provisions are carried forward [forward] in Rule 78.

**Addition to Reporter's Notes, 1984 Amendment:** Rule 78(b) is amended by adding the last sentence of the subsection to assure that no court will consider it necessary to grant a frivolous motion even though there has been no response to the motion.

**Court's Notes, 1995 Amendment:** Subsection (d) is added to modify the effect of Act 582, § 1, of 1991 which amended Ark. Code Ann. § 16-115-104 (Supp. 1993). Act 582 increased the time to hear writs of prohibition and mandamus to 45 days. The Court has concluded that the abbreviated procedure for-

merly prescribed in Ark. Code Ann. § 16-115-104 is necessary in election matters because of their urgency.

**Addition to Reporter's Notes, [February] 2001 Amendment:** The title of subdivision (b) has been changed — from “Briefs” to “Motions, responses and briefs” — to more accurately reflect its contents. Also, a new sentence has been added at the end of the subdivision excepting summary judgment motions and responses from its time frames. As amended in 2001, Rule 56(c) governs the timing of motions and responses under that rule.

**Addition to Reporter's Notes, [May] 2001 Amendment:** Subdivision (d) has been deleting the words “judge or chancellor” and replacing them with “circuit court.” Constitutional Amendment 80 established the circuit courts as the “trial courts of original jurisdiction” in the state and abolished the separate chancery and probate courts.

**Addition to Reporter's Notes, 2002 Amendment:** The provisions of subdivision (b) have been deleted and replaced with cross-references to Rule 6(c), which now governs the timing of motions, responses, and replies, and to Rule 7(b), which now governs their content. Under the new first sentence of subdivision (c), the court may not hold a hearing on a motion, except one that may properly be heard ex parte, until the time for reply has expired. A similar provision was added to Rule 56(c), which applies to motions for summary judgment, in 2001. The title of subdivision (c) has been revised to make plain that it does not refer simply to waiver of hearings, and stylistic changes have been made in subdivision (d).

## RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey — Civil Procedure, 11 U. Ark. Little Rock L.J. 137,

## CASE NOTES

### ANALYSIS

Election contests.  
Jurisdiction.  
Response to motion.  
Response to motion for new trial.  
Waiver of the motion.

### Election Contests.

A violation of the two-to-seven day provision does not deprive the court of jurisdiction in an election contest. *Jacobs v. Yates*, 342 Ark. 243, 27 S.W.3d 734 (2000).

Issue presented in the claimant's petition



asserting that the candidate was ineligible was moot, because the claimant failed to pursue his petition expeditiously in order to obtain the remedy of removing the candidate's name from the ballot before the election and the claimant had offered no compelling reason for his delay in filing the petition, and waiting until the day before the election to file the petition rendered it impossible for the trial court to fulfill the requirement under subsection (d) of this rule that the trial court hold a hearing no sooner than two and no longer than seven days thereafter. *Oliver v. Phillips*, 375 Ark. 287, 290 S.W.3d 11 (2008).

Because a candidate did not comply with subsection (d) of this rule and Ark. Sup. Ct. & Ct. App. R. 6-1(b) in contesting a declaration that the candidate was ineligible to hold office under § 7-5-207(b), the lapse of time and the fact that the election had already been held rendered moot the issues presented on appeal. *Fite v. Grulkey*, 2011 Ark. 188, — S.W.3d —, 2011 Ark. LEXIS 166 (Apr. 28, 2011).

### **Jurisdiction.**

The violation of the two- to seven-day provision contained in subsection (d) of this rule does not deprive the court of jurisdiction. *Jenkins v. Bogard*, 335 Ark. 334, 980 S.W.2d 270 (1998).

### **Response to Motion.**

There is no specific requirement of a written response to a written motion; subsection (b) of this rule merely requires that if a written response is to be filed, it must be done so within ten days of service of the motion. However, a trial court should either allow a written response to the motion or hold a hearing at which a response is heard. *Smith v. Walt Bennett Ford, Inc.*, 314 Ark. 591, 864 S.W.2d 817 (1993).

Circuit court erred in granting the Department of Correction's motion to dismiss an inmate's complaint under § 12-28-604 for failure to state a claim under Ark. R. Civ. P. 12(b)(6), because the circuit court granted the motion without holding a hearing or considering the inmate's written response, which

was timely filed under Ark. R. Civ. P. 6 and subsection (b) of this rule. *Loveless v. Agee*, 2010 Ark. 53, — S.W.3d —, 2010 Ark. LEXIS 67 (Feb. 4, 2010).

### **Response to Motion for New Trial.**

ARCP 59 does not require a response to a motion for a new trial, and there is no civil provision or precedent which would allow a new trial by default. *Transit Homes, Inc. v. Bellamy*, 282 Ark. 453, 671 S.W.2d 153 (1984), overruled *Peters v. Pierce*, 314 Ark. 8, 858 S.W.2d 680 (1993).

Unless a hearing on a motion for a new trial was requested by counsel or ordered by the court, a hearing would be deemed waived and the court may act upon the matter without further notice after the time for reply has expired. *Cincinnati Ins. Co. v. Johnson*, 367 Ark. 468, 241 S.W.3d 264 (2006).

### **Waiver of the Motion.**

Where, after plaintiff served defendant with a request for admissions, defendant filed a timely motion for an extension of time in which to answer, which plaintiff failed to either object or respond to, and then filed a belated response to the request, the court properly found defendant's response untimely and insufficient, resulting in the matters set forth in the request for admissions being deemed admitted, since the defendant could not argue that plaintiff's failure to respond to the request constituted the granting of his motion under this rule in that the failure of the defendant to secure the ruling constituted a waiver of the motion. *Collier v. Hot Springs Sav. & Loan Ass'n*, 272 Ark. 162, 612 S.W.2d 730 (1981).

**Cited:** *May v. Barg*, 276 Ark. 199, 633 S.W.2d 376 (1982); *Harrell v. International Paper Co.*, 305 Ark. 490, 808 S.W.2d 779 (1991); *Standridge v. Priest*, 334 Ark. 568, 976 S.W.2d 388 (1998); *In re Implementation of Amendment 80: Amendments to Rules of Civ. Procedure & Inferior Court Rules*, — Ark. —, — S.W.3d —, 2001 Ark. LEXIS 707 (May 24, 2001).

## **Rule 79. [Abolished.]**

**Publisher's Notes.** The Supreme Court of Arkansas, in its per curiam of Dec. 21, 1987, abolished this rule and replaced it with Su-

preme Court Administrative Order No. 2. This rule number is reserved for future use.

## **Rule 80. Admissibility of testimony at prior trial.**

When admissible, the testimony of any witness given in any court at any former trial between the same parties or their privies and involving the same issue or claim for relief may be proved by the duly certified transcript thereof.

**Reporter's Notes to Rule 80:** 1. Rule 80 is a slightly revised version of FRCP 80. Superseded *Ark. Stat. Ann.* § 28-713 (Repl. 1962) contained the grounds for admitting former testimony although Rule 804 of the Uniform

Rules of Evidence now contains such grounds. The question, therefore, as to when former testimony is admissible is determined by Rule 804. When it is admissible, it is proved under this rule.

## CASE NOTES

### ANALYSIS

Different parties.  
Objections.

#### Different Parties.

Where the defendant, in a civil action for assault and battery, requested that testimony, given by three witnesses at his previous criminal trials on the same assault and battery incident, be admitted into evidence in the civil action, the trial judge properly ruled that the former testimony was inadmissible in the civil action because the plaintiff in the civil

action was not a party to the criminal trial, nor was the state a predecessor in interest to the civil plaintiff. *Bolden v. Carter*, 269 Ark. 391, 602 S.W.2d 640 (1980).

#### Objections.

This rule does not change the general rule that testimony given by a witness at the first trial, if used at a subsequent trial, is open to all proper objections which would exclude the testimony on the basis of relevancy or competency. *Morrison v. Lowe*, 274 Ark. 358, 625 S.W.2d 452 (1981).

## ARTICLE X. GENERAL PROVISIONS

### Rule 81. Applicability of rules.

(a) *Applicability in General.* These rules shall apply to all civil proceedings cognizable in the circuit courts of this state except in those instances where a statute which creates a right, remedy or proceeding specifically provides a different procedure in which event the procedure so specified shall apply.

(b) *Actions Appealed From Lower Court.* These rules shall apply to civil actions which are appealed to a court of record and which are triable de novo.

(c) *Procedure Not Specifically Prescribed.* When no procedure is specifically prescribed by these rules, the court shall proceed in any lawful manner not inconsistent with the Constitution of this State, these rules or any applicable statute. (Amended May 24, 2001, effective July 1, 2001; amended October 9, 2008, effective January 1, 2009.)

**Reporter's Notes to Rule 81:** 1. Rule 81 marks a significant departure from the form and substance of FRCP 81. The latter contains much which is simply inapplicable to state practice and this rule is designed to define, as concisely as possible, the breadth of coverage of these rules. Generally speaking, these rules apply to all proceedings in the circuit, chancery, and probate courts of this State. The exception would be those proceedings established by statute and the statute prescribes a different procedure. Except to the extent that these rules are specifically modified by statute, however, they shall apply in all cases.

2. Section (b) is designed to insure that those cases which are appealed from inferior courts and which are triable de novo shall be governed by these rules. Examples would be

civil cases appealed from municipal courts and bastardy cases from county courts. There is no need, however, to replead on appeal unless ordered to do so by the court on appeal.

3. Section (c) covers those situations where a procedure is not specifically provided by these rules. In such cases, the court is free to act in any lawful manner not inconsistent with the Arkansas Constitution, these rules or any applicable Arkansas statute.

4. FRCP 81(b) abolishes writs of mandamus. These rules do not abolish this writ as it is believed it serves a valuable function in limited cases in state practice.

**Addition to Reporter's Notes, 2001 Amendment:** The reference to chancery and probate courts in subdivision (a) has been deleted in light of Constitutional Amendment 80, which abolished these courts and estab-



lished circuit courts as the “trial courts of original jurisdiction” in the state.

**Addition to Reporter’s Notes, 2008 Amendment:** Subdivision (b) of this rule has been amended to eliminate the circuit court’s

discretion about pleading again. The 2008 amendment to District Court Rule 9 requires pleading again in every civil case appealed to circuit court from district court. The change here conforms the two rules.

## RESEARCH REFERENCES

**Ark. L. Notes.** Watkins, Procedural Rules You Won’t Find in the Rules of Civil Procedure, 1992 Ark. L. Notes 53.

**Ark. L. Rev.** Biggers, Special Proceedings in Arkansas After Weiss v. Johnson, 52 Ark. L. Rev. 233.

**U. Ark. Little Rock L.J.** Survey — Debtor-Creditor, 10 U. Ark. Little Rock L.J. 173.

## CASE NOTES

### ANALYSIS

Actions and proceedings.  
Administrative procedures.  
Criminal proceedings.  
Debt collection action.  
Discovery rules.  
Enforcement of lien.  
Garnishment statutes controlling.  
Liquidation.  
Medical malpractice action.  
Probate proceedings.  
Service of process.  
Statutory exemptions.  
Teachers.  
Wrongful death.

### Actions and Proceedings.

An “action” is an ordinary proceeding in a court of justice by one party against another for the enforcement or protection of a private right or the redress of prevention of a private wrong; all proceedings which are not ordinary proceedings are “special proceedings” created exclusively by statute. In re Martindale, 327 Ark. 685, 940 S.W.2d 491 (1997).

In an election contest, the circuit court erred in dismissing a complaint by a candidate for failure to join the Secretary of State as a party; the complaint was properly filed in the correct county and was timely filed, timely served, and timely answered by the electoral winner; although the specific procedure was provided by § 7-5-801, that statute did not supplant the rules of civil procedure. Baker v. Rogers, 368 Ark. 134, 243 S.W.3d 911 (2006).

Because a protective order hearing was a special proceeding under this rule, the notice procedures in § 9-15-204(b)(1)(A), and not Ark. R. Civ. P. 6(c), applied; therefore, because a respondent was timely served six days before the protective order hearing, the respondent’s motion to set aside an order of protection was properly dismissed. Wills v. Lacefield, 2011 Ark. 262, — S.W.3d —, 2011 Ark. LEXIS 247 (June 16, 2011).

### Administrative Procedures.

The Administrative Procedure Act procedure for judicial review is an exception to the rules of civil procedure as provided in subsection (a) of this rule. Whitlock v. G.P.W. Nursing Home, Inc., 283 Ark. 158, 672 S.W.2d 48 (1984); Wright v. Arkansas State Plant Bd., 311 Ark. 125, 842 S.W.2d 42 (1992).

### Criminal Proceedings.

The service provisions of ARCP 4 apply to the de novo review proceedings in § 5-65-104 because the statutory proceeding is silent on notice or service of process at the circuit court level. Weiss v. Johnson, 331 Ark. 409, 961 S.W.2d 28 (1998), overruled in part, Wright v. City of Little Rock, 366 Ark. 96, 233 S.W.3d 644 (2006).

### Debt Collection Action.

A suit to collect a debt is not a special proceeding as contemplated by subsection (a) of this rule. Borg-Warner Acceptance Corp. v. Kesterson, 288 Ark. 611, 708 S.W.2d 606 (1986).

### Discovery Rules.

The discovery procedures permitted in ARCP 30 and 34, are applicable only to civil actions; they are not applicable in criminal proceedings unless there is a specific statute so providing. Kelley v. State, 7 Ark. App. 130, 644 S.W.2d 638 (1983).

### Enforcement of Lien.

Subsection (a) of this rule does not exclude the use of ARCP 6(a) in computing the time within which a suit in a civil proceeding has to be filed in order to perfect and enforce a lien, because § 18-44-117 does not provide that a certain method or procedure be used in computing the 120 days. Transportation Properties, Inc. v. Central Glass & Mirror of N.W. Ark., Inc., 38 Ark. App. 60, 827 S.W.2d 667 (1992).

### Garnishment Statutes Controlling.

To the extent the garnishment procedures prescribed in § 16-110-401 et seq. differ from

those prescribed in the Rules of Civil Procedure, the statutes control. *Travelodge Int'l, Inc. v. Handleman Nat'l Book Co.*, 288 Ark. 368, 705 S.W.2d 440 (1986).

### **Liquidation.**

The Arkansas Rules of Civil Procedure do not apply to the nonjudicial procedure to provide an efficient and fair procedure for the liquidation of defaulted mortgage loans codified in this chapter. *Union Nat'l Bank v. Nichols*, 305 Ark. 274, 807 S.W.2d 36 (1991).

### **Medical Malpractice Action.**

When the legislature enacted a procedural scheme for medical malpractice actions, including a 60-day notice requirement as a prerequisite to bringing a civil action, it did not create a statutory right, remedy, or proceeding as contemplated by the exception under subsection (a) of this rule. *Weidrick v. Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992), limited, *Thomas v. Cornell*, 316 Ark. 366, 872 S.W.2d 370 (1994).

### **Probate Proceedings.**

In accordance with this rule, it is precisely because the probate code and the Arkansas Rules of Civil Procedure set forth different time limits on the court's authority to modify or vacate prior orders that § 28-1-115 applies in probate proceedings; therefore, an appeal under § 28-1-116 was timely since Ark. R. Civ. P. 52 was not implicated in an appeal from a denial of reconsideration arising from a denial of intervention in a probate case. *Helena Reg'l Med. Ctr. v. Wilson*, 362 Ark. 117, 207 S.W.3d 541 (2005).

### **Service of Process.**

Since the service of process provisions of § 16-58-124 do not fit into the exception described in subsection (a) of this rule, Rule 4(d)(5) supersedes § 16-58-124. *May v. Bob Hankins Distrib. Co.*, 301 Ark. 494, 785 S.W.2d 23 (1990).

### **Statutory Exemptions.**

The exception in subsection (a) of this rule is limited to special proceedings created exclusively by statute where a special procedure is appropriate and warranted. *Weidrick v. Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992), limited, *Thomas v. Cornell*, 316 Ark. 366, 872 S.W.2d 370 (1994).

Election contests are governed entirely by statute and, as such, they are statutory or special proceedings under this rule. *Womack v. Foster*, 340 Ark. 124, 8 S.W.3d 854 (2000).

### **Teachers.**

These rules apply to a proceeding under the Teacher Fair Dismissal Act, § 6-17-1501 et seq. *Sosebee v. County Line Sch. Dist.*, 320 Ark. 412, 897 S.W.2d 556 (1995).

### **Wrongful Death.**

The exceptions stated in this rule did not apply in a wrongful death claim. *McGuire v. Smith*, 58 Ark. App. 68, 946 S.W.2d 717 (1997).

**Cited:** *Fulmer v. Board of Comm'rs*, 286 Ark. 419, 692 S.W.2d 246 (1985); *Summers v. Mylan*, 287 Ark. 150, 697 S.W.2d 91 (1985); *Mixon v. Anderson (In re Ozark Restaurant Equip. Co.)*, 61 Bankr. 750 (W.D. Ark. 1986), aff'd 816 F.2d 1222 (8th Cir. 1987); *Travelodge Int'l, Inc. v. Handleman Nat'l Book Co.*, 288 Ark. 368, 705 S.W.2d 440 (1986); *Hanson v. Garland County Election Comm'n*, 289 Ark. 367, 712 S.W.2d 288 (1986); *Bohnsack v. Beck*, 294 Ark. 19, 740 S.W.2d 611 (1987); *McEuen Burial Ass'n v. Arkansas Burial Ass'n Bd.*, 298 Ark. 572, 769 S.W.2d 415 (1989); *Nix v. St. Edward Mercy Med. Ctr.*, 342 Ark. 650, 30 S.W.3d 746 (2000); *In re Implementation of Amendment 80: Amendments to Rules of Civ. Procedure & Inferior Court Rules*, — Ark. —, — S.W.3d —, 2001 Ark. LEXIS 707 (May 24, 2001); *Tate-Smith v. Cupples*, 355 Ark. 230, 134 S.W.3d 535 (2003); *Mitchell v. State*, 94 Ark. App. 304, 229 S.W.3d 583 (2006); *First Sec. Bank v. Estate of Leonard*, 369 Ark. 213, 253 S.W.3d 434 (2007).

## **Rule 82. Jurisdiction and venue unaffected.**

These rules shall not be construed to extend or limit the jurisdiction of circuit courts in this state or the venue of actions therein. (Amended May 24, 2001, effective July 1, 2001.)

**Reporter's Notes to Rule 82:** 1. Rule 82 tracks FRCP 82. It makes it clear that these rules are intended to be procedural only and do not affect any substantive issues such as venue and jurisdiction. These rules assume that venue and jurisdiction are proper. Whether this is true depends upon substantive law and due process requirements.

### **Addition to Reporter's Notes, 2001**

**Amendment:** The reference to chancery and probate courts has been deleted in light of Constitutional Amendment 80, which abolished these courts and established circuit courts as the "trial courts of original jurisdiction" in the state.



## CASE NOTES

**Cited:** *Wasp Oil, Inc. v. Arkansas Oil & Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983); *In re Implementation of Amendment*

80: *Amendments to Rules of Civ. Procedure & Inferior Court Rules*, — Ark. —, — S.W.3d —, 2001 Ark. LEXIS 707 (May 24, 2001).

**Rule 83. [Abolished.]**

**Publisher's Notes.** The Supreme Court of Arkansas abolished this rule in its per curiam of Dec. 21, 1987. The per curiam provided, in pertinent part: "... While the changes we adopt today at the suggestion of the committee are generally explained in the accompanying reporter's notes, we wish to comment upon the abolition of Arkansas Rule of Civil Procedure 83. In 1984 the committee suggested that we abolish all local court rules. We declined to do so at that time, but asked the committee to document its complaint that local rules were unnecessary and were serving as little more than traps for the unwary lawyer or litigant participating in a case while away from home. The committee came back to us with documented instances of conflict between local rules and the Arkansas Rules of Civil Procedure. We noted that at that juncture some trial judges announced that they could well do without local rules and declared that they would no longer have them.

We then embarked upon a compromise. We asked the trial courts to review their local rules and to tender revised versions of their local rules. We then received proposed local rules from a number of the trial judges. We submitted those proposals to our committee for review, and we ultimately approved most of them, excepting from approval those which were in direct conflict with the Arkansas Rules of Civil Procedure. The many trial judges who did not respond to our order that they review and submit proposed rules to us for review no longer have local rules, as our per curiam order of December 22, 1986, stated: "As of July 1, 1987, the only local rules in effect in the circuit, chancery and probate courts will be those filed subsequent to June 24, 1985, and approved by this court after review by the appropriate committee or committees."

In our initial screening, and as we have continued to review local rules tendered to us, we and the committee have observed that many of the rules are no more than "house-keeping" orders having nothing to do with the conduct of lawyers or litigants. Others are duplicative of the Arkansas Rules of Civil Procedure and thus serve no purpose except to say the same thing a different way and provide unnecessary fodder for disagreement. Sometimes, hidden within these innocuous and repetitious provisions, there are proce-

dural requirements which do not conflict with the Arkansas Rules of Civil Procedure and which may seriously affect the rights of litigants. To become aware of these rules, a litigant or counsel may have to wade through many pages of confusing materials.

A member of the bar of this state, or a litigant representing himself or herself, should be able to go into any of our courts and know what to expect without having to read, in some instances, 50 pages of local rules trying to discern their effect. We recognize that some of the local rules may have great merit, and if they do, we should consider adopting them for all our courts. The Uniform Rules for Circuit and Chancery Courts apparently resulted from an attempt to create uniform "local rules." We are also abolishing those rules as of March 14, 1988, as we find them to be unnecessary in view of the since-adopted Arkansas Rules of Civil Procedure and Arkansas Rules of Criminal Procedure. The useful portions of those rules have been transferred to the Arkansas Rules of Civil Procedure and to the Administrative Orders we also publish today.

We recognize that not all our judges operate under the same conditions, however, when the inconvenience caused by not having local rules is balanced against the inconvenience caused by them and, more importantly, against the often unanticipated and unnecessary effect they may have upon the rights of litigants, we conclude the scales tip in favor of not having them. We note that the Supreme Court of Kentucky, the state which gave us so much of our original statutory procedure, abolished its comparable Rule 83 in 1982.

It is not our intention to subvert the power of the trial courts to preside as they see fit within the universal procedural rules we have established. We presume there will be a need for trial judges to publish administrative orders which will attend to necessary "house-keeping" matters, such as the time and place court shall commence, the duties of the bailiff and the reporter and so on. It is, however, our intention that we will no longer sanction the promulgation by the trial courts of orders which may be characterized as procedural rules which will detract from the ability of any litigant or member of the bar of this state to know the fundamental rules of litigation which may affect their rights adversely no matter what court of this state they may be

before. By doing away with Rule 83, we relieve the trial courts of filing local rules with this court, and we no longer sanction or recognize those which have been filed to date.

As always, we invite the members of the bench and bar, and indeed any person, to make suggestions of rules changes to us through the appropriate committee. The reporters of our civil and criminal procedure rules committees, respectively, are:

Professor John J. Watkins  
School of Law  
University of Arkansas

Fayetteville, AR 72701

Samuel A. Perroni, Esq.  
Suite 215  
10810 Executive Center Dr.  
Little Rock, AR 72211

We invite comment upon the changes to the Arkansas Rules of Civil Procedure and the Arkansas Rules of Appellate Procedure and the Administrative Orders which will become effective as follows on March 14, 1988, unless previously withdrawn or altered by per curiam order prior to that date: ..."

## Rule 84. Uniform paper size.

All pleadings, motions, interrogatories, requests for admissions, responses to discovery requests, depositions, briefs, findings, judgments, orders, and other papers required or authorized by these rules shall be on 8½" x 11" paper. (Adopted May 15, 1989.)

**Publisher's Notes.** The May 15, 1989 Per Curiam read: "In our per curiam order of December 19, 1988, we suspended our earlier order on the subject of doing away with the practice of abstracting the record for appeal and substituting a practice by which the parties would submit an appendix or appendices. We took that action because we wished to examine the possibility of changing from the use of legal size paper to letter size paper in all the courts, and we became aware that unless the changes occurred at the same time, appendices would likely be composed of paper of a different size from that of any brief we might permit to be filed, and that appendices might be composed of documents of varying paper sizes. The accompanying possible handling and storage problems made it seem a good idea to put off the changes until we had sought the recommendation of our Committee on Rules of Pleading, Practice, and Procedure (Civil).

"We have now received a recommendation from the committee along with suggestions as to the rules which should be revised to accomplish the change in paper size.

"In addition to the committee's recommendations, we have studied those submitted by lawyers, judges, law firms, and lawyers' associations submitted in response to our earlier request for comments on the basic rules we proposed for the purpose of moving to the system of appendices rather than abstracts. Many of those suggestions have been implemented in the amendments we publish today.

"As we noted in our per curiam order of October 17, 1988, on this subject, we wish to have a trial period. These amendments will become effective this date; however, any case in which the appellant's brief is submitted or becomes due between now and December 31,

1989, may be presented in accordance with the rules in effect up until today. That will give this court sufficient time to observe the new practice. If we choose to retain the new system, we will be able to make that decision prior to the publication of the 1989 revision of the Rules Book which accompanies the Arkansas Code Annotated. The rules requiring appendices rather than abstracts may then be made permanent.

"During the trial period an appellant will be in the position of choosing the manner in which the briefs will be presented. If the appellant chooses to present a brief with an appendix rather than an abstract, then the appellee will be required to proceed in accordance with the new rules. If the appellant chooses to work under the abstract system, the appellee will do so also.

"While we may well decide, depending on the results of the trial period, to retain the abstracting practice, we will make permanent the changes with respect to paper size and doing away with printed briefs. Judges, clerks, lawyers, court reporters and others thus will have until January 1, 1990, to prepare to present all legal documents on 8½" by 11" paper.

"The purposes of these changes are to decrease the cost of appellate litigation, increase the ease and accuracy of the evaluation of cases at the appellate level, and provide uniformity as well as compatibility with the age of the word processor in the case of the paper size. We acknowledge and appreciate the comments we received from members of the bench and bar, and we count on continued cooperation as we evaluate the appendix system."

The October 2, 1989 Per Curiam read: "By per curiam order of May 15, 1989, we published changes of court rules necessary to



implement a system of appeals using appendices rather than abstracts of record. The order also provided for a change to a uniform 8½" by 11" paper size to be used in all courts. The order provided that the changes with respect to paper size would come into effect January 1, 1990. The other changes having to do with using appendices rather than abstracts of record on appeal went into effect on May 15, 1989, but permitted an appellant to choose to follow the rules in effect until that date for cases in which the appellant's brief was submitted or became due between May 15, 1989, and December 31, 1989.

"We have reviewed the appeals now ready for submission and those which will be ready prior to December 31, 1989. Most appellants have chosen to follow the old rules. We have concluded we will not be able to decide the relative merits of the two methods by the end of this year because we will have had too little experience with appendices. The trial period is, therefore, extended until July 15, 1990. Any case in which the appellant's brief is submitted or becomes due prior to July 15, 1990, may be presented in accordance with the rules in effect up until May 15, 1989.

"The paper size changes are not affected by this order. All courts will begin using 8½" by 11" paper no later than January 1, 1990."

The June 10, 1991 Per Curiam read: "On and after August 1, 1991, all briefs submitted to the Supreme Court and the Court of Appeals will be accompanied by abstracts of record, as provided in Arkansas Supreme Court and Court of Appeals Rule 9. We will no longer accept briefs including appendices.

"The Per Curiam Order by which we created a trial period for experimental changes in our Rules was issued May 15, 1989, entitled, 'In re: Amendments to the Arkansas Rules of Civil Procedure, the Arkansas Rules of Appellate Procedure, the Arkansas Supreme Court Administrative Orders, the Rules of the Arkansas Supreme Court and Court of Appeals, and the Inferior Court

Rules.' In that Order we made it clear that the rules changes having to do with the appendix experiment were adopted on a trial basis but that the changes no longer allowing printed briefs and establishing uniform paper size were to be permanent. We hereby revoke the changes, other than those having to do with printed briefs and paper size, which provided for submitting appendices rather than abstracts. We retain the changes with respect to paper size.

"The reason for ending the appendix experiment at this time is that we have found that it adds to the difficulty of, and time consumed in, reading briefs. If our case load and that of the Court of Appeals were not so great, we would be less willing to revert entirely to the abstracting system. Given the numbers of cases we must decide to remain current with our docket, however, we cannot tolerate the additional work we find the appendix system to have caused.

"The experiment with the appendix system began with our Per Curiam Order of October 17, 1988, creating a trial period for testing the new system which, with one intermission and two extensions, was to end March 1, 1991. As was expected, there were difficulties in adapting to the change. The main one from our perspective was the problem of expansion of the statement of the case, with appropriate appendix references, to an extent which would save members of the Court from having to scour the appendix for factual details.

"If we find a way to bring our case load and that of the Court of Appeals within reason, we may return to the appendix system, with some revisions, because we continue to wish to implement the goals stated in our original order. We would like our system to be as inexpensive and simple as possible. Under other circumstances we will be able to exercise the patience required to permit lawyers and litigants to become accustomed to the change and to fine tune it with revisions."

## RESEARCH REFERENCES

**Ark. L. Rev.** Watkins, Procedural Notes from All Over, 1989 Ark. L. Notes 65.

### Rule 85. Title.

These rules may be known and cited as the Arkansas Rules of Civil Procedure (ARCP).

### Rule 86. Effective date.

These rules will take effect on July 1, 1979.





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# **RULES OF CRIMINAL PROCEDURE**

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## ARTICLE I. GENERAL PROVISIONS

### RULE 1. TITLE, SCOPE, PURPOSE AND CONSTRUCTION, COMPUTATION OF TIME, PROSECUTIONS IN NAME OF STATE, DEFINITIONS, EFFECTIVE DATE AND APPLICATION

#### Rule 1.1. Title.

These rules shall be known and may be cited as the Arkansas Rules of Criminal Procedure.

#### Order Granting Petition for Promulgation of Rules of Criminal Procedure

IN THE MATTER OF RULES OF CRIMINAL PROCEDURE. Per Curiam. The movement for reformation of the Arkansas criminal justice system began in 1971 with three workshops to study the American Bar Association's "Minimum Standards for the Administration of Criminal Justice" and criminal procedure in Arkansas. The workshops were sponsored by the Arkansas Supreme Court, the Arkansas Judicial Council, the Arkansas Prosecuting Attorneys' Association, the American Bar Association, the Arkansas Bar Association, and the Arkansas Commission on Crime and Law Enforcement. Later in 1971 the General Assembly enacted Act 470 of 1971, expressly authorizing the Arkansas Supreme Court to prescribe rules of pleading, practice, and procedure in criminal cases and proceedings.

Pursuant to Act 470 the Supreme Court, acting by its Chief Justice, and the Attorney General joined in creating the Arkansas Criminal Code Revision Commission. That eighteen-member Commission was selected to provide representation for all concerned groups, professions, institutions, and geographical areas in the state. The Commission was divided into two committees. One was charged with the responsibility of revising the substantive criminal law. That task was completed in 1974 and culminated in the adoption by the General Assembly of Act 280 of 1975, the Arkansas Criminal Code, effective January 1, 1976.

The procedural committee also completed its proposed draft in 1974. In December the Commission petitioned the Supreme Court to adopt the Rules of Criminal Procedure. The Court entered an order fixing a briefing schedule and providing any interested person or group 38th an opportunity to file objections or suggest modifications. The Bobbs-Merrill Company had co-operated by publishing, without cost to the State, the proposed Rules. Copies had been sent to all attorneys in the state, with an invitation for suggestions. The Rules were also submitted to many groups, including the General Assembly's Legislative Council Judiciary Committee and its Standing Joint Interim Committee on the Judiciary.

Pursuant to the Court's briefing schedule suggestions and briefs were filed by the Arkansas Prosecuting Attorneys' Association, bail bondsmen, and others, including responses by the Criminal Code Revision Commission. All suggestions were considered by the Court, resulting in several amendments to the proposed Rules. All those amendments are on file with the Clerk of the Court.

Pursuant to Act 470 of 1971, and in harmony with the Court's constitutional superintending control over all trial courts, the Court hereby adopts and approves the proposed Rules of Criminal Procedure, as amended, effective January 1, 1976.

#### Commentary to Article I

Article I, *General Provisions*, addresses concerns of pervasive importance in the construction and application of the rules.

The article is composed of a single rule divided into seven [now eight] provisions, each dealing with a different subject.

Rule 1.1 is the "Title" provision common to most codes.

Rule 1.2 delineates the scope of the rules and maximizes uniformity of application. Criminal cases before the Supreme Court and circuit courts are explicitly governed by the



rules. Courts of inferior jurisdiction are affected by the rules (1) to the extent that application of the rules is necessitated by constitutional considerations, and (2) where their application is practicable. For example, it is obvious that holding an omnibus hearing in a criminal proceeding before a justice of the peace, while theoretically possible, would in most cases be infeasible and unwise. Application of the whole of the rules to all state courts would also be anomalous. For example, rules respecting trial by jury should not be framed so as to speak to courts in which jury trials are not permitted.

Rule 1.3 is a broad statement of principle intended to guide construction of the rules.

Computation of time is governed by Rule 1.4, patterned after Ark. Stat. Ann. § 27-130 (Repl. 1962) and Arizona Rules of Criminal Procedure § 1.3.

Ark. Stat. Ann. § 27-130 (Repl. 1962) has no counterpart in the Arkansas statutes governing criminal procedure, although it has been held applicable to criminal proceedings by two cases of rather ancient vintage. *See, Jones v. State*, 42 Ark. 93 (1883), *Moore v. State*, 52 Ark. 265, 12 S.W. 562 (1889). *See, also, State v. Hunter*, 134 Ark. 443, 204 S.W. 308 (1918).

On its face the language of § 27-130 (Repl. 1962) seems to be addressed only to situations where notice must precede an act by a certain number of days:

Where a certain number of days are required to intervene between two [2] acts, the day of one only of the acts may be counted. Ark. Stat. Ann. § 27-130 (Repl. 1962) [emphasis supplied].<sup>1</sup>

On the other hand, the language of the Arizona rule seems to contemplate only limitation computations:

In computing any period of time ... the day of the act or event from which the designated period of time begins to run is not to be included. *Arizona Rule* § 1.3 [emphasis supplied].

The proposed formulation combines language from both provisions to speak neutrally of prescribed periods of time which may or must intervene between events or acts.

The rule explicitly provides that time periods shall not be computed so as to begin or end on Saturdays, Sundays, or state or federal legal holidays.

The last sentence of the rule provides for automatic extension of all time periods where service of notice or other paper is by mail.

Rule 1.5, providing for prosecution in the name of the state, needs no elucidation.

Rule 1.6 defines terms in the rules.

"Law enforcement officer" is given a functional definition by Rule 1.6(a). *Cf.* Ark. Stat. Ann. § 43-406 (Supp. 1964), merely defining "peace officers" as "sheriffs, constables, coroners, jailers, marshals, and policemen."

"Prosecuting attorney" receives comprehensive definition. "Prosecutor" means one elected, appointed, or otherwise designated specially or generally to prosecute persons. The term encompasses deputy prosecutors and city attorneys.

A "judicial officer" is restrictively defined as one in whom authority to hear criminal cases is vested. Thus, under the rules, chancery judges are not normally "judicial officers" for the purpose of issuing search warrants, although by virtue of Ark. Stat. Ann. §§ 22-340 — 22-342 (Repl. 1962), 22-341.1 (Supp. 1973), chancellors may temporarily acquire this status and circuit judges temporarily lose it.

"Information" is defined broadly to include indictments and other charging instruments.

Rule 1.7 describes the rules' application in terms of their effective date.

[Rule 1.8 provides for the designation and duties of criminal magistrates.]

**A.C.R.C. Notes.** Acts 2003, No. 1077, §§ 1 and 2, provided: "Arkansas Criminal Code Revision Commission created.

"(a) There is created the Arkansas Criminal Code Revision Commission.

"(b) The commission shall consist of the following members: (1) The Governor or the Governor's designee; (2) A member of the House Judiciary Committee selected by the Speaker of the House of Representatives; (3) A member of the Senate Judiciary Committee selected by the President Pro Tempore of the Senate; (4) The Attorney General or the Attorney General's designee; (5) The Director of the Arkansas Sentencing Commission; (6) A public defender appointed by the Public Defender Commission; (7) The Prosecutor Coordinator or the coordinator's designee; (8) A practicing attorney selected by the President of the Arkansas Bar Association; (9) A circuit judge selected by the Chief Justice of the Arkansas Supreme Court; (10) A Judge of the Arkansas Court of Appeals selected by the Chief Judge of the Arkansas Court of Appeals; (11) A Supreme Court Justice selected by the Chief Justice of the Arkansas Supreme Court; (12) The Director of the Department of Correction or the director's designee; (13) A sheriff selected by the Arkansas Sheriff's Association; (14) The Director of the Department of Arkansas State Police or the director's designee; (15) The Director of the Department of Community Punishment or the director's designee; (16) A professor from the University of

<sup>1</sup>However, the court has construed the statute to govern the running of time in limitation contexts. *Early & Co. v. Maxwell & Co.*, 103 Ark. 569, 148 S.W. 496 (1912).

Arkansas School of Law selected by the dean of the law school; (17) A professor from the University of Arkansas at Little Rock, William N. Bowen School of Law, selected by the dean of the law school; (18) The Executive Director of the Arkansas Code Revision Commission or the director's designee; and (19) The Director of the Bureau of Legislative Research or the director's designee.

"(c)(1) The Attorney General or the Attorney General's designee shall call the first meeting within thirty (30) days of the effective date of this act and shall serve as chair at the first meeting.

"(2) At the first meeting, the members of the commission shall elect from its membership a chair and other officers as needed for the transaction of its business.

"(3)(A) The commission shall conduct its meetings in Pulaski County.

"(B) Meetings shall be held at least once every three (3) months, but may occur more often at the call of the chair.

"(d) If any vacancy occurs on the commission, the vacancy shall be filled by the same process as the original appointment.

"(e) The commission shall establish rules and procedures for the conduct of its business.

"(f) Members of the commission shall serve without compensation, but may receive expense reimbursement according to § 25-16-902.

"(g) A majority of the members of the commission shall constitute a quorum for transacting any business of the commission.

"(h) The Attorney General shall provide staff for the commission.

"Duties of the commission.

"The commission shall:

"(1) Review all criminal laws and procedure of this state and propose any needed changes or corrections to be made by law or court rules;

"(2) Prepare draft legislation concerning the needed changes or corrections to the Arkansas Criminal Code and the criminal statutes of Arkansas;

"(3) Provide a copy of the draft legislation and any recommended changes to the court rules to the House and Senate Committee on Judiciary no later than October 1, 2004; and

"(4) Recommend to the Arkansas Supreme Court no later than October 1, 2004 any needed changes in court rules.

"SECTION 2. The commission expires July 1, 2005."

Acts 2005, No. 1994, entitled "The Arkansas Criminal Code Revision Commission's Bill," became effective August 12, 2005, and affected over 576 sections of the Arkansas Code.

## CASE NOTES

### Authority of Court to Promulgate.

Section 16-11-301, which authorizes the Supreme Court to prescribe rules of criminal procedure merely recognizes the court's inherent power rather than conferring an express power, and if the Supreme Court has the inherent power to make the rules of criminal procedure, it follows that it has the inherent

power to amend those rules. *Jennings v. State*, 276 Ark. 217, 633 S.W.2d 373, cert. denied 459 U.S. 862, 103 S. Ct. 137, 74 L. Ed. 2d 117 (1982).

**Cited:** *Ray v. State*, 328 Ark. 176, 941 S.W.2d 427 (1997); *Blount v. State*, 2010 Ark. App. 219, — S.W.3d —, 2010 Ark. App. LEXIS 191 (Mar. 3, 2010).

## Rule 1.2. Scope.

These rules shall govern the proceedings in all criminal cases in the Supreme Court and in circuit courts of the State of Arkansas. They shall also apply in all other courts where their application is practicable or constitutionally required.

## CASE NOTES

### Construction of Rules.

A municipal court speedy trial violation motion to dismiss pursuant to ARCrP 30.1(a) may be raised in the de novo circuit court

proceeding even though ARCrP 28.1 only refers to trial in a circuit court. *Whittle v. Washington County Circuit Court*, 325 Ark. 136, 925 S.W.2d 383 (1996).



### Rule 1.3. Purpose and Construction.

These rules are intended to provide for a just, speedy determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, the elimination of unnecessary delay and expense, and to protect the fundamental rights of the individual while preserving the public interest.

#### RESEARCH REFERENCES

**Ark. L. Rev. Notes**, Richardson v. State: Ark. R. Crim. P. 8.1 — A Rule in Need of a Standard, 38 Ark. L. Rev. 842.

### Rule 1.4. Computation of time.

Where these rules, any statute governing procedure in criminal proceedings, or any court order entered in a criminal proceeding prescribes that a period of time of more than twenty-four (24) hours may or must intervene between events or acts, the day on which one (1) only of the events or acts occurs shall be computed as part of the designated period. When the first or last day of a time period is a Saturday, Sunday, or state or federal legal holiday, it shall not be computed as part of the period, which shall run until the end of the next day which is neither a Saturday, Sunday, nor a legal holiday. Whenever a party has the right or is required to take some action within a prescribed period after service of a notice or other paper and such service is allowed and made by mail, five (5) days shall be added to the prescribed period.

#### CASE NOTES

##### Applicability.

Appellant's attorney was clearly at fault when he filed a motion for new trial more than 30 days after entry of the judgment and commitment order pursuant to Ark. R. Crim. P. 33.3(b), and the attorney could not shift the responsibility for timely perfecting an appeal to the trial court clerk for his or her failure to send him copy of the judgment; Rule 33.3 did not permit the addition of five days for service

of the judgment under this rule. Woods v. State, 368 Ark. 131, 243 S.W.3d 258 (2006).

**Cited:** Lark v. State, 276 Ark. 441, 637 S.W.2d 529 (1982); Foster v. State, 38 Ark. App. 245, 832 S.W.2d 293 (1992); Kersh v. State, 56 Ark. App. 39, 938 S.W.2d 569 (1997); Gondolfi v. Clinger, 352 Ark. 156, 98 S.W.3d 812 (2003); Zangerl v. State, 352 Ark. 278, 100 S.W.3d 695 (2003).

### Rule 1.5. Prosecutions in name of state.

All prosecutions for violations of the criminal laws of this state shall be in the name of the State of Arkansas, provided that this rule shall in no way affect the distribution, as provided by law, of moneys collected by district courts. (Amended May 17, 2001, effective July 1, 2001.)

**Cross References.** Appointment of counsel, ARCrP 8.2

#### CASE NOTES

##### Municipal Courts.

While it would be correct to style a case in municipal court as "State of Arkansas," the style naming the plaintiff as the "City" does

not affect the court's jurisdiction to try the crime charged. Graham v. State, 25 Ark. App. 234, 756 S.W.2d 921 (1988); Virden v. State, 297 Ark. 507, 764 S.W.2d 43 (1989).

**Cited:** *Urich v. State*, 293 Ark. 246, 737 S.W.2d 155 (1987); *Jones v. City of Newport*, 29 Ark. App. 42, 780 S.W.2d 338 (1989).

### Rule 1.6. Definitions.

For the purposes of these rules, unless the context otherwise plainly requires:

(a) “Law enforcement officer” and “officer” mean any person vested by law with a duty to maintain public order or to make arrests for offenses.

(b) “Prosecuting attorney” means any person legally elected, appointed, or otherwise designated or charged generally or specially with the duty of prosecuting persons accused of crime or traffic offenses, and includes, but is not limited to:

(i) a prosecuting attorney and any of his deputies or assistants; and

(ii) a city attorney and any of his deputies or assistants.

(c) “Judicial officer” means a person in whom is vested authority to preside over the trial of criminal cases.

(d) “Information” means:

(i) an instrument issued by a prosecuting attorney charging an offense; and

(ii) an indictment.

(e) “Defense counsel” shall include the defendant in a case, as well as his attorney, whenever obligations are imposed upon defense counsel.

(f) “District court” shall mean a court established pursuant to § 7, Amendment 80 to the Arkansas Constitution. The term shall include a city court that continues in existence after January 1, 2005, pursuant to § 19(B)(2), Amendment 80 to the Arkansas Constitution. (Amended March 31, 2005.)

### RESEARCH REFERENCES

**Ark. L. Rev.** Arrest, Citation and Summons — The Supreme Court Takes a Giant Step Forward, 30 Ark. L. Rev. 137.

### CASE NOTES

**Cited:** *Bigham v. State*, 23 Ark. App. 108, 743 S.W.2d 405 (1988); *McDaniel v. State*, 309 Ark. 20, 826 S.W.2d 286 (1992); *Forrest v. Ford*, 324 Ark. 27, 918 S.W.2d 162 (1996).

### Rule 1.7. Effective date and application.

(a) These rules shall apply to all criminal proceedings commenced upon or after the effective date hereof, and all appeals and other post-conviction proceedings relating thereto.

(b) These rules shall also apply to (i) all criminal proceedings commenced prior to the effective date hereof but still pending on such date, and (ii) all appeals and other post-conviction proceedings commenced upon or after such effective date which relate to criminal actions and proceedings commenced or concluded prior to such effective date; Provided That, if application of these provisions in any particular case would not be feasible or would work injustice, these rules shall not apply.



(c) The provisions of this chapter do not impair or render ineffectual any proceedings or procedural matters which occurred prior to the effective date thereof.

(d) These rules shall become effective on January 1, 1976.

### CASE NOTES

#### In General.

The procedural law in effect at the time of trial governs all procedural matters. *Owen v. State*, 263 Ark. 493, 565 S.W.2d 607 (1978).

### Rule 1.8. Criminal magistrates.

(a) With the concurrence of a majority of the circuit court judges of a judicial circuit, the administrative judge of the judicial circuit may designate one or more district court judge(s), with the judge's consent, as a referee or master, who shall be referred to as a "criminal magistrate" for the judicial circuit, and who shall be authorized to perform any of the duties described in subsection (b) of this rule. A criminal magistrate shall be subject at all times to the superintending control of the circuit judges of the judicial circuit, and the criminal magistrate's territorial jurisdiction shall be coextensive to that of the circuit judges of the judicial circuit unless specifically limited by the designating order.

(b) A criminal magistrate may perform the following duties with respect to an investigation or prosecution of an offense lying within the exclusive jurisdiction of the circuit court:

(i) Issue a search warrant pursuant to Rule 13.1.

(ii) Issue an arrest warrant pursuant to Rule 7.1 or Arkansas Code § 16-81-104, or issue a summons pursuant to Rule 6.1.

(iii) Make a reasonable cause determination pursuant to Rule 4.1(e).

(iv) Conduct a first appearance pursuant to Rule 8.1, at which the criminal magistrate may appoint counsel pursuant to Rule 8.2; inform a defendant pursuant to Rule 8.3; accept a plea of "not guilty" or "not guilty by reason of insanity"; conduct a pretrial release inquiry pursuant to Rules 8.4 and 8.5; or release a defendant from custody pursuant to Rules 9.1, 9.2, and 9.3.

(v) Conduct a preliminary hearing as provided in Ark. Code Ann. § 5-4-310(a).

(c) If a person is charged with the commission of an offense lying within the exclusive jurisdiction of the circuit court, a criminal magistrate designated pursuant to this rule may not accept or approve a plea of guilty or *nolo contendere* to the offense charged or to a lesser included offense.

(d) Nothing in this order shall affect the authority of a district court judge to perform the duties described in subsection (b) as otherwise permitted by these Rules or other law.

(e) Nothing in this rule shall impair or render ineffectual any proceeding or procedural matters which occurred before the effective date of this rule. (Adopted February 24, 2005.)

### CASE NOTES

#### Authority of District Court Judge.

This rule permits, but does not require, the designation of a criminal magistrate if de-

sired by a certain locale, but it did not alter the authority district court judges already had in criminal matters, such as to issue

search warrants. *Wagner v. State*, 2010 Ark. 389, — S.W.3d —, 2010 Ark. LEXIS 480 (Oct. 21, 2010).

### **Rule 1.9. Compliance with Administrative Order 19 — Confidential Information.**

Administrative Order Number 19 requires that “confidential information” be excluded from the “case record,” as those terms are therein defined. Every pleading, motion, response, order, and other paper filed in a case, and any document attached to any of them, must comply with the protective requirements for confidential information established by Administrative Order 19. Counsel and unrepresented parties shall follow the redaction and filing procedure established by Rule of Civil Procedure 5(c)(2)(A) & (B). That procedure includes: (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal. (Added December 11, 2008, effective January 1, 2009.)

**Reporter’s Note:** Administrative Order 19 requires that any necessary and relevant confidential information in a case record must be redacted. Unrepresented parties, counsel, and judges must follow the redaction/duplicate-filing-under-seal procedure outlined in Rules of Civil Procedure (5)(c)(2)(A) & (B) and

58 for all case records, as that term is defined by Administrative Order 19 Section III (A)(2), and which includes all pleadings and papers and any attached materials. *See* Reporter’s Notes, 2008 Amendment to Rules of Civil Procedure 5 and 58.

### **RESEARCH REFERENCES**

**Ark. L. Rev.** Recent Development: In re: Adoption of Rule 1.9, Rules of Criminal Procedure, 61 Ark. L. Rev. 787.

## **ARTICLE II. PROCEDURES COMMENCING WITH INITIAL CONTACT BY LAW ENFORCEMENT OFFICER**

### **Commentary to Article II**

Article II confronts fundamental threshold problems associated with encounters between law enforcement officer and citizen. The Article is composed of Rules 2 and 3. The former is concerned with the law enforcement officer’s authority to request cooperation, the latter with detention not occasioned by formal arrest. As is the case with Articles III and IV, Article II parallels closely in language and concept the provisions of the American Law Institute *Model Code of Pre-Arrest Procedure* (Proposed Official Draft No. 1: April 10, 1972), designated throughout this commentary as the A.L.I.

Rule 2 authorizes law enforcement officers to seek cooperation from any person in order to facilitate investigation and prevention of

crime. As pointed out in the explanatory note to A.L.I. § 110.1, the rule is not the product of innovation.

Given the importance of voluntary cooperation to the successful investigation of crime, such an explicit statement is appropriate in a comprehensive code in order to encourage officials to seek voluntary cooperation wherever possible, and to express to the public that official requests for cooperation are lawful. *Id.* at 4.

Rule 2.1 defines “reasonable suspicion,” a concept central to the Article. It will be immediately observed that a “reasonable suspicion,” while somewhat more than an intuitive guess or hunch, is not equitable with probable cause. The distinction is drawn because de-



tention authorized pursuant to reasonable suspicion serves different purposes and is of a different nature than detention occasioned by arrest. The *Comment* to the rule is Ark. Stat. Ann. § 43-435 (Supp. 1973) virtually verbatim. It elucidates by way of example the kinds of conduct that may provide a basis for "reasonable suspicion."

Rule 2.2 is divided into two parts. The first, 2.2(a), confers authority to request cooperation; the second, 2.2(b), is restrictive, prohibiting a policeman from leading a person to believe that compliance with the officer's request is required by law. Additionally, 2.2(b) makes it clear that, in the absence of an improper statement or implication, compliance with a request for cooperation will not be deemed involuntary simply by virtue of the inherent respect accorded by some citizens to a request by an officer.

Rule 2.3 requires that a request to go to a police station be accompanied by some form of notice that the request is not attended by a legal obligation to comply.

Rule 3 is concerned with detention not arising in the context of an arrest. Present Arkansas authority, Ark. Stat. Ann. § 43-429 *et seq.* (Supp. 1973), as well as the A.L.I. Code, was used as the model for the rule.

The Arkansas statutory scheme is characteristic of those generated by the decision of the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The fundamental aspects of the provision have historical antecedents as well, some in the form of statutes dating from the thirteenth century. *See, Commentary*, A.L.I. § 110.2 at 105, 106.

Rule 3.1 closely tracks § 43-429, but broadens police authority in two ways.

First, it permits a stop in a situation where the officer has a reasonable suspicion respecting the commission of a misdemeanor involving danger of forcible injury to persons or damage to or theft of property. In limiting the authority to stop to those situations where "such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct," the rule closely follows the language of § 43-429.

Second, although the fifteen minute time limitation is adopted from current law, this limitation is itself qualified by the phrase "or such further time as is reasonable under the circumstances." Although fifteen minutes is a desirable limit in most cases, the Commission recognizes that exigent circumstances occur justifying detention for longer periods and, accordingly, feels that the outer bounds of the permissible duration of nonarrest detention should be left to definition through court decision.

Rule 3 is designed to regulate on-the-street investigations; consequently, unless an arrest is made, entry upon private premises is not licensed. Neither is removal of persons to a police station authorized except where a material witness refuses to provide certain information.

The purpose of the rule is to allow brief detention in circumstances not affording reasonable cause to arrest but giving rise to a "reasonable suspicion" that criminal conduct is afoot. The Commission shares the conviction of the A.L.I. Reporters that "... such an authority is essential to the control of crime in an urban, mobile and anonymous environment. [The Commission is] further convinced that only by providing for this authority explicitly is it possible to confine its exercise even approximately to those situations of genuine urgency which best justify it." *A.L.I. at 110.*

The rule is grounded on the premise that the law enforcement officer is repeatedly confronted with circumstances requiring acquisition of information from or about a person unknown to him and whom, once departed, he is unlikely to find again. *See*, A.L.I. at 110.

Several arguments have been essayed to support the proposition that under circumstances not affording grounds capable of supporting an arrest law enforcement officers should be left to rely on voluntary cooperation. The following subsidiary arguments supporting this proposition are persuasively met by the A.L.I. Reporters thusly:

First, that if voluntary cooperation is inadequate to fill the law enforcement need this is only because society is reluctant to go to the trouble and expense of hiring more and better police. But surely no police force can be large enough to allow officers to follow and observe every suspicious person they encounter. Nor is it clear that individual liberty from government action would be more secure in a society so pervasively policed. In reality, if an authority such as is proposed here is not granted, the real choice for the police in these situations is between an attempt to secure voluntary cooperation and an arrest. If cooperation cannot be secured and an arrest is unjustified, the person must be allowed to disappear, and with him must disappear any information or clarification his detention might have provided.

Second, it is argued that the dilemma faced by the police if they are denied the power to stop is not so bleak, since in many cases the failure to stop and provide voluntary cooperation will resolve the ambiguity in the suspect's situation and justify an arrest. Indeed the failure to comply with a lawful request for cooperation might well be taken into account as a factor relevant to

the arrest decision ... But as sound as this argument may be in some cases, there are other cases where it will not work, and the attempt to make it work must result either in disingenuity about whether the person was constrained under authority or in an undesirable expansion in the standard of belief justifying an arrest. How can an officer, without a coercive stop, secure the voluntary cooperation of persons traveling in a car at night at sixty miles per hour? Similarly, it is artificial to describe as a request for voluntary cooperation the word "stop," shouted to a man running down a street, or the announcement to the persons at the scene of a shooting, "nobody leave; we want your names and addresses." So also it seems dubious that an arrest would be justified if a person who meets in a very general way the description of one wanted in connection with a serious crime, politely refuses to stop and identify himself, but calmly turns his back on the officer and walks away.

Ultimately, the positive justification of the section is this: If, as some have argued, the only power to restrain a person, even briefly, is by arresting him on reasonable grounds to believe him guilty of a crime, the police will be foreclosed from responding to confused, emergency situations in the way that seems most natural and rational. For in such circumstances, where a crime may have been committed and a suspect or important witness is about to disappear, it seems irrational to deprive the officer of the opportunity to "freeze" the situation for a short time, so that he may make inquiry and arrive at a considered judgment about further action to be taken. To deny the police such a power would be to pay a high price in effective policing and in the police's respect for the good sense of the rules that govern them. *A.L.I. at 111-113* [footnotes omitted].

Another argument against permitting stops is that granting authority to detain necessarily creates a potential for abuse which ultimately outweighs the advantages sought to be gained. Further, it is said that, at best, the stop constitutes an unwarranted imposition upon innocent parties concerned; at worse, it is susceptible to being used as a method for

harassment, a method engendering resentment and disrespect of laws and enforcement agencies.

What empirical data does exist is unfortunately not determinative, although it does not appear that widespread misuse of the power to stop is inevitable wherever such power is conferred. *See, Commentary, A.L.I. § 110.2 at 114-117*. However, to minimize the possibilities of abuse and the inconvenience unavoidably incident to the procedure, the circumstances justifying the stop have been circumscribed: only where there is a direct threat to persons or property is detention permissible.

Rule 3.2 closely follows § 43-429(b) (Supp. 1973) in requiring that a detained person be advised of the reason for his detention and the authority of the person detaining him.

Rule 3.3 is patterned after § 43-430 (Supp. 1973) but is more restrictive in so far as it permits the use of only nondeadly force in effecting a stop. While the Commission feels that the power to stop necessarily entails authority to coerce obedience, it is of the view that here deadly force is so manifestly inappropriate that it should be unequivocally forbidden.

Ark. Stat. Ann. § 43-431 is assimilated into the code by Rule 3.4, which permits the search of a person lawfully stopped and reasonably suspected of possessing a weapon posing an immediate threat to the officer or other persons. The provision seeks to ensure the safety of the officer, the subject, and bystanders, while precluding routine frisking and, in the process, thereby discouraging pretextual stops.

While permitting searches undeniably entails a certain risk of abuse, the Commission stands with the A.L.I. Reporters in its belief that police officers cannot be asked to risk what they perceive to be potentially lethal encounters unless they are, at the same time, authorized to make protective frisks.

Rule 3.5 incorporates § 43-432 (Supp. 1973) almost word for word in sanctioning the stop of a person believed to be a witness to a felony. The fifteen minute time limit imposed by 3.1 finds application here also.

Section 43-434 (Supp. 1973), setting out limitations on the right to stop, was deemed surplusage and was not made part of Rule 3.

## RULE 2. PRE-ARREST CONTACTS

### Rule 2.1. Definitions.

For the purposes of this Article, unless the context otherwise plainly requires:

"Reasonable suspicion" means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify



a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

### Comment to Rule 2.1

The following are among the factors to be considered in determining if a “reasonable suspicion” exists:

- (a) The conduct and demeanor of a person.
- (b) The gait and manner of a person.
- (c) Any knowledge the officer may have of a person’s background or character.
- (d) Whether a person is carrying anything, and what he is carrying.
- (e) The manner of a person’s dress, including bulges in his clothing, when considered in light of all the other factors.
- (f) The time of the day or night.
- (g) Any overheard conversation of a person.

(h) The particular streets and areas involved.

(i) Any information received from third person, whether he is known or unknown.

(j) Whether a person is consorting with others whose conduct is “reasonably suspect.”

(k) A person’s proximity to known criminal conduct.

(l) Incidence of crime in the immediate neighborhood.

(m) A person’s apparent effort to conceal an article.

(n) Apparent effort of a person to avoid identification or confrontation by the police.

### 1987 Unofficial Supplementary Commentary to Rule 2.1

The legality of stops under Rule 3.1 and weapons searches under Rule 3.4 turns on whether a law enforcement officer has “reasonable suspicion” as defined in Rule 2.1. Whether the officer has adequate grounds is a question that will, of course, arise most frequently when the stop yields an incriminating statement or other evidence.

In *Tillman v. State*, 275 Ark. 275, 630 S.W.2d 5 (1982), *cert. denied*, 459 U.S. 1201, 103 S. Ct. 1185, 75 L. Ed. 2d 432 (1983), the Court established a quadripartite standard helpful in understanding how it will deter-

mine whether the reasonable suspicion test of Rule 2.1 has been met.

Considerations [pertaining to grounds for relief] are relative, and can be compared to a ladder with four rungs: at the highest level is certain knowledge, as in the case of an eyewitness to a crime; next is probable cause, less than a certainty, but enough to satisfy a prudent man; lower yet is a reasonable suspicion; and at the lowest level, a bare or imaginary suspicion, founded on nothing more than a hunch. 275 Ark. at 279, 630 S.W.2d at 7.

### RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Annual Survey of Case Law, Criminal Law, 28 U. Ark.

Little Rock L. Rev. 680.

### CASE NOTES

#### ANALYSIS

Accomplice.

Arrest.

Factors considered.

Noncompliance.

Reasonable suspicion.

#### Accomplice.

Even though “mere presence” does not make one an accomplice under § 5-2-403, there can be enough presence to constitute probable cause to arrest. *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

#### Arrest.

If a police officer has probable cause to arrest, failure to give an ARCrP 2.3 warning

is irrelevant. *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

#### Factors Considered.

Under § 16-81-203, the trial court may consider several factors, including, but not limited to: (a) the demeanor of the suspect; (b) the gait and manner of the suspect; (c) any knowledge the officer may have of the suspect’s background or character; and (d) any apparent effort of the suspect to avoid identification or confrontation by the police. *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997).

Stop of defendant was lawful and complied with this rule, Ark. R. Crim. P. 2.2(a), and 14.1 (2010) as an officer arrived on the scene

within 30 seconds of a police broadcast; defendant's was the only vehicle in the area; and the stop was brief, non-aggressive, and a minimal intrusion compared to the state's interest in investigating the crime. *Penister v. State*, 2011 Ark. App. 405, — S.W.3d —, 2011 Ark. App. LEXIS 430 (June 1, 2011).

### **Noncompliance.**

Detention without probable cause did not comply with requirements of this Rule. *Rose v. State*, 294 Ark. 279, 742 S.W.2d 901 (1988).

### **Reasonable Suspicion.**

Where the suspects were followed a considerable distance and observed to be studying residences along the way as if to be "casing" them, and coupled to those circumstances were the knowledge and observations of the arresting officer that the area had been frequently burglarized, that the vehicle was unfamiliar to him, and that the occupants were unknown to him and were thought to have just emerged from a private driveway 45 minutes to an hour after the informant observed them "casing" the residence, such circumstances collectively established a reasonable suspicion warranting a stop and detention of the suspects. *Tillman v. State*, 275 Ark. 275, 630 S.W.2d 5 (1982), cert. denied 459 U.S. 1201, 103 S. Ct. 1185, 75 L. Ed. 2d 432 (1983).

The justification for investigative stops depends upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person or vehicle may be involved in criminal activity. *Reeves v. State*, 20 Ark. App. 17, 722 S.W.2d 880 (1987).

Evidence sufficient to support reasonable suspicion to stop. *Adams v. State*, 26 Ark. App. 15, 758 S.W.2d 709 (1988), cert. denied 489 U.S. 1018, 109 S. Ct. 1136, 103 L. Ed. 2d 197 (1989); *Coffman v. State*, 26 Ark. App. 45, 759 S.W.2d 573 (1988); *Folly v. State*, 28 Ark. App. 98, 771 S.W.2d 306 (1989).

Reasonable suspicion is more than an imaginary or purely conjectural suspicion, but less than probable cause. *Nottingham v. State*, 29 Ark. App. 95, 778 S.W.2d 629 (1989); *Jackson v. State*, 34 Ark. App. 4, 804 S.W.2d 735 (1991), criticized *Stewart v. State*, 59 Ark. App. 77, 953 S.W.2d 599 (1997).

Defendant's arrest was not pretextual where the arresting officer had been told that the defendant was a "possible suspect," where a witness told him that he thought defendant did it, and he wore thermal shirts like the one that was found and a spent shotgun shell was visible on the defendant's car seat. *Ray v. State*, 304 Ark. 489, 803 S.W.2d 894, cert. denied 501 U.S. 1222, 111 S. Ct. 2837, 115 L. Ed. 2d 1005 (1991).

Reasonable suspicion entails a consideration of the total circumstances and the exis-

tence of particularized, specific reasons for a belief that the person may be engaged in criminal activity. *Stout v. State*, 304 Ark. 610, 804 S.W.2d 686 (1991).

A stop, based on a citizen's tip regarding criminal activity, and on policeman's observation that the vehicle was driving back through a neighborhood it had just left, was reasonable. *Brooks v. State*, 40 Ark. App. 208, 845 S.W.2d 530 (1993).

Considering the totality of the circumstances, the officers were justified in reasonably suspecting that defendant was involved in criminal activity. *Roark v. State*, 46 Ark. App. 49, 876 S.W.2d 596 (1994).

Officer's belief that a narcotics transaction was occurring was reasonable where it was based on his observations that a person was leaning into the driver's side of the window and quickly left the vehicle after the officer's arrival, that the defendant's vehicle was stopped on the wrong side of the street facing in the wrong direction, that the area was known for drug activity, and that it was after dark. *Dickerson v. State*, 51 Ark. App. 64, 909 S.W.2d 653 (1995).

Although the police acted reasonably in responding to a motel employee's report of a suspicious truck and in stopping and detaining the truck and its two occupants to determine whether the vehicle was stolen, the police lacked reasonable suspicion to conduct a search of the defendant passenger after they learned that the truck was not stolen when the driver produced papers verifying his recent purchase of it. *Wimbley v. State*, 68 Ark. App. 56, 3 S.W.3d 709 (1999).

Officers lacked reasonable suspicion to stop and detain defendant where the only factors tending to lead to reasonable suspicion for an investigatory stop under ARCrP 3.1 were the time of day and the incidence of crime in the neighborhood, and where the officers did not observe any criminal activity or observe a suspicious transaction; the officers did not have reasonable suspicion, as defined by this rule, and they were not investigating a particular crime as required by ARCrP 2.2. *Davis v. State*, 77 Ark. App. 310, 74 S.W.3d 671 (2002), rev'd 351 Ark. 406, 94 S.W.3d 892 (2003).

Defendant's behavior gave rise to a reasonable suspicion where defendant and another man were in a high crime area known for drug activity, they engaged in an apparent hand-to-hand transaction, when they saw the police officers approach they separated, defendant appeared nervous, and the totality of the circumstances gave rise to a reasonable suspicion sufficient to justify making an investigatory stop. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003).

Although the searching officer testified that defendant did not present a danger to him



because defendant was in the custody of a fellow officer, it was still possible that defendant could have broken away from the police and obtained access to any weapons in the truck; moreover, unlike *Long and Reeves*, defendant was stopped because his vehicle met the description of the police broadcast regarding shots being fired from the described vehicle and, thus, it was reasonable for the officer to search the passenger compartment of the automobile for the safety of the officers and the safety of others. *Saulsberry v. State*, 81 Ark. App. 419, 102 S.W.3d 907 (2003).

Police officer had reasonable suspicion to stop defendant's vehicle after he observed that the left taillight and brake light of the car was not functioning, which was a violation of § 27-36-216(a) and (b); however, after issuing defendant a citation, the officer did not have reasonable suspicion to further detain him and the subsequent search of defendant's car for drugs was not justified. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004).

Under this rule, "reasonable suspicion" means a suspicion based on facts or circumstances that give rise to more than a bare suspicion, not an imaginary or purely conjectural suspicion. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004).

Officer did not have reasonable suspicion to further detain defendant for a canine sniff after a traffic stop where the officer based the further detention on a one-way rental, a rental in another person's name, nervousness, and the presence of air freshener. *Lilley v. State*, 362 Ark. 436, 208 S.W.3d 785 (2005).

Police officer's continued detention of defendant for questioning and the officer's actions in running a drug dog around defendant's vehicle constituted an unreasonable, unlawful seizure because the legitimate purpose of the valid traffic stop was complete when the officer returned defendant's license and gave him a warning ticket; the officer did not have a reasonable, articulable suspicion, based on defendant's nervousness, defendant's possession of energy-drink cans and a rental car agreement signed by an absent third party, or the smell of air freshener in the car, that defendant was committing, had committed, or was about to commit a felony or misdemeanor involving danger to persons or property. *Lilley v. State*, 89 Ark. App. 43, 199 S.W.3d 692 (2004).

Trial court did not err in denying defendant's motion to suppress marijuana seized after a search of his vehicle where the officer developed a reasonable suspicion that defendant was committing a felony, authorizing his continued detention of defendant; further, the officer detected a strong odor of fabric sheets, as opposed to air freshener, which the officer testified were often used to mask the odor of

illegal controlled substances. *Ayala v. State*, 90 Ark. App. 13, 203 S.W.3d 659 (2005).

Defendant's motion to suppress evidence was properly denied in a drug case because an officer had authority to continue a detention under Ark. R. Crim. P. 3.1; there was reasonable suspicion based on defendant's nervousness, his unusual travel plans, and the strong smell of fabric softener in his car. *Ayala v. State*, 90 Ark. App. 13, 203 S.W.3d 659 (2005).

Defendant's drug convictions were improper as the police lacked reasonable suspicion to stop him based only on an informant's information that defendant had just bought a "large quantity" of matches; therefore, the initial stop and the subsequent search of defendant's home were illegal seizures. *Summers v. State*, 90 Ark. App. 25, 203 S.W.3d 638 (2005).

In a drug case, defendant's motion to suppress evidence should have been granted because the officer did not have reasonable suspicion to detain defendant after the issuance of a warning ticket; nervousness, as well as a new cell phone, atlases, fast food wrappers, and energy drinks in the car, were insufficient for reasonable suspicion. *Meraz-Lopez v. State*, 92 Ark. App. 157, 211 S.W.3d 564 (2005).

In a murder case, the trial court properly denied a motion to suppress because, although defendant was seized when she was told she could not leave the crime scene, in light of the remoteness of the crime scene and the circumstances existing at the time, requesting defendant to remain at the crime scene was reasonable, and defendant's statements were not incriminating as defendant said that she had last seen the victim the night before when he got into a van with some other people to go and drink beer. *Flanagan v. State*, 368 Ark. 143, 243 S.W.3d 866 (2006).

Counsel was not ineffective in relation to a motion to suppress evidence following a traffic stop because defendant flew to California, stayed a very short while, returned to Tennessee by rental car, the person who rented the car was not present, the rental agreement provided that the car was to be operated in California, only by the renter, and although the car was nearly new, the manufacturer provided jack and associated tools were lying on the floor of the car. *Harrison v. State*, 371 Ark. 474, 268 S.W.3d 324 (2007).

Motion to suppress evidence was improperly granted because, where police had known an informant to give reliable information in the past, and accurate information was received from the informant about defendant and his vehicle, officers had specific, particularized, and articulable reasons for thinking that defendant was involved in criminal activity, which justified a stop under Ark. R. Crim. P. 3.1. Because the officers had reason-

able suspicion to stop and detain the vehicle, any pretext on the part of the officers was irrelevant; moreover, the officers did not need any additional reasonable suspicion to justify a canine sniff, which was not a search under the Fourth Amendment. *State v. Harris*, 372 Ark. 492, 277 S.W.3d 568 (2008).

Police officer's 6:00 p.m. stop after defendant backed defendant's truck into a department store's side lot in a two-three mile zone of recent armed robberies violated both Ark. R. Crim. P. 2.2 and 3.1 since there was clearly a Fourth Amendment seizure when the officer blocked defendant's truck with the patrol car, turned on the bright headlights, placed the spot light and take-down lights on defendant, and approached the truck with a gun in hand; further, defendant's mere presence in a high crime area did not rise to reasonable suspicion sufficient to authorize an investigatory stop. *Cockrell v. State*, 2009 Ark. App. 700, — S.W.3d —, 2009 Ark. App. LEXIS 889 (2009).

Trial court properly denied defendant's motion to suppress because an officer had reasonable suspicion that defendant was carrying a weapon and, therefore, a frisk of defendant was not an illegal search; the officer testified that defendant's shrugged shoulders, no eye contact, and tightening up indicated to the officer that defendant was lying about not having any weapons or anything illegal. *Gilbert v. State*, 2010 Ark. App. 857, — S.W.3d —, 2010 Ark. App. LEXIS 894 (Dec. 15, 2010).

Officer had reasonable suspicion to stop defendant and investigate drug-related criminal activity because a reliable known informant provided information about a delivery of methamphetamine. The fact that defendant arrived in a black car rather than a white car of the same make as described did not undermine reasonable suspicion. *James v. State*, 2012 Ark. App. 118, — S.W.3d —, 2012 Ark. App. LEXIS 228 (Feb. 8, 2012).

Officer had reasonable suspicion for a stop because an informant told the police that a white male had bought five one-pound bags of

iodine from the feed store just down the road from the police department, and he gave the police the vehicle's license-plate number. It was sufficient corroboration when the car with that license-plate number passed by the officers and its occupants were two white males. *Ashley v. State*, 2012 Ark. App. 131, — S.W.3d —, 2012 Ark. App. LEXIS 232 (Feb. 8, 2012).

Officer had reasonable suspicion to stop and detain defendant based on a reliable confidential informant's information that he was going to deliver methamphetamine at a specified convenience store and defendant's arrival at the store, followed by the informant's call to defendant that he was at the wrong store and defendant's then leaving the first store and driving toward the other store. *Owens v. Arkansas*, 2011 Ark. App. 763, — S.W.3d —, 2011 Ark. App. LEXIS 802 (Dec. 7, 2011).

**Cited:** *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284 (1982), cert. denied 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982); *Miller v. State*, 21 Ark. App. 10, 727 S.W.2d 393 (1987); *Kaiser v. State*, 24 Ark. App. 19, 746 S.W.2d 559 (1988), rev'd 296 Ark. 125, 752 S.W.2d 271 (1988); *Cooper v. State*, 297 Ark. 478, 763 S.W.2d 645 (1989); *Addison v. State*, 298 Ark. 1, 765 S.W.2d 566 (1989), overruled *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997); *Weaver v. State*, 305 Ark. 180, 806 S.W.2d 615 (1991); *Bliss v. State*, 33 Ark. App. 121, 802 S.W.2d 479 (1991); *Stewart v. State*, 42 Ark. App. 28, 853 S.W.2d 286 (1993); *Johnson v. State*, 43 Ark. App. 145, 862 S.W.2d 290 (1993); *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995); *Roberson v. State*, 54 Ark. App. 230, 925 S.W.2d 820 (1996); *Frette v. State*, 58 Ark. App. 81, 947 S.W.2d 15 (1997), rev'd 331 Ark. 103, 959 S.W.2d 734 (1998), questioned *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999); *Stewart v. State*, 59 Ark. App. 77, 953 S.W.2d 599 (1997); *Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998); *Dowty v. State*, 363 Ark. 1, 210 S.W.3d 850 (2005).

## Rule 2.2. Authority to request cooperation.

(a) A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request.

(b) In making a request pursuant to this rule, no law enforcement officer shall indicate that a person is legally obligated to furnish information or to otherwise cooperate if no such legal obligation exists. Compliance with the request for information or other cooperation hereunder shall not be regarded as involuntary or coerced solely on the ground that such a request was made by a law enforcement officer.



## 1987 Unofficial Supplementary Commentary to Rules 2.2 and 2.3

**Consequences of Failure to Warn.**

Rules 2.2 and 2.3 require that "reasonable steps" be taken to advise persons from whom information is sought that there is no "legal obligation" to comply with a request for cooperation. Failure to advise may convert a stop into an arrest and trigger the need for *Miranda* warnings.

In *Lascano v. State*, 275 Ark. 346, 631 S.W.2d 258 (1982), appellant was taken by a deputy sheriff from her home to the sheriff's office where she was questioned as a suspect by an officer. In response to questions, she indicated that she had last seen the decedent on the preceding day at about the time she was killed. After making this disclosure, appellant was given *Miranda* warnings. She subsequently made incriminating statements which were admitted into evidence at the trial at which she was convicted of murder. The Arkansas Supreme Court affirmed the conviction, noting that the record did not disclose whether appellant was advised that she did not have to accompany the officers to the sheriff's office. The Court disposed of her contention that she had not been given adequate Rule 2.3 warnings by pointing out that because the issue had not been raised below it could not be pursued on appeal. The Court hinted that its decision might have been different if the evidence had shown that appellant was likely a suspect from the outset. *Id.* at 349, 631 S.W.2d at 259.

Chief Justice Adkisson, dissenting, noted that "evidence that this 'pick up' was, in effect, an arrest can be garnered from the failure of the deputies to advise her that she was not required to accompany them. Such a statement is required by Rule 2.3 ..." *Id.* at 352, 631 S.W.2d at 261. See, also, *Richardson v. State*, 288 Ark. 407, 706 S.W.2d 363 (1986), where failure to advise under Rule 2.3 was considered evidence that an arrest was pretextual.

Rule 2.3 contains no sanction for its violation, but in *Richardson* suppression of evidence in the form of clothing seized pursuant to the appellant's incarceration was found necessary.

If one becomes a suspect *after* complying with a request to cooperate and then is given *Miranda* warnings, a subsequently given statement will be admissible. See, for example, *Hayes v. State*, 269 Ark. 47, 598 S.W.2d 91 (1980). It is clear, however, that failure to give the advice required by Rules 2.2(b) and 2.3 may result in suppression of an incriminating statement, even if the statement follows entirely adequate *Miranda* warnings. In *Foster v. State*, 285 Ark. 363, 687 S.W.2d 829 (1985), appellant was convicted of first degree murder at a trial at which a tape recorded state-

ment was admitted into evidence. Four police officers took appellant from her home at 2:30 a.m., telling her that the prosecuting attorney wanted to speak with her. After arriving at the prosecutor's office she was questioned by officers, and a tape recorded statement of an accomplice was played to her. She was then advised of her rights, signed a form waiver, and gave a tape recorded statement.

The Arkansas Supreme Court, without citing *Lascano* or *Hays*, observed:

There are several legal mechanisms by which an individual can lawfully be picked up for questioning, but none of them were used in this case.

...

The entire procedure whereby Mrs. Foster's presence at the prosecutor's office was obtained was merely a guise to let the officers detain her and interrogate her. Based on the totality of the circumstances, the illegality of this procedure has impermissibly tainted Mrs. Foster's subsequent statement and it should have been suppressed.

*Id.* at 367-68, 687 S.W.2d at 830-31.

**Rule 2.2 Stop vs. Rule 3.1 Stop.**

Though under Rule 2.2 a law enforcement officer may have authority to interrupt the normal course of a citizen's activities long enough to request information in an effort to prevent or investigate "crime," a Rule 3.1 stop must be based upon a reasonable suspicion that the person stopped has committed or is about to commit a felony or a misdemeanor. In *Meadows v. State*, 269 Ark. 380, 602 S.W.2d 636 (1980), police officers waiting at an airport became suspicious when two men looked back at them after walking past them. The officers followed them, required them to produce identification, and arrested them when a check disclosed an outstanding felony arrest warrant for one of them. In suppressing evidence adduced at trial (heroin) on grounds that it was obtained after an unauthorized stop, the Court reasoned as follows:

Here the officer's sole reason for approaching the two men was their conduct in looking back and in quickening their pace upon being followed. That conduct, however, could not possibly suggest that Meadows or Duncan had committed or were about to commit any *particular* type of felony or misdemeanor, which is necessarily what Rule 3.1 refers to. In fact, Bounds testified that he suspected that Meadows had committed "crime," but he was unable to be more specific. We must conclude that in the circumstances the officers were not authorized by Rule 3.1 to stop the two men.

269 Ark. at 382-83, 602 S.W.2d at 638 (Court's emphasis).

Prior decisions to the effect that an officer need not have in mind a specific crime committed at the time of an arrest were not distinguished or reconciled with the holding in *Meadows*, so it may be assumed that these cases have continuing validity.

The Court's decision in *Meadows* turned on the finding that the conduct in question — walking fast and looking back at the officers — could not suggest that appellants had committed any “particular type” of crime. Whether the decision would have been the same if appellants had turned and fled at top speed after appearing to recognize the officers

is unclear. Though it is difficult to imagine the Court ruling that the police should stand by idly in such circumstances, it is also hard to see how the rationale of *Meadows* permits another result.

Finally, it should be noted that the Court did not advert in *Meadows* to the Comment following Rule 2.1 stating that conduct, demeanor, gait, manner, and efforts to avoid confrontation by the police may be considered in applying the “reasonable suspicion” test. In fact, no case relying on Comment has been found, though consideration of these criteria might have led to different results in some cases. See, e.g., *Van Patten v. State*, 16 Ark. App. 83, 697 S.W.2d 919 (1985).

## CASE NOTES

### ANALYSIS

In general.

Applicability.

Invasion of privacy.

Miranda warnings.

Reasonable suspicion.

Request for identification.

Seizure.

Stop held improper.

Stop held proper.

Subpoena power.

### In General.

The approach of a citizen pursuant to a policeman's investigative law enforcement function must be reasonable under the existent circumstances and requires a weighing of the government's interest for the intrusion against the individual's right to privacy and personal freedom; to be considered are the manner and intensity of the interference, the gravity of the crime involved, and the circumstances attending the encounter. *Baxter v. State*, 274 Ark. 539, 626 S.W.2d 935, cert. denied 457 U.S. 1118, 102 S. Ct. 2930, 73 L. Ed 2d 1331 (1982); *Blakemore v. State*, 25 Ark. App. 335, 758 S.W.2d 425 (1988).

### Applicability.

A situation may not involve the authority of a police officer to make an investigatory stop based on reasonable suspicion in accordance with ARCrP 3.1, but may involve the question of the extent of permissible interruption a citizen must bear to accommodate a law officer who is investigating a crime under this rule. *Blakemore v. State*, 25 Ark. App. 335, 758 S.W.2d 425 (1988).

An interview does not come within the ambit of this rule when the defendant did not go to the police department as a result of a request by a member of that department, but rather on his own volition. *Smith v. State*, 321 Ark. 580, 906 S.W.2d 302 (1995).

When defendant stopped his vehicle, he did

not do so after a “show of authority” by the officer, rather, it was a voluntary act such that there were no utterances or conduct by the officer that would have conveyed to a reasonable person that he was being ordered to restrict his movement; defendant was not “seized” through a “show of authority” and the appellate court was not required to consider whether the officer had the requisite grounds under either subsection (a) of this rule or ARCrP 3.1 for stopping defendant's car. *Simmons v. State*, 83 Ark. App. 87, 118 S.W.3d 136 (2003).

This rule authorized an officer to approach defendant's car to investigate whether he was about to drive while intoxicated. Information provided by identified citizen-informants combined with defendant's obvious intoxication when the officer approached provided the reasonable suspicion that defendant was about to drive under the influence, allowing detention under Ark. R. Crim. P. 3.3. *Stewart v. State*, 2010 Ark. App. 9, — S.W.3d —, 2010 Ark. App. LEXIS 15 (Jan. 6, 2010).

Defendant was detained under Ark. R. Crim. P. 3.1, and the stop was not voluntary under this rule, at the point that officers wearing guns and badges ordered defendant to step out of his car. *Ashley v. State*, 2012 Ark. App. 131, — S.W.3d —, 2012 Ark. App. LEXIS 232 (Feb. 8, 2012).

As defendant abandoned the cocaine that he was carrying prior to being seized by a police officer, such that the evidence was not the fruit of a search, it was not necessary to determine whether his detention was illegal under this rule and Ark. R. Crim. P. 3.1 for purposes of suppression. *Williams v. State*, 2012 Ark. App. 337, — S.W.3d —, 2012 Ark. App. LEXIS 441 (May 9, 2012).

### Invasion of Privacy.

Consent to an invasion of privacy must be proved by clear and positive testimony — a burden that is not met by showing only acqui-



escence to a claim of lawful authority. *Meadows v. State*, 269 Ark. 380, 602 S.W.2d 636 (1980).

Where shortly after a jewelry store was robbed a police officer stopped the defendant, in a public park near the store, to ask him if he had seen anyone running through the park, the initial nonaggressive stop of the defendant, which led to the subsequent discovery of the robbery suspects, was valid, since the manner and intensity of the interference with the defendant's right of privacy and freedom of movement was slight and minimal as compared to the governmental interest in investigating a serious felony offense. *Baxter v. State*, 274 Ark. 539, 626 S.W.2d 935, cert. denied 457 U.S. 1118, 102 S. Ct. 2930, 73 L. Ed. 2d 1331 (1982); *Blevins v. State*, 310 Ark. 538, 837 S.W.2d 879 (1992).

### **Miranda Warnings.**

A police officer investigating a crime may request a person to furnish information by answering questions and may stop and detain a suspect for 15 minutes or as is reasonable under the circumstances, where he reasonably suspects that person is involved in a crime. The Miranda warning is not required unless statements result from custodial interrogation, nor is it required for voluntary, spontaneous statements. *Ward v. State*, 308 Ark. 415, 827 S.W.2d 110, cert. denied 506 U.S. 841, 113 S. Ct. 124, 121 L. Ed. 2d 79 (1992).

### **Reasonable Suspicion.**

Where the officer stopped defendant and he was aware that defendant had been identified as a suspect in a felony under investigation, under the totality of the circumstances, the trial court could properly find that the officer had adequate reason to stop defendant's vehicle under both ARCrP 3.1 and this rule. *McDaniel v. State*, 20 Ark. App. 201, 726 S.W.2d 688, cert. denied 484 U.S. 838, 108 S. Ct. 121, 98 L. Ed. 2d 80 (1987).

Evidence sufficient to support reasonable suspicion to stop. *Adams v. State*, 26 Ark. App. 15, 758 S.W.2d 709 (1988), cert. denied 489 U.S. 1018, 109 S. Ct. 1136, 103 L. Ed. 2d 197 (1989); *Hammons v. State*, 327 Ark. 520, 940 S.W.2d 424 (1997).

Officers lacked reasonable suspicion to stop and detain defendant where the only factors tending to lead to reasonable suspicion for an investigatory stop under ARCrP 3.1 were the time of day and the incidence of crime in the neighborhood, and where the officers did not observe any criminal activity or observe a suspicious transaction; the officers did not have reasonable suspicion as defined by ARCrP 2.1, and they were not investigating a particular crime as required by this rule.

*Davis v. State*, 77 Ark. App. 310, 74 S.W.3d 671 (2002), rev'd 351 Ark. 406, 94 S.W.3d 892 (2003).

In a murder case, the trial court properly denied a motion to suppress because, although defendant was seized when she was told she could not leave the crime scene, in light of the remoteness of the crime scene and the circumstances existing at the time, requesting defendant to remain at the crime scene was reasonable, and defendant's statements were not incriminating as defendant said that she had last seen the victim the night before when he got into a van with some other people to go and drink beer. *Flanagan v. State*, 368 Ark. 143, 243 S.W.3d 866 (2006).

### **Request for Identification.**

Where there was nothing in the police officer's testimony to support a belief that the officer asked the defendant for identification in the course of a criminal investigation, the request made of the defendant for identification was improper under this rule since a police officer may not stop a citizen at any time, without reasonable grounds for suspicion, request identification, and arrest and search the citizen if his identity uncovers an outstanding felony warrant. *Meadows v. State*, 269 Ark. 380, 602 S.W.2d 636 (1980).

Defendant's nervous demeanor and the fact that he shifted his bag away from the drug dog were objective reasons for police officers to stop him and request his identification under this rule, even though they did not know at that point who defendant was. *Jackson v. State*, 359 Ark. 297, 197 S.W.3d 468 (2004), cert. denied 544 U.S. 1039, 125 S. Ct. 2266, 161 L. Ed. 2d 1070 (2005).

Vehicle passenger, who was allegedly arrested by a state police officer for refusing to provide identification, stated a claim against the officer for a Fourth Amendment violation. There was no probable cause to arrest the passenger under § 5-54-102(a)(1) for obstructing the performance of a governmental function; the officer's authority under this rule to request information did not provide probable cause because there was no showing that the passenger had a duty under Arkansas law to furnish identification. *Stufflebeam v. Harris*, 521 F.3d 884 (8th Cir. 2008).

### **Seizure.**

This rule authorizes a police officer to undertake a nonseizure encounter, such as where an officer approaches an individual on a street and asks if he is willing to answer some questions; because the encounter is in a public place and is consensual, it does not constitute a "seizure" within the meaning of the Fourth Amendment. *Thompson v. State*, 303 Ark. 407, 797 S.W.2d 450 (1990).

Officer's approach to investigate defendant's car, which was parked in a public place

with its lights on and engine running, resulting in the defendant's arrest for driving while intoxicated, was a consensual encounter in public, and was not a "seizure" within the meaning of the Fourth Amendment. *Thompson v. State*, 303 Ark. 407, 797 S.W.2d 450 (1990).

A "seizure" occurred when the officer ordered defendant to step from his vehicle, so that it was an investigatory stop under ARCrP 3.1, and not a request under this rule for information. *Frette v. State*, 58 Ark. App. 81, 947 S.W.2d 15 (1997), rev'd 331 Ark. 103, 959 S.W.2d 734 (1998), questioned *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999).

Although the "knock-and-talk" procedure has been upheld as a consensual encounter and a valid means to request consent to search a house, the officers failed to provide clear and positive testimony that any type of consent, verbal or otherwise, was obtained by the officers before they entered defendant's house; thus, the officer's warrantless entry into defendant's home constituted a Fourth Amendment violation. *Latta v. State*, 350 Ark. 488, 88 S.W.3d 833 (2002).

#### Stop Held Improper.

Where contraband was seized from a vehicle belonging to a missing girl's boyfriend after police stopped the vehicle looking for the girl, the evidence was properly suppressed pursuant to this rule because the stop of defendant's vehicle was not proper under this rule; the intrusion into defendant's privacy was unreasonable when weighed against the governmental interest of locating a missing girl, where no allegations of criminal activity were made. *State v. McFadden*, 327 Ark. 16, 938 S.W.2d 797 (1997).

Where police officer requested that defendant approach his patrol car simply because she was standing on the corner in a high crime area late in the evening, and the officer was not investigating a nearby crime or a tip from an informant at the time of the encounter, the encounter was impermissible under this rule. *Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998).

Stop was not justified where there was no testimony that the officer was investigating or preventing a crime when she encountered defendant, therefore, the stop and search was illegal and defendant's motion to suppress the evidence of the cocaine and the firearm should have been granted. *Jennings v. State*, 69 Ark. App. 50, 10 S.W.3d 105 (2000).

Police could not require defendant to identify himself, under this rule, when they were not investigating a particular crime, but were on routine patrol. *Jefferson v. State*, 76 Ark. App. 300, 64 S.W.3d 791 (2002), rev'd 349 Ark. 236, 76 S.W.3d 850 (2002).

Where police officer was not investigating a

crime or a tip from an informant at the time of the encounter, the officer's stop and pat-down search of defendant, who was standing near a "No Loitering" sign in a parking lot in a high crime area with several other men, was impermissible and could not be justified under the rule. *Anderson v. State*, 79 Ark. App. 286, 86 S.W.3d 403 (2002).

This rule did not provide a basis for defendant's stop where the detective was not tipped off that defendant was arriving at the bus station, and detective's presence at the station was for the purpose of routine monitoring activities; the detective also did not state that he was investigating any particular crime and defendant's conduct was not indicative of any criminal activity. *Jackson v. State*, 86 Ark. App. 39, 158 S.W.3d 715 (2004), overruled in part *Jackson v. State*, 359 Ark. 297, 197 S.W.3d 468 (2004).

Where an officer drove past a closed gas station where he observed two vehicles in the parking lot, there were no signs of criminal activity, no moving violations, nor any defective equipment on the vehicles; nonetheless, he stopped one vehicle, questioned the driver, asked him to get out of the car, and seized marijuana from the vehicle and defendant's person. Because the police officer was not investigating a crime, the initial encounter was not authorized by this rule; therefore, the trial court erred by denying defendant's motion to suppress the evidence. *Dosia v. State*, 2009 Ark. App. 429, 318 S.W.3d 583 (2009).

Police officer's 6:00 p.m. stop after defendant backed defendant's truck into a department store's side lot in a two-three mile zone of recent armed robberies violated both this rule and Ark. R. Crim. P. 3.1 since there was clearly a Fourth Amendment seizure when the officer blocked defendant's truck with the patrol car, turned on the bright headlights, placed the spot light and take-down lights on defendant, and approached the truck with a gun in hand; further, defendant's mere presence in a high crime area did not rise to reasonable suspicion sufficient to authorize an investigatory stop. *Cockrell v. State*, 2009 Ark. App. 700, — S.W.3d —, 2009 Ark. App. LEXIS 889 (2009).

#### Stop Held Proper.

The initial encounter of defendant and the police was appropriate under this rule considering the manner of the interference, the gravity of the crimes in the area, and the circumstances of the encounter. *Stewart v. State*, 59 Ark. App. 77, 953 S.W.2d 599 (1997).

Where officers were executing a search warrant and had found evidence of a methamphetamine lab when defendant came onto property, officers were permitted to approach defendant to ask for identification and inquire about the purpose of his visit. *Sanders v.*



State, 76 Ark. App. 104, 61 S.W.3d 871 (2001), cert. denied 537 U.S. 815, 123 S. Ct. 82, 154 L. Ed. 2d 19 (2002).

Trial court did not err in denying defendant's motion to suppress statements she made to police during their investigation of her landlord's death where the officers made it reasonably clear to defendant that she was not legally obligated to furnish information or otherwise cooperate; the officers made it clear that she could go to the sheriff's office at her own convenience. *Wilson v. State*, 364 Ark. 550, 222 S.W.3d 171 (2006).

Trial court properly denied defendant's motion to suppress a crack pipe that was found in a vehicle in which he was a passenger because the officer's initial approach of the vehicle was valid as the vehicle was sitting in a parking lot early in the morning; although defendant might have been illegally seized when the officer ordered him out of the vehicle, the driver of the vehicle gave consent to the vehicle search independent of any violation of defendant's rights, thus, defendant lacked standing to challenge the vehicle search. *Swan v. State*, 94 Ark. App. 115, 226 S.W.3d 6 (2006).

Based on the totality of the circumstances, an investigating officer did not violate this rule when he asked defendant to show him a robbery/murder victim's car without informing defendant that he was not required to assist him; after learning that defendant had recently bought the car, the officer had an articulable suspicion that defendant had committed a crime and, at that point, was justified in detaining defendant for a reasonable amount of time. In fact, defendant agreed to show the officer where the car was parked and walked freely around the area of the victim's car until he was placed under arrest; although the officer was in uniform, he did not show defendant his weapon, and he did not tell defendant that he was required to assist him. *Boldin v. State*, 373 Ark. 295, 283 S.W.3d 565 (2008).

Officer's initial approach to investigate defendant's vehicle was lawful pursuant to this rule; defendant's movement in reaching down when the officer shined lights on defendant, combined with the fact that the vehicle was backed into a parking spot in a dark area of the parking lot, in an area that recently had a high incidence of armed robberies, provided the officer reasonable suspicion that justified detaining defendant. *Cockrell v. State*, 2010 Ark. 258, — S.W.3d —, 2010 Ark. LEXIS 306 (May 27, 2010).

Where, at 7:25 a.m., officers observed defen-

dant walking through a backyard on private property near a school, the officers did not violate subsection (a) of this rule by calling defendant to their vehicle and asking defendant's name. *Fowler v. State*, 2010 Ark. 431, — S.W.3d —, 2010 Ark. LEXIS 543 (Nov. 11, 2010).

Although an officer did not explicitly inform defendant that he was not required to go to the police station and make a statement, the circumstances of the officer's request, including allowing defendant to drive there in his own vehicle, showed that the officer made clear that defendant was not required to go, pursuant to Ark. R. Crim. P. 2.3. Therefore, his incriminating statements regarding the rape of his seven-year-old daughter were properly admitted. *Charland v. State*, 2011 Ark. App. 4, — S.W.3d —, 2011 Ark. App. LEXIS 10 (Jan. 5, 2011).

Stop of defendant was lawful and complied with subsection (a) of this rule, and Ark. R. Crim. P. 2.1 and 14.1, as an officer arrived on the scene within 30 seconds of a police broadcast; defendant's was the only vehicle in the area; and the stop was brief, non-aggressive, and a minimal intrusion compared to the state's interest in investigating the crime. *Penister v. State*, 2011 Ark. App. 405, — S.W.3d —, 2011 Ark. App. LEXIS 430 (June 1, 2011).

#### **Subpoena Power.**

Use of the prosecutor's subpoena power to obtain the presence of a witness for questioning by a police officer, absent the prosecutor, was illegal. *Duckett v. State*, 268 Ark. 687, 600 S.W.2d 18 (1980).

Where prosecutor's subpoena power was used to give police officers a means not only of getting on defendant's property but to force defendant to talk to police officers, the abuse resulted in unlawful seizure of evidence which was properly excluded. *State v. Shepherd*, 303 Ark. 447, 798 S.W.2d 45 (1990).

**Cited:** *Richardson v. State*, 283 Ark. 82, 678 S.W.2d 772 (1984); *Harris v. State*, 12 Ark. App. 181, 672 S.W.2d 905 (1984); *Foster v. State*, 285 Ark. 363, 687 S.W.2d 829 (1985); *Williams v. State*, 26 Ark. App. 62, 760 S.W.2d 71 (1988); *Dees v. State*, 30 Ark. App. 124, 783 S.W.2d 372 (1990); *Hart v. State*, 312 Ark. 600, 852 S.W.2d 312 (1993), overruled *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997); *Bernal v. State*, 48 Ark. App. 175, 892 S.W.2d 537 (1995); *Phillips v. State*, 53 Ark. App. 36, 918 S.W.2d 721 (1996); *Wright v. State*, 327 Ark. 558, 940 S.W.2d 432 (1997); *Otis v. State*, 364 Ark. 151, 217 S.W.3d 839 (2005).

### **Rule 2.3. Warning to persons asked to appear at a police station.**

If a law enforcement officer acting pursuant to this rule requests any

person to come to or remain at a police station, prosecuting attorney's office or other similar place, he shall take such steps as are reasonable to make clear that there is no legal obligation to comply with such a request.

### 1987 Unofficial Supplementary Commentary to Rule 2.3

See unofficial supplementary commentary to Rule 2.2.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Arkansas Law Survey, Irving and Schoen, Criminal Procedure, 9 U. Ark. Little Rock L.J. 129.

## CASE NOTES

### ANALYSIS

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### In General.

This rule requires that an officer inform a person he is free not to accompany the officer if the officer does not have a warrant. *Burnett v. State*, 295 Ark. 401, 749 S.W.2d 308 (1988); *Johnson v. State*, 325 Ark. 197, 926 S.W.2d 837 (1996).

This rule does not provide that a person must repeatedly be advised that he has no legal obligation to come to the police station each time he agrees to appear for an interview or questioning. *Johnson v. State*, 325 Ark. 197, 926 S.W.2d 837 (1996).

The Supreme Court will no longer interpret this rule to require a verbal warning of freedom to leave as a bright-line rule for determining whether a seizure of the person has occurred under the Fourth Amendment and whether a statement to police officers must be suppressed; rather, a verbal admonition of freedom to leave will be one factor to be considered in an analysis of the total circumstances surrounding compliance with this rule. *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

### Construction.

When interpreting this rule in deciding whether a seizure of a person has transpired, the Arkansas Supreme Court will be following *United States v. Mendenhall*, 446 U.S. 544 (1980); to the extent that Arkansas decisions

such as *Martin v. State*, 328 Ark. 420, 944 S.W.2d 512 (1997), state a contrary interpretation, the Supreme Court will henceforth retreat from those interpretations. *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

The question of whether a person's consent to accompany the police was voluntary or the product of duress or coercion should be determined by the totality of the circumstances. *Wilson v. State*, 364 Ark. 550, 222 S.W.3d 171 (2006).

### Applicability.

An interview does not come within the ambit of this rule when the defendant did not go to the police department as a result of a request by a member of that department, but rather of his own volition. *Smith v. State*, 321 Ark. 580, 906 S.W.2d 302 (1995).

This rule did not apply where police arrested and detained defendant for driving without insurance and without a valid driver's license, even though the arrest was a pretext to apprehend defendant for questioning about an unrelated criminal charge, because a valid and objective reason existed for the arrest. *Brown v. State*, 54 Ark. App. 44, 924 S.W.2d 251 (1996).

### Appellate Review.

Although defendant might have been barred on remand from arguing that there had been a violation of this rule because he had failed to argue that point in his first appeal, the state's argument was not preserved for appeal because it was not raised in the trial court; the law-of-the-case defense cannot be raised for the first time on appeal. *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

The court would reject the contention that the trial court should have suppressed evidence seized at the defendants' apartment and statements made by one defendant at city hall on the basis that officers violated the rule by failing to inform the defendant that he was



under no obligation to accompany them to the police station to give a statement since the officers had probable cause to arrest the defendant based on strong medical evidence that he had physically abused his infant child. *Efurd v. State*, 334 Ark. 596, 976 S.W.2d 928 (1998).

#### **Compliance.**

Trial court did not err by denying defendant's motion to suppress his statements where, although defendant was fourteen years old, a seventh-grade drop-out, and had a functional IQ of 68 or 69, there was testimony indicating that the officers informed defendant that he did not have to accompany them to the police station and defendant's mother was present when he signed the Miranda waiver form. *Otis v. State*, 364 Ark. 151, 217 S.W.3d 839 (2005).

Although an officer did not explicitly inform defendant that he was not required to go to the police station and make a statement, the circumstances of the officer's request, including allowing defendant to drive there in his own vehicle, showed that the officer made clear that defendant was not required to go, pursuant to this rule. Therefore, his incriminating statements regarding the rape of his seven-year-old daughter were properly admitted. *Charland v. State*, 2011 Ark. App. 4, — S.W.3d —, 2011 Ark. App. LEXIS 10 (Jan. 5, 2011).

Denial of defendant's motion to suppress evidence derived from the saliva sample and his statement given on November 25, 2008 was appropriate because the officers satisfied this rule's requirement to make it clear that he was not legally obligated to comply with their request to accompany them to the station. *Vance v. State*, 2011 Ark. 243, — S.W.3d —, 2011 Ark. LEXIS 223 (June 2, 2011).

#### **Evidence Illegally Obtained.**

The arrest for public intoxication was a pretext for conducting the search of a person who was a suspect in a murder and arson investigation, where the search had no relation to the nature and purpose of the arrest, each of the law enforcement officials testified that the defendant could not have left the police station because he was a suspect in the murder and arson investigation even at the time he was brought to the police station, the officers failed to comply with this rule, and there was a violation of the detention limit posed by ARCrP 3.1. Therefore, the evidence obtained pursuant to the arrest for public intoxication had to be suppressed. *Richardson v. State*, 288 Ark. 407, 706 S.W.2d 363 (1986).

#### **Noncompliance.**

Where the detectives did not comply with this rule, there was a seizure of the defendant and a violation of his rights under the U.S. Const. Amend. 4. *Hart v. State*, 312 Ark. 600,

852 S.W.2d 312 (1993), overruled *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

Error associated with a violation of this rule held harmless. *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

#### **Probable Cause.**

Where defendant was put in the back seat of a state police car from which he could not get out unless the door was opened from the outside, and detained for longer than 15 minutes, and taken to the sheriff's office, but not told that he was not required to go, this rule and ARCrP 3.1 were not violated because based on the information that the officers had at the time of the stop, indicating the defendant was an accomplice to armed robbery, it was reasonable that the defendant was held longer than 15 minutes and the officers had probable cause to arrest the defendant for being an accomplice to the armed robbery of the bank before he was put in the police car. *Beebe v. State*, 303 Ark. 691, 799 S.W.2d 547 (1990).

If a police officer has probable cause to arrest, failure to give a warning under this rule is irrelevant. *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

#### **Search and Seizure.**

This rule does not require a verbal warning of freedom to leave as a bright-line rule for determining whether a seizure of the person has occurred under the Fourth Amendment and whether a statement to police officers must be suppressed; courts view a verbal admonition of freedom to leave as one factor to be considered in our analysis of the total circumstances surrounding compliance with this rule. *Shields v. State*, 348 Ark. 7, 70 S.W.3d 392 (2002).

#### **Statements Involuntary.**

Where the defendant did not volunteer for questioning but only went to the prosecutor's office because four officers came to her house and took her there, there was no compliance with this rule and the defendant's statement taken at the prosecutor's office was excluded. *Foster v. State*, 285 Ark. 363, 687 S.W.2d 829 (1985), cert. denied, 482 U.S. 929, 107 S. Ct. 3213, 96 L. Ed. 2d 700 (1987).

#### **Statements Voluntary.**

The state met its burden of proving that the statements of defendant were voluntary, since the interrogation was not rendered coercive by reason of the fact that the officers took no steps to make it clear to defendant that he had no legal obligation to accompany them to the sheriff's office, or by reason of the presence of his parole officer, who had, on a previous occasion, caused defendant's apartment to be searched under a "white warrant." *Pace v. State*, 265 Ark. 712, 580 S.W.2d 689 (1979).

The court was correct in refusing to suppress police officer's testimony about defendant's statement to him where there was probable cause to arrest defendant at the time the statement was made and defendant had been informed of his rights when he volunteered his statement. *Kiefer v. State*, 297 Ark. 464, 762 S.W.2d 800 (1989).

This rule does not require an explicit statement that one is not required to accompany the police, rather, the police only need to take such steps as are reasonable to make clear that there is no legal obligation to comply with the request to come to the police station; where an explicit statement was made to defendant that he was not under arrest and was free to leave, this advice by law enforcement adequately supported the state's position that it was clear to defendant that he was not required to go to the sheriff's department and, thus, defendant's subsequent confession was admissible. *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004).

Rape conviction was affirmed where police complied with this rule by making it reasonably clear to defendant that he was only wanted for questioning regarding allegations of abuse of his granddaughter and he was Mirandized before the interviews; because defendant's reference to needing an attorney was ambiguous, police did not violate his right to counsel by continuing to question him and, thus, his confession was voluntary. *Baker v. State*, 363 Ark. 339, 214 S.W.3d 239 (2005).

Trial court did not err in denying defendant's motion to suppress statements she made to police during their investigation of her landlord's death where the officers made it reasonably clear to defendant that she was not legally obligated to furnish information or otherwise cooperate; the officers made it clear that she could go to the sheriff's office at her

own convenience. *Wilson v. State*, 364 Ark. 550, 222 S.W.3d 171 (2006).

In defendant's murder case, the trial court properly denied a motion to suppress statements because, although defendant might have been a suspect at the time she made the statements, she was asked, not ordered, to go to the police station, she was not handcuffed, and she was described as being very cooperative; further, an officer testified that defendant did not appear to be intoxicated when she spoke to him, the interval of time between the last Miranda warning and the giving of the statement did not render the confession involuntary, and defendant's question — "do I need to call an attorney" — was an ambiguous request for counsel. *Flanagan v. State*, 368 Ark. 143, 243 S.W.3d 866 (2006).

#### **Subpoena Power.**

Use of the prosecutor's subpoena power to obtain the presence of a witness for questioning by a police officer, absent the prosecutor, was illegal. *Duckett v. State*, 268 Ark. 687, 600 S.W.2d 18 (1980).

Where prosecutor's subpoena power was used to give police officers a means not only of getting on defendant's property but to force defendant to talk to police officers, the abuse resulted in unlawful seizure of evidence which was properly excluded. *State v. Shepherd*, 303 Ark. 447, 798 S.W.2d 45 (1990).

**Cited:** *Lascano v. State*, 275 Ark. 346, 631 S.W.2d 258 (1982), cert. denied 459 U.S. 942, 103 S. Ct. 254, 74 L. Ed. 2d 199 (1982); *Richardson v. State*, 283 Ark. 82, 678 S.W.2d 772 (1984); *Beebe v. State*, 301 Ark. 430, 784 S.W.2d 765 (1990); *Dees v. State*, 30 Ark. App. 124, 783 S.W.2d 372 (1990); *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996); *Drymon v. State*, 327 Ark. 375, 938 S.W.2d 825 (1997); *Martin v. State*, 328 Ark. 420, 944 S.W.2d 512 (1997), overruled *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997); *Evans v. State*, 331 Ark. 240, 959 S.W.2d 745 (1998).

### **RULE 3. DETENTION WITHOUT ARREST**

#### **Rule 3.1. Stopping and detention of person: time limit.**

A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time



as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

**Publisher's Notes.** A proposed amendment to Rules 3.1 was published by the Supreme Court of Arkansas on June 27, 2002, for comment from the bench and bar. The

proposed amendment to Rule 3.1 would expand the scope of the rule to allow a stop and detention for any criminal offense.

### 1987 Unofficial Supplementary Commentary to Rule 3.1

Several cases interpreting this rule are discussed in the supplementary commentary to Rules 2.2 and 2.3. For cases in which the Arkansas Supreme Court has arrived at different conclusions based upon the adequacy of "specific, particularized, and articulable rea-

sons" for believing that a person has been involved in criminal activity, see *Hill v. State*, 275 Ark. 71, 628 S.W.2d 285 (1982). Compare, *Reeves v. State*, 20 Ark. App. 17, 722 S.W.2d 880 (1987) with *Van Patten v. State*, 16 Ark. App. 83, 697 S.W.2d 919 (1985).

### RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Arkansas Law Survey, Irving and Schoen, Criminal Procedure, 9 U. Ark. Little Rock L.J. 129 (1986-87).

**U. Ark. Little Rock L. Rev.** Annual Survey of Case Law, Criminal Law, 28 U. Ark. Little Rock L. Rev. 700.

### CASE NOTES

#### ANALYSIS

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#### Applicability.

A situation may not involve the authority of a police officer to make an investigatory stop based on reasonable suspicion in accordance with this rule, but may involve the question of the extent of permissible interruption a citizen must bear to accommodate a law officer who is investigating a crime under ARCrP 2.2. *Blakemore v. State*, 25 Ark. App. 335, 758 S.W.2d 425 (1988).

Where defendant threw the cocaine on the ground before he was seized, he abandoned any reasonable expectation of privacy to the cocaine and the contraband was not the product of a seizure; thus, the appellate court was not required to determine whether the officer's detention of defendant was illegal under this rule. *Simmons v. State*, 83 Ark. App. 87, 118 S.W.3d 136 (2003).

In a DWI case where the trial court denied defendant's motion to dismiss, finding that the officer had jurisdiction to arrest under

this rule, as the motion to dismiss was not the proper mechanism for challenging the arrest, the appellate court did not need to decide the jurisdictional issue. *Weaver v. State*, 103 Ark. App. 201, 287 S.W.3d 649 (2008).

Where a confidential informant appeared at a drug dealer's home to buy drugs, the drug dealer's wife contacted defendant, and defendant immediately left his home carrying a package, drove to the dealer's home, entered the home without knocking, and left a short time thereafter without the package, the police had probable cause to effect a warrantless arrest of defendant because the evidence essentially established a call by a known drug dealer requesting the delivery of narcotics from a supplier, immediate movement by a known drug supplier who was the suspected supplier, direct travel by that supplier to the source of the supply request, and the apparent delivery of a package. While this proof may not have been sufficient to convict defendant, it provided sufficient probable cause to make an arrest, and the court rejected defendant's argument that the evidence only supported an investigatory stop pursuant to this rule. *Pullan v. State*, 104 Ark. App. 78, 289 S.W.3d 180 (2008).

As defendant abandoned the cocaine that he was carrying prior to being seized by a police officer, such that the evidence was not the fruit of a search, it was not necessary to determine whether his detention was illegal under Ark. R. Crim. P. 2.2 and this rule for purposes of suppression. *Williams v. State*,

2012 Ark. App. 337, — S.W.3d —, 2012 Ark. App. LEXIS 441 (May 9, 2012).

### **Custodial Interrogation.**

Subsequent detention for custodial interrogation at the police station is not authorized by this rule because this rule, by its plain language, does not contemplate the detention of persons at one place and a subsequent detention at a police station. *Addison v. State*, 298 Ark. 1, 765 S.W.2d 566 (1989), overruled *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

### **Detention.**

Discovery of contraband was not fruit of detention, legal or otherwise, where, when the defendant discarded the contraband, there was no indication that the officers had activated the siren or had turned on the flashing lights, or had engaged in any other activity which would lead a reasonable person to believe that he was not free to leave. *Rabun v. State*, 36 Ark. App. 237, 821 S.W.2d 62 (1991).

Not all personal intercourse between policemen and citizens involves a detention under § 16-81-204(a) or this rule. *Phillips v. State*, 53 Ark. App. 36, 918 S.W.2d 721 (1996).

Whether a person has been detained depends on whether, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Phillips v. State*, 53 Ark. App. 36, 918 S.W.2d 721 (1996).

It is not a detention for a police officer to approach a car parked in a public place to determine whether there is anything wrong; thus, where officer approached van that was stopped and appeared to have a problem, there was no detention under § 16-81-204(a) or this rule until after the van window was rolled down, officer smelled marijuana, and then asked for defendant's driver's license. *Phillips v. State*, 53 Ark. App. 36, 918 S.W.2d 721 (1996).

A "seizure" occurred when the officer ordered defendant to step from his vehicle, so that it was an investigatory stop under this rule, and not an ARCrP 2.2 request for information. *Frette v. State*, 58 Ark. App. 81, 947 S.W.2d 15 (1997), rev'd 331 Ark. 103, 959 S.W.2d 734 (1998), questioned *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999).

Police officer's detention and questioning of defendant for about 30 minutes was reasonable as much of this time was spent attempting to verify false identification given by defendant. *Townsend v. State*, 76 Ark. App. 371, 66 S.W.3d 666 (2002), overruled in part *Townsend v. State*, 350 Ark. 129, 85 S.W.3d 526 (2002).

Search of a vehicle was proper because an officer determined that he was going to give defendant a warning for a traffic violation, he

asked defendant for consent to search, and the passenger, whose name was on the car rental agreement, consented to the search 16 minutes after the stop was initiated. As of the point in time when the passenger gave his consent to the search, the officer had neither returned defendant's identification papers to him nor given him a copy of the warning. *Yarbrough v. State*, 370 Ark. 31, 257 S.W.3d 50 (2007).

Defendant was detained under this rule, and the stop was not voluntary under Ark. R. Crim. P. 2.2, at the point that officers wearing guns and badges ordered defendant to step out of his car. *Ashley v. State*, 2012 Ark. App. 131, — S.W.3d —, 2012 Ark. App. LEXIS 232 (Feb. 8, 2012).

### **Justification for Stop.**

The justification for the investigative stop depends upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person or vehicle may be involved in criminal activity. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982); *Miller v. State*, 21 Ark. App. 10, 727 S.W.2d 393 (1987); *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

Where the defendant was stopped while driving an automobile which closely matched the detailed description given in a police broadcast of an automobile that was involved in a murder and robbery in a nearby community, and the defendant fit the description given of the perpetrator of those crimes, the investigatory stop of the defendant's vehicle was justified and the limited search of the automobile for weapons by the police was reasonable; therefore, a pistol seized from under the driver's seat was admissible. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

Since defendant's parked car created a traffic hazard, the officers had specific, particular, and articulable reasons to suspect that a misdemeanor involving danger of injury to persons or property was being committed by the defendant; thus, the stop was reasonable under this rule and the evidence of driving while intoxicated was admissible. *Dacus v. State*, 16 Ark. App. 222, 699 S.W.2d 417 (1985).

Where felonies or crimes involving a threat to public safety are concerned, the government's interest in solving the crime and promptly detaining the suspect outweighs the individual's right to be free from a brief stop and detention. *Reeves v. State*, 20 Ark. App. 17, 722 S.W.2d 880 (1987); *Nottingham v. State*, 29 Ark. App. 95, 778 S.W.2d 629 (1989).

Where a person has not been arrested, his detention for investigation of driving while



intoxicated is expressly authorized by this rule. *Arndt v. State*, 26 Ark. App. 243, 763 S.W.2d 98 (1989).

It is without question that DWI under § 5-65-103 carries with it the danger of forcible injury to persons as required by this rule. *Nottingham v. State*, 29 Ark. App. 95, 778 S.W.2d 629 (1989); *Wright v. State*, 327 Ark. 558, 940 S.W.2d 432 (1997).

The fact that the conduct observed by an officer is consistent with innocence will not preclude a legitimate stop. *Jackson v. State*, 34 Ark. App. 4, 804 S.W.2d 735 (1991), criticized *Stewart v. State*, 59 Ark. App. 77, 953 S.W.2d 599 (1997).

Although it was quite clear that the police officer's primary purpose in stopping defendant was to search for drugs, the arrest was not tainted by this fact since the arrest would have occurred in any event; the test is whether a "reasonable officer" would have made the traffic stop — not whether this particular officer would have made the stop absent his ulterior motive. *Miller v. State*, 44 Ark. App. 112, 868 S.W.2d 510 (1993), cert. denied 511 U.S. 1128, 114 S. Ct. 2137, 128 L. Ed. 2d 866 (1994).

An officer does not have to witness the violation of a statute in order to stop a suspect. *Piercefield v. State*, 316 Ark. 128, 871 S.W.2d 348 (1994).

Where police officer asked defendant to approach his patrol car because she was standing on a street corner in a known drug area at around 1:45 a.m., and nothing in her actions or demeanor indicated that she was involved in any illegal activity, the officer did not have sufficient reason to stop defendant under this rule. *Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998).

There was sufficient evidence of reliability to justify an investigatory stop where an officer stated that his confidential informant had supplied reliable information on many prior occasions and the informant had given an earlier tip regarding the defendant which the officer was able to verify. *Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998).

The trial court did not err in finding that a police officer was justified in making a stop based upon a reasonable suspicion that the defendant was committing, had committed, or was about to commit the felony of stalking, or a misdemeanor involving a danger of personal injury or the appropriation or damage to property where a woman notified the police that the defendant had been following her for several weeks and that she felt that he was stalking her, and her descriptions of their location and the types of vehicles that they were driving was confirmed by the officer. *Potter v. State*, 342 Ark. 621, 30 S.W.3d 701 (2000).

Defendant's presence in a high crime area

in the early hours of the morning did not provide reasonable suspicion to stop him, nor did other surrounding circumstances. *Jefferson v. State*, 76 Ark. App. 300, 64 S.W.3d 791 (2002), rev'd 349 Ark. 236, 76 S.W.3d 850 (2002).

Defendant's behavior gave rise to a reasonable suspicion where defendant and another man were in a high crime area known for drug activity, they engaged in an apparent hand-to-hand transaction, they separated when they saw the police officers approach, defendant appeared nervous, and the totality of the circumstances gave rise to a reasonable suspicion sufficient to justify making an investigatory stop. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003).

Defendant's motion to suppress evidence should have been granted because the stop and detention of defendant was impermissible where an officer only suspected defendant of the crime of loitering at the time he approached defendant; pursuant to § 5-71-213(a)(6), the misdemeanor crime of loitering does not involve a danger of forcible injury to persons or of appropriation of or damage to property. *Brazwell v. State*, 354 Ark. 281, 119 S.W.3d 499 (2003).

Once the legitimate purpose of a valid traffic stop is over, an officer must have a reasonable suspicion that the person stopped is committing, has committed, or is about to commit a felony or a misdemeanor involving danger to persons or property. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004).

Stop of defendant was not justified where the officer responsible for the police dog testified that the dog was the type that would sometimes make people nervous; repeated glances back at law enforcement officers and a quickened stride were not indicative of criminal activity, and shifting a bag from one side to the other was so common and innocuous an activity as to provide no suspicion of criminal activity whatsoever. *Jackson v. State*, 86 Ark. App. 39, 158 S.W.3d 715 (2004), overruled in part *Jackson v. State*, 359 Ark. 297, 197 S.W.3d 468 (2004).

Defendant's drug convictions were improper as the police lacked reasonable suspicion to stop him based only on an informant's information that defendant had just bought a "large quantity" of matches; therefore, the initial stop and the subsequent search of defendant's home were illegal seizures. *Summers v. State*, 90 Ark. App. 25, 203 S.W.3d 638 (2005).

In a murder case, the trial court properly denied a motion to suppress because, although defendant was seized when she was told she could not leave the crime scene, in light of the remoteness of the crime scene and the circumstances existing at the time, requesting defendant to remain at the crime

scene was reasonable, and defendant's statements were not incriminating as defendant said that she had last seen the victim the night before when he got into a van with some other people to go and drink beer. *Flanagan v. State*, 368 Ark. 143, 243 S.W.3d 866 (2006).

Defendant's motion to suppress a breath test was improperly overruled under this rule; witnessing no traffic violations, the arresting officer stopped defendant's vehicle without reasonable suspicion for possible road rage even though no one ever saw an actual fight or had any indication that one was about to erupt other than an obscene gesture incident. *Jones v. State*, 2011 Ark. App. 61, — S.W.3d —, 2011 Ark. App. LEXIS 67 (Jan. 26, 2011).

Stop of defendant was lawful and complied with this rule and Ark. R. Crim. P. 2.1, 2.2(a), and 14.1 as an officer arrived on the scene within 30 seconds of a police broadcast; defendant's was the only vehicle in the area; and the stop was brief, non-aggressive, and a minimal intrusion compared to the state's interest in investigating the crime. *Penister v. State*, 2011 Ark. App. 405, — S.W.3d —, 2011 Ark. App. LEXIS 430 (June 1, 2011).

#### **Miranda Warnings.**

A police officer investigating a crime may request a person to furnish information by answering questions and may stop and detain a suspect for 15 minutes or as is reasonable under the circumstances, where he reasonably suspects that person is involved in a crime. The Miranda warning is not required unless statements result from custodial interrogation, nor is it required for voluntary, spontaneous statements. *Ward v. State*, 308 Ark. 415, 827 S.W.2d 110, cert. denied 506 U.S. 841, 113 S. Ct. 124, 121 L. Ed. 2d 79 (1992).

Officer was not required to read defendant his Miranda rights prior to questioning him about an attempt to use a company credit card to buy a large amount of gas because a detention for up to 15 minutes was permitted under this rule. *Lee v. State*, 102 Ark. App. 23, 279 S.W.3d 496 (2008).

#### **Reasonable Suspicion.**

Where the suspects were followed a considerable distance and observed to be studying residences along the way as if to be "casing" them, and coupled to those circumstances were the knowledge and observations of the arresting officer that the area had been frequently burglarized, that the vehicle was unfamiliar to him, and that the occupants were unknown to him and were thought to have just emerged from a private driveway 45 minutes to an hour after the informant observed them "casing" the residence, such circumstances collectively established a reasonable suspicion warranting a stop and

detention of the suspects. *Tillman v. State*, 275 Ark. 275, 630 S.W.2d 5 (1982), cert. denied 459 U.S. 1201, 103 S. Ct. 1185, 75 L. Ed. 2d 432 (1983).

Where the officer stopped the defendant on the basis of an anonymous radio dispatch which gave extremely general information about a "loud party" and a "brown jeep," the officer did not have specific, particular or articulable reasons to suspect that a felony or a misdemeanor involving danger of injury to persons or property had been committed; thus, the officer's stop of defendant was unreasonable under this rule, it violated defendant's Fourth Amendment rights and the evidence of the driving while intoxicated violation should have been excluded. *Van Patten v. State*, 16 Ark. App. 83, 697 S.W.2d 919 (1985).

Where the officer stopped defendant and he was aware that defendant had been identified as a suspect in a felony under investigation, under the totality of the circumstances, the trial court could properly find that the officer had adequate reason to stop defendant's vehicle under both this rule and ARCrP 2.2. *McDaniel v. State*, 20 Ark. App. 201, 726 S.W.2d 688, cert. denied 484 U.S. 838, 108 S. Ct. 121, 98 L. Ed. 2d 80 (1987).

Investigatory stops may be conducted without a warrant. *Kaiser v. State*, 24 Ark. App. 19, 746 S.W.2d 559, rev'd 296 Ark. 125, 752 S.W.2d 271 (1988).

Evidence sufficient to support reasonable suspicion to stop. *Adams v. State*, 26 Ark. App. 15, 758 S.W.2d 709 (1988), cert. denied 489 U.S. 1018, 109 S. Ct. 1136, 103 L. Ed. 2d 197 (1989); *Coffman v. State*, 26 Ark. App. 45, 759 S.W.2d 573 (1988); *Cooper v. State*, 297 Ark. 478, 763 S.W.2d 645 (1989); *Folly v. State*, 28 Ark. App. 98, 771 S.W.2d 306 (1989); *Smith v. State*, 301 Ark. 569, 785 S.W.2d 465 (1990); *Bliss v. State*, 33 Ark. App. 121, 802 S.W.2d 479 (1991); *Weaver v. State*, 305 Ark. 180, 806 S.W.2d 615 (1991); *Brooks v. State*, 40 Ark. App. 208, 845 S.W.2d 530 (1993); *Johnson v. State*, 43 Ark. App. 145, 862 S.W.2d 290 (1993).

Where a person attempts to avoid a roadblock, police officers have reasonable suspicion that he has been engaged in unlawful activity. *Tims v. State*, 26 Ark. App. 102, 760 S.W.2d 78 (1988), modified 26 Ark. App. 102, 770 S.W.2d 211 (1989).

Evidence insufficient to support reasonable suspicion to stop. *Vega v. State*, 26 Ark. App. 172, 762 S.W.2d 1 (1988).

For the purposes of this rule, "reasonable suspicion" means a suspicion based upon facts or circumstances which give rise to more than a bare, imaginary, or purely conjectural suspicion. *Addison v. State*, 298 Ark. 1, 765 S.W.2d 566 (1989), overruled *State v. Bell*, 329



Ark. 422, 948 S.W.2d 557 (1997); *Hammons v. State*, 327 Ark. 520, 940 S.W.2d 424 (1997).

Under certain circumstances, a police officer may rely on his experience and make inferences and deductions that might well elude an untrained person. *Smith v. State*, 301 Ark. 569, 785 S.W.2d 465 (1990).

Where defendant was put in the back seat of a state police car from which he could not get out unless the door was opened from the outside, and detained for longer than 15 minutes, and taken to the sheriff's office, but not told that he was not required to go, ARCrP 2.3 and this rule were not violated because the officers had a reasonable suspicion at the time of the stop, that the defendant was an accomplice to an armed robbery, and it was reasonable that the defendant was held longer than 15 minutes. *Beebe v. State*, 303 Ark. 691, 799 S.W.2d 547 (1990); *Jackson v. State*, 34 Ark. App. 4, 804 S.W.2d 735 (1991), criticized *Stewart v. State*, 59 Ark. App. 77, 953 S.W.2d 599 (1997).

Defendant's arrest was not pretextual where the arresting officer had been told that the defendant was a "possible suspect", where a witness told him that he thought defendant did it and wore thermal shirts like the one that was found and a spent shotgun shell was visible on the defendant's car seat. *Ray v. State*, 304 Ark. 489, 803 S.W.2d 894, cert. denied 501 U.S. 1222, 111 S. Ct. 2837, 115 L. Ed. 2d 1005 (1991).

Reasonable suspicion entails a consideration of the total circumstances and the existence of particularized, specific reasons for a belief that the person may be engaged in criminal activity. *Stout v. State*, 304 Ark. 610, 804 S.W.2d 686 (1991).

Based on what the detectives knew, they had grounds to detain the defendant without arrest for a reasonable time under this rule as part of their investigation into foul play where defendant's roommate was missing, the roommate's employer had seen blood on the defendant's front porch and yard which was gone the next day, the detectives themselves had found blood on the premises, and where defendant had changed residences shortly after the roommate's absence. *Weaver v. State*, 305 Ark. 180, 806 S.W.2d 615 (1991).

A "reasonable suspicion" need not rise to the level of probable cause, but it must amount to more than a purely conjectural suspicion. *Stewart v. State*, 42 Ark. App. 28, 853 S.W.2d 286 (1993).

"Reasonable suspicion," which is something less than probable cause, is required to constitutionally justify an investigative stop. *Johnson v. State*, 43 Ark. App. 145, 862 S.W.2d 290 (1993).

Considering the totality of the circumstances, the officers were justified in reasonably suspecting that defendant was involved

in criminal activity. *Roark v. State*, 46 Ark. App. 49, 876 S.W.2d 596 (1994).

Once police officer stopped defendant at roadblock and detected signs of intoxication, officers had authority under this rule to further detain defendant. *Mullinax v. State*, 53 Ark. App. 176, 920 S.W.2d 503 (1996), superseded 327 Ark. 41, 938 S.W.2d 801 (1997).

Reasonable suspicion sufficient to justify a stop and search of possible jewel thieves shown where police lieutenant not only had information from a radio dispatch but also had personal knowledge that the local pawn shops had given reliable information in the past that was used by the police, he confirmed the vehicle description, license number and identification of the occupants of the truck, and observed a ring box on the front seat of the individuals' vehicle before questioning the suspects. *Roberson v. State*, 54 Ark. App. 230, 925 S.W.2d 820 (1996).

An officer had a reasonable suspicion warranting a stop and detention where he had lawfully stopped defendant's vehicle for investigative purposes, and defendant then began to scramble and reach under the front seat and the officer thought he saw a pistol. *Hammons v. State*, 327 Ark. 520, 940 S.W.2d 424 (1997).

Testimony from the arresting officer that he had nothing more than "feelings" that defendant "might" be engaged in drug trafficking was not enough to support a reasonable suspicion under this rule. *Stewart v. State*, 59 Ark. App. 77, 953 S.W.2d 599 (1997).

An officer had probable cause to seize the defendant after seeing him ingest an off-white substance where (1) the officer was sent to investigate a complaint of a pickup truck blocking an apartment complex driveway, and (2) when the officer approached the truck, the defendant jumped out of the truck, started to use profanities, and then reached in his pocket and put an off-white substance in his mouth. *Hunter v. State*, 62 Ark. App. 275, 970 S.W.2d 323 (1998).

An officer had reasonable suspicion sufficient to detain the defendant after a traffic stop in order to conduct a consensual search of the defendant's vehicle where the officer suspected that the defendant was armed based on his extreme nervousness, his rigid posture, his trembling lips, his manner of dress, and his criminal background. *Muhammad v. State*, 64 Ark. App. 352, 984 S.W.2d 822 (1998).

The initial stop of the defendant's car was not based on reasonable suspicion where (1) police officers went to the defendant's house to execute a warrant to search the house, but the defendant was not at home, (2) the officers decided not to search the house at that time and, instead, to look for the defendant's car based on their suspicion that he might have

drugs on him, and (3) the officers located the defendant's car and stopped the car, although the defendant was not speeding or committing any traffic violation. *Colbert v. State*, 340 Ark. 657, 13 S.W.3d 162 (2000).

In determining whether an encounter with defendant was unconstitutional under this rule, the court considered the factors listed in § 16-81-203, and determined that the officer did not have grounds to reasonably suspect defendant enough to warrant the detention and search. *Jennings v. State*, 69 Ark. App. 50, 10 S.W.3d 105 (2000).

Defendant's criminal history, failure to disclose his drug arrest and charge, refusal to reveal his vehicle's ownership, combative demeanor, and drugs and paraphernalia found in the van gave an officer reasonable suspicion of criminal activity, authorizing defendant's detention and further search of the van. *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001), cert. denied 535 U.S. 1055, 122 S. Ct. 1914, 152 L. Ed. 2d 823 (2002).

A police officer had reasonable suspicion to order the defendant out of his car where (1) he approached the defendant's car, which was parked in a driveway, (2) shined his flashlight into the car, and (3) saw empty beer cans, the defendant sleeping with a coat over him, and keys in the ignition. *Bohanan v. State*, 72 Ark. App. 422, 38 S.W.3d 902 (2001).

While it is proper to establish and secure a reasonable perimeter to insure the safety of the law enforcement officers that are conducting a lawful search of premises pursuant to a warrant, an officer is not justified in detaining and searching an individual or his vehicle simply because he is approaching the perimeter from the outside; the notion that under any circumstances a person can be subject to a warrantless search merely because he is approaching such a perimeter is inconsistent with the principle that an individual is free from unreasonable searches and seizures. *Mathis v. State*, 73 Ark. App. 90, 40 S.W.3d 816 (2001).

No reasonable cause existed for the search of the defendant's person, and a directive that he empty his pockets was unlawful, where (1) a police officer stopped the defendant's vehicle after observing it cross the highway's center line three times in approximately a mile and a half, (2) a driver's license check and criminal history revealed that the defendant had been convicted of possession of methamphetamine, but that he had no outstanding warrants, and (3) the defendant was unable to produce proof of insurance, but he was neither arrested nor given a citation. *Hoey v. State*, 73 Ark. App. 118, 42 S.W.3d 564 (2001).

Based on the totality of the circumstances, a sheriff's officer who, while following defendant's pickup, saw defendant drive his pickup across the centerline and to the right of the

fog line on a road had the requisite suspicion to stop defendant for driving while intoxicated. *Hoay v. State*, 75 Ark. App. 103, 55 S.W.3d 782 (2001), modified, aff'd 348 Ark. 80, 71 S.W.3d 573 (2002).

Where police were patrolling a trailer park known for drug trafficking at 2:00 a.m. and defendant appeared from between two trailers and attempted to evade police, there was a reasonable suspicion that something illegal was afoot to justify a stop; moreover, the trial court properly denied defendant's motion to suppress evidence of cocaine which fell to the ground when defendant pulled his hand from his pocket. *Jefferson v. State*, 349 Ark. 236, 76 S.W.3d 850 (2002).

Officers lacked reasonable suspicion to stop and detain defendant where the only factors tending to lead to reasonable suspicion for an investigatory stop under this rule were the time of day and the incidence of crime in the neighborhood, and where the officers did not observe any criminal activity or observe a suspicious transaction; officers did not have reasonable suspicion as defined by ARCrP 2.1, and they were not investigating a particular crime as required by ARCrP 2.2. *Davis v. State*, 77 Ark. App. 310, 74 S.W.3d 671 (2002), rev'd 351 Ark. 406, 94 S.W.3d 892 (2003).

Police officer's continued detention of defendant for questioning and the officer's actions in running a drug dog around defendant's vehicle constituted an unreasonable, unlawful seizure because the legitimate purpose of the valid traffic stop was complete when the officer returned defendant's license and gave him a warning ticket; the officer did not have a reasonable, articulable suspicion, based on defendant's nervousness, defendant's possession of energy-drink cans and a rental car agreement signed by an absent third party, or the smell of air freshener in the car, that defendant was committing, had committed, or was about to commit a felony or misdemeanor involving danger to persons or property. *Lilley v. State*, 89 Ark. App. 43, 199 S.W.3d 692 (2004).

Officer did not have reasonable suspicion to further detain defendant for a canine sniff after a traffic stop where the officer based the further detention on a one-way rental, a rental in another person's name, nervousness, and the presence of air freshener. *Lilley v. State*, 362 Ark. 436, 208 S.W.3d 785 (2005).

Motion to suppress evidence was properly denied, even though the trial court erred by finding that no seizure occurred when defendant was detained outside of a restaurant to wait on a canine sniff of his vehicle, because the officers had specific, particularized, and articulable reasons for suspecting defendant of involvement in the sale of methamphetamine based on the fact that he was following a known associate, who was driving a rental



car, and they parked next to each other at the restaurant. *Dowty v. State*, 363 Ark. 1, 210 S.W.3d 850 (2005).

Police officers had justifiably detained appellant under this rule where although they may not have observed him engaging in criminal activity, they had information that he and another detained individual were involved in drug trafficking, that his rental car could have been involved in drug trafficking, he had an obvious association with the other detained individual, and a dog had alerted on the rental car during a second dog sniff. *Dowty v. State*, 363 Ark. 1, 210 S.W.3d 850 (2005).

Stop of defendant was legal given the broken taillight, and the slight detention of defendant beyond the initial stop to allow a dog sniff around the perimeter of the car was proper as the officer had a reasonable suspicion that defendant had or was committing a crime; the car defendant was driving was registered to someone in Texas but defendant could not prove that he had permission to drive the car, defendant was extremely nervous while talking to the officer, and defendant did not know where he was driving to in Arkansas. *Malone v. State*, 364 Ark. 256, 217 S.W.3d 810 (2005), cert. denied 547 U.S. 1102, 126 S. Ct. 1890, 164 L. Ed. 2d 575 (2006).

Defendant's motion to suppress evidence was properly denied in a drug case because an officer had authority to continue a detention under this rule; there was reasonable suspicion based on defendant's nervousness, his unusual travel plans, and the strong smell of fabric softener in his car. *Ayala v. State*, 90 Ark. App. 13, 203 S.W.3d 659 (2005).

Pursuant to a report of a drug related disturbance, officer stopped defendant's vehicle and conducted a pat-down of defendant without any objective, factual basis for a reasonable belief that defendant was dangerous or might have gained immediate control of a weapon, moreover, the illegal frisk was not cured by defendant's purported consent in turning over the small bottle in his pocket as the lapse of time between the pat-down and the request to see what was in his pocket was not sufficient to dissipate the taint; thus, the methamphetamine seized as a result of the illegal frisk was the fruit of the poisonous tree and had to be suppressed. *Hill v. State*, 89 Ark. App. 126, 206 S.W.3d 300 (2005), reversed 363 Ark. 505, 215 S.W.3d 586 (2005).

In a drug case, defendant's motion to suppress evidence should have been granted because the officer did not have reasonable suspicion to detain defendant after the issuance of a warning ticket; nervousness, as well as a new cell phone, atlases, fast food wrappers, and energy drinks in the car, were

insufficient for reasonable suspicion. *Meraz-Lopez v. State*, 92 Ark. App. 157, 211 S.W.3d 564 (2005).

There was no violation of this rule where defendant was detained for 37 minutes after a traffic stop because, based on defendant's nervousness, evasive answers, the odor of air freshener, and the fact that defendant had a new cell phone, gave an officer a reasonable suspicion of criminal activity and justified calling for a canine sniff; therefore, a motion to suppress evidence was properly denied. *Omar v. State*, 99 Ark. App. 436, 262 S.W.3d 195 (2007).

Counsel was not ineffective in relation to a motion to suppress evidence seized following traffic stop because defendant flew to California, stayed a very short while, returned to Tennessee by rental car, the person who rented the car was not present, the rental agreement provided that the car was to be operated in California, only by the renter, and although the car was nearly new, the manufacturer provided jack and associated tools were lying on the floor of the car. *Harrison v. State*, 371 Ark. 474, 268 S.W.3d 324 (2007).

Motion to suppress evidence was improperly granted because, where police had known an informant to give reliable information in the past, and accurate information was received from the informant about defendant and his vehicle, officers had specific, particularized, and articulable reasons for thinking that defendant was involved in criminal activity, which justified a stop under this rule. Because the officers had reasonable suspicion to stop and detain the vehicle, any pretext on the part of the officers was irrelevant; moreover, the officers did not need any additional reasonable suspicion to justify a canine sniff, which was not a search under the Fourth Amendment. *State v. Harris*, 372 Ark. 492, 277 S.W.3d 568 (2008).

Evidence should have been suppressed in a drug case because a state trooper's post-warning questioning of defendant was not a consensual police-citizen encounter since a reasonable person would not have felt like he could have left without answering; since there was no reasonable suspicion under this rule, an illegal detention resulted. *Bedsole v. State*, 104 Ark. App. 253, 290 S.W.3d 607 (2009).

Police officer's 6:00 p.m. stop after defendant backed defendant's truck into a department store's side lot in a two-three mile zone of recent armed robberies violated both Ark. R. Crim. P. 2.2 and this rule since there was clearly a Fourth Amendment seizure when the officer blocked defendant's truck with the patrol car, turned on the bright headlights, placed the spot light and take-down lights on defendant, and approached the truck with a gun in hand; further, defendant's mere presence in a high crime area did not rise to

reasonable suspicion sufficient to authorize an investigatory stop. *Cockrell v. State*, 2009 Ark. App. 700, — S.W.3d —, 2009 Ark. App. LEXIS 889 (2009).

Evidence seized upon defendant's arrest did not violate his rights under the U.S. Constitution, Ark. Const., Art. 2, § 15, or this rule and Ark. R. Crim. P. 4.1 because defendant's erratic driving in a high crime area provided a reasonable suspicion to stop him, and defendant's attempts to hide his identity from the officer provided probable cause for his arrest. *Mosley v. Ark.*, 2009 Ark. App. 799, — S.W.3d —, 2009 Ark. App. LEXIS 989 (2009).

Defendant's movement in reaching down when the officer shined lights on defendant, combined with the fact that the vehicle was backed into a parking spot in a dark area of the parking lot, in an area that recently had a high incidence of armed robberies, provided the officer reasonable suspicion that justified detaining defendant. *Cockrell v. State*, 2010 Ark. 258, — S.W.3d —, 2010 Ark. LEXIS 306 (May 27, 2010).

Where, at 7:25 a.m., officers observed defendant walking through a backyard on private property near a school, they had reasonable suspicion to pursue and stop defendant when defendant ran after they called defendant to their vehicle. *Fowler v. State*, 2010 Ark. 431, — S.W.3d —, 2010 Ark. LEXIS 543 (Nov. 11, 2010).

In a case in which defendant, pursuant to Arkansas R. Crim. P. 24.3(b), appealed the trial court's denial of his motion to suppress evidence, he unsuccessfully argued that two deputies had no reasonable suspicion to believe that he was armed and dangerous, thereby justifying the pat-down search. Immediately prior to their encounter with defendant, the deputies were dealing with three individuals who appeared to be hiding from them, one of whom had a weapon on his person, defendant approached the deputies unprovoked and appeared to be under the influence of a drug, and the deputies saw a bulge in his pants soon after finding a knife on another suspect after seeing a similar bulge. *Blount v. State*, 2010 Ark. App. 219, — S.W.3d —, 2010 Ark. App. LEXIS 191 (Mar. 3, 2010).

Trial court did not err in denying defendant's motion to suppress, in which defendant argued that the evidence against him was obtained as a result of an unlawful search that police conducted because the officers had a specific, particularized, and articulable reason to believe that defendant was involved in illegal activity in light of the fact that one suspect told the officers that defendant had hidden cocaine in his buttocks area. *Canada v. State*, 2010 Ark. App. 510, — S.W.3d —, 2010 Ark. App. LEXIS 548 (June 23, 2010).

Trial court did not err in denying defendant's motion to suppress evidence seized as a

result of a detention and a canine sniff of defendant's truck because an officer had reasonable suspicion to detain defendant; after stopping defendant for driving a vehicle with a broken tail light, the officer noted that defendant refused to make eye contact, exhibited increased nervousness, and was known to have had prior drug problems. *Johnson v. State*, 2012 Ark. App. 167, — S.W.3d —, 2012 Ark. App. LEXIS 278 (Feb. 22, 2012).

Circuit court's ruling denying defendant's motion to suppress evidence recovered in a search of her truck after she was stopped for a traffic violation was not clearly against the preponderance of the evidence. Factors that combined to give a state trooper a reasonable suspicion that defendant was engaged in criminal activity were: (1) one month earlier he had stopped the same truck and arrested defendant's passenger for drunk driving and possession of marijuana; (2) during a criminal history check, the trooper discovered defendant had been previously arrested; (3) the trooper had information from a local police department that defendant was suspected of drug dealing; (4) defendant was nervous; and (5) it was late at night. *Menne v. State*, 2012 Ark. 37, — S.W.3d —, 2012 Ark. LEXIS 57 (Feb. 2, 2012).

#### —Informants.

When an informant is the source of the information that results in one law enforcement agency requesting another agency to stop a suspect, the officers who originally dealt with the informant must have reasonable suspicion to stop the suspect. *Kaiser v. State*, 24 Ark. App. 19, 746 S.W.2d 559, rev'd 296 Ark. 125, 752 S.W.2d 271 (1988).

Evidence of informant's reliability, combined with the accuracy of the informant's information and the detective's testimony regarding the area's reputation for drug traffic, was enough to give the officers specific, particularized and articulable reasons indicating the person or vehicle may be involved in criminal activity. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

Police officer, who acted solely on the basis of a tip phoned in by an identified citizen informant, acted lawfully in ordering defendant, the occupant of a parked tractor-trailer, out of his vehicle; the tip carried with it sufficient indicia of reliability to give the officer reasonable suspicion to justify an investigatory stop. *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998).

Officer had reasonable suspicion for a stop because an informant told the police that a white male had bought five one-pound bags of iodine from the feed store just down the road from the police department, and he gave the police the vehicle's license-plate number. It was sufficient corroboration when the car with that license-plate number passed by the



officers and its occupants were two white males. *Ashley v. State*, 2012 Ark. App. 131, — S.W.3d —, 2012 Ark. App. LEXIS 232 (Feb. 8, 2012).

Officer had reasonable suspicion to stop and detain defendant based on a reliable confidential informant's information that he was going to deliver methamphetamine at a specified convenience store and defendant's arrival at the store, followed by the informant's call to defendant that he was at the wrong store and defendant's then leaving the first store and driving toward the other store. *Owens v. Arkansas*, 2011 Ark. App. 763, — S.W.3d —, 2011 Ark. App. LEXIS 802 (Dec. 7, 2011).

#### **Right to Counsel.**

Supreme Court had jurisdiction to hear interlocutory appeal by the state where the issue was whether an accused had the right to have an attorney of his own choosing present during an in-custody interrogation. *State v. Johnson*, 326 Ark. 660, 934 S.W.2d 499 (1996).

#### **Suppression of Evidence.**

Where the police officer's sole reason for stopping and detaining the defendant and his companion at the airport was their conduct in looking back and in quickening their pace upon being followed through an air terminal by the plain clothes police officer, such conduct could not possibly suggest that they were about to commit any particular type of felony or misdemeanor which is required to support a police detainment under this rule, therefore, the trial court should have suppressed the evidence produced by a search of the defendant following his detainment. *Meadows v. State*, 269 Ark. 380, 602 S.W.2d 636 (1980).

The arrest for public intoxication was a pretext for conducting the search of a person who was a suspect in a murder and arson investigation, where the search had no relation to the nature and purpose of the arrest, each of the law enforcement officials testified that the defendant could not have left the police station because he was a suspect in the murder and arson investigation even at the time he was brought to the police station, the officers failed to comply with ARCrP 2.3, and there was a violation of the detention limit posed by this rule. Therefore, the evidence obtained pursuant to the arrest for public intoxication had to be suppressed. *Richardson v. State*, 288 Ark. 407, 706 S.W.2d 363 (1986).

Where contraband was seized from a vehicle belonging to a missing girl's boyfriend after police stopped the vehicle looking for the girl, the evidence was properly suppressed pursuant to this rule because the stop of defendant's vehicle was not proper under ARCrP 2.2; the intrusion into defendant's privacy was unreasonable when weighed against the governmental interest of locating

a missing girl, where no allegations of criminal activity were made. *State v. McFadden*, 327 Ark. 16, 938 S.W.2d 797 (1997).

The fact that the detention and search of the defendant exceeded the scope of a Terry stop did not require suppression of evidence discovered by the police because the police had probable cause to arrest the defendant when they first made contact. *Blockman v. State*, 69 Ark. App. 192, 11 S.W.3d 562 (2000).

Officer did not articulate a reasonable suspicion that defendant was committing, or about to commit, a felony or misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property; therefore, the trial court erred in denying defendant's motion to suppress evidence as the investigatory stop was impermissible. *Anderson v. State*, 79 Ark. App. 286, 86 S.W.3d 403 (2002).

Defendant was entitled to suppress evidence of drugs seized from his car when police detained him after the legitimate purpose of the traffic stop ended. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004).

Trial court erred in denying defendant's motion to suppress where the officer provided no reasons for frisking defendant other than that it was "policy" and admitted he had not seen anything that led him to believe that defendant had a weapon; thus, while the officer had a reasonable basis to stop defendant under this rule, the officer lacked specific, objective, and articulable facts to support a reasonable suspicion that defendant was armed and presently dangerous to warrant a search under Ark. R. Crim. P. 3.4. *Hill v. State*, 89 Ark. App. 126, 206 S.W.3d 300 (2005).

Trial court did not err in denying defendant's motion to suppress marijuana seized after a search of his vehicle where the officer developed a reasonable suspicion that defendant was committing a felony, authorizing his continued detention of defendant; further, the officer detected a strong odor of fabric sheets, as opposed to air freshener, which the officer testified were often used to mask the odor of illegal controlled substances. *Ayala v. State*, 90 Ark. App. 13, 203 S.W.3d 659 (2005).

Where an officer drove past a closed gas station where he observed two vehicles in the parking lot, there were no signs of criminal activity, no moving violations, nor any defective equipment on the vehicles; nonetheless, he stopped one vehicle, questioned the driver, asked him to get out of the car, and seized marijuana from the vehicle and defendant's person. Because the police officer lacked reasonable suspicion, the initial encounter was not authorized by this rule; therefore, the trial court erred by denying defendant's motion to suppress the evidence. *Dosia v. State*, 2009 Ark. App. 429, 318 S.W.3d 583 (2009).

Because a police officer had probable cause to stop defendant's vehicle based on an apparent invalid license tag, defendant's weaving and low-speed driving, and the officer's training, the stop was justified under this rule; therefore, defendant's motion to suppress was properly denied. *Murrell v. State*, 2011 Ark. App. 311, — S.W.3d —, 2011 Ark. App. LEXIS 344 (Apr. 27, 2011).

Officer had reasonable suspicion to stop defendant and investigate drug-related criminal activity because a reliable known informant provided information about a delivery of methamphetamine. The fact that defendant arrived in a black car rather than a white car of the same make as described did not undermine reasonable suspicion. *James v. State*, 2012 Ark. App. 118, — S.W.3d —, 2012 Ark. App. LEXIS 228 (Feb. 8, 2012).

### **Territorial Jurisdiction.**

Evidence sufficient to find that police officer who had the authority to either stop, or to stop and arrest, the defendant before he left the officer's jurisdiction, and the officer was within the bounds of his authority when he followed defendant outside his jurisdiction and subsequently made the stop and arrest. *King v. State*, 42 Ark. App. 97, 854 S.W.2d 362 (1993).

### **Time Limit.**

A 17 to 20 minute search was not unreasonable where police officers acted diligently and caused no undue delay in performing the consensual search and, the defendant's girlfriend extended the stop by consenting to the search of their car. *Newton v. State*, 73 Ark. App. 285, 43 S.W.3d 170 (2001).

Where defendant repeatedly lied to a police officer about his identity, any delay in obtaining or verifying his identity was defendant's own fault. *Townsend v. State*, 350 Ark. 129, 85 S.W.3d 526 (2002).

In the absence of reasonable suspicion of

criminal activity, this rule, which allowed up to 15 minutes for a stop, did not provide a trooper additional time up to the 15-minute mark in order to obtain consent to search the vehicle when the legitimate purpose of the traffic stop was complete in under 10 minutes, when the trooper had written a warning citation; defendant's motion to suppress should have been granted. *Menne v. State*, 2010 Ark. App. 807, — S.W.3d —, 2010 Ark. App. LEXIS 865 (Dec. 8, 2010).

**Cited:** *Holmes v. State*, 262 Ark. 683, 561 S.W.2d 56 (1978); *Garrett v. Goodwin*, 569 F. Supp. 106 (E.D. Ark. 1982); *Foster v. State*, 278 Ark. 473, 646 S.W.2d 699 (1983); *Richardson v. State*, 283 Ark. 82, 678 S.W.2d 772 (1984); *Roderick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986); *McElrath v. Goodwin*, 713 F. Supp. 299 (E.D. Ark. 1988); *Beebe v. State*, 301 Ark. 430, 784 S.W.2d 765 (1990); *Thomas v. State*, 303 Ark. 210, 795 S.W.2d 917 (1990); *Thompson v. State*, 303 Ark. 407, 797 S.W.2d 450 (1990); *Smith v. City of Little Rock*, 305 Ark. 168, 806 S.W.2d 371 (1991); *Blevins v. State*, 310 Ark. 538, 837 S.W.2d 879 (1992); *Williams v. State*, 321 Ark. 344, 902 S.W.2d 767 (1995), cert. denied 516 U.S. 1030, 116 S. Ct. 676, 133 L. Ed 2d 525 (1995); *Dickerson v. State*, 51 Ark. App. 64, 909 S.W.2d 653 (1995); *Brunson v. State*, 54 Ark. App. 248, 925 S.W.2d 434 (1996), aff'd 327 Ark. 567, 940 S.W.2d 440 (1997), questioned *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999); *Pettigrew v. State*, 64 Ark. App. 339, 984 S.W.2d 72 (1998); *Hill v. State*, 81 Ark. App. 178, 100 S.W.3d 84 (2003); *Flores v. State*, 87 Ark. App. 327, 194 S.W.3d 207 (2004); *Stufflebeam v. Harris*, 521 F.3d 884 (8th Cir. 2008); *Jackson v. State*, 2010 Ark. App. 359, — S.W.3d —, 2010 Ark. App. LEXIS 368 (Apr. 28, 2010); *Charland v. State*, 2011 Ark. App. 4, — S.W.3d —, 2011 Ark. App. LEXIS 10 (Jan. 5, 2011).

## **Rule 3.2. Advice as to reason for detention.**

A law enforcement officer who has detained a person under Rule 3.1 shall immediately advise that person of his official identity and the reason for the detention.

### **CASE NOTES**

**Cited:** *McElrath v. Goodwin*, 713 F. Supp. 299 (E.D. Ark. 1988); *Stewart v. State*, 332

Ark. 138, 964 S.W.2d 793 (1998); *Hollis v. State*, 346 Ark. 175, 55 S.W.3d 756 (2001).

## **Rule 3.3. Use of force.**

A law enforcement officer acting under the authority of Rule 3.1 may use such nondeadly force as may be reasonably necessary under the circumstances to stop and detain any person for the purposes authorized by Rules 3.1 through 3.5.



## CASE NOTES

**Applicability.**

Ark. R. Crim. P. 2.2 authorized an officer to approach defendant's car to investigate whether he was about to drive while intoxicated. Information provided by identified citizen-informants combined with defendant's

obvious intoxication when the officer approached provided the reasonable suspicion that defendant was about to drive under the influence, allowing detention under this rule. *Stewart v. State*, 2010 Ark. App. 9, — S.W.3d —, 2010 Ark. App. LEXIS 15 (Jan. 6, 2010).

**Rule 3.4. Search for weapons.**

If a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer or someone designated by him may search the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others. In no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer or others.

**1987 Unofficial Supplementary Commentary to Rule 3.4****Objective Standard.**

The "reasonably necessary" language of this rule and Rule 3.1 establish an objective test. In deciding whether the stop or frisk at issue is reasonable, courts evaluate the conduct by

measuring it against what could be expected of a "reasonably prudent man" under the circumstances. *Leopold v. State*, 15 Ark. App. 292, 299, 692 S.W.2d 780 (1985).

## CASE NOTES

## ANALYSIS

In general.

Fruit of reasonable search.

Possession by felon.

Reasonableness of search.

**In General.**

A search under this rule cannot be lawfully undertaken unless justification for detaining the suspect exists under ARCrP 3.1. *Muhamad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999).

**Fruit of Reasonable Search.**

Hydromorphone discovered but not confiscated by police officer who was executing an invalid search warrant was admissible in evidence as the fruit of a reasonable and lawful "pat-down" search, and would also have been admissible as a controlled substance seized without a search due to the apparent abandonment of the pills by defendant when he subsequently hid them under the seat of the police car. *Webb v. State*, 269 Ark. 415, 601 S.W.2d 848 (1980).

A police officer executing an arrest warrant acted reasonably in looking at a pill bottle in defendant's pants' pocket felt during the "pat-down" search for weapons and in returning the pill bottle to defendant's pants' pocket after determining that it was not a weapon where the officer testified he found two knives

concealed on defendant, since a glass pill bottle is certainly similar enough to the size and shape of a knife to warrant further examination when felt. *Webb v. State*, 269 Ark. 415, 601 S.W.2d 848 (1980).

In a case in which defendant, pursuant to Arkansas R. Crim. P. 24.3(b), appealed the trial court's denial of his motion to suppress evidence, he unsuccessfully argued that two deputies had no reasonable suspicion to believe that he was armed and dangerous, thereby justifying the pat-down search. Immediately prior to their encounter with defendant, the deputies were dealing with three individuals who appeared to be hiding from them, one of whom had a weapon on his person, defendant approached the deputies unprovoked and appeared to be under the influence of a drug, and the deputies saw a bulge in his pants soon after finding a knife on another suspect after seeing a similar bulge. *Blount v. State*, 2010 Ark. App. 219, — S.W.3d —, 2010 Ark. App. LEXIS 191 (Mar. 3, 2010).

**Possession by Felon.**

There are rarely clearer circumstances for the immediate search and seizure of a weapon than when an officer actually sees the weapon in the pocket of a person he knows to be a convicted felon. *Combs v. State*, 270 Ark. 496, 606 S.W.2d 61 (1980).

**Reasonableness of Search.**

Justification for a limited search for weapons turns upon the question of whether the facts available to the officer at the moment of search would warrant a man of reasonable caution to believe that the action taken was appropriate; and it is only required that the police officer be able to point to specific and articulable facts which, taken together with rational inferences to be drawn from those facts, reasonably warrant a belief that his safety or that of others is in danger. *Webb v. State*, 269 Ark. 415, 601 S.W.2d 848 (1980).

Where the defendant was stopped while driving an automobile which closely matched the detailed description given in a police broadcast of an automobile that was involved in a murder and robbery in a nearby community, and the defendant fit the description given of the perpetrator of those crimes, the investigatory stop of the defendant's vehicle was justified and the limited search of the automobile for weapons by the police was reasonable; therefore, a pistol seized from under the driver's seat was admissible. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

Although the police officers had reasonable suspicion to make an investigative stop of defendants' truck, a protective search allegedly conducted for weapons was invalid. The state's bald assertion that since the officers suspected that defendants were engaged in spotlighting for deer, it was reasonable for the officers to expect that they might have had weapons in the truck, was unsupported by the testimony of the officer and was insufficient to pass constitutional muster. *Leopold v. State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985).

Limited search or "pat down" deemed warranted. *Cooper v. State*, 297 Ark. 478, 763 S.W.2d 645 (1989); *Dickerson v. State*, 51 Ark. App. 64, 909 S.W.2d 653 (1995).

Where the officer has every reason to suspect that a person is armed, a pat-down search is reasonable. *Folly v. State*, 28 Ark. App. 98, 771 S.W.2d 306 (1989).

When a lawful stop occurs, the police are permitted to search the outer clothing of an individual and the immediate vicinity for weapons, if the facts available to an officer would warrant a person of reasonable caution to believe that a limited search was appropriate, and officer was justified in conducting a limited search to determine that the obvious bulge in defendant's jacket was not a weapon. *Stout v. State*, 304 Ark. 610, 804 S.W.2d 686 (1991).

While it seems clear that an ordinary gun or weapon would not fit into a matchbox, this does not mean that the officer did not have the right to open the matchbox. Under this rule, he was authorized to seize "any weapon or

other dangerous thing" which "may" be used against the officer and even a "penny" matchbox could hold a razor blade. *Jackson v. State*, 34 Ark. App. 4, 804 S.W.2d 735 (1991), criticized *Stewart v. State*, 59 Ark. App. 77, 953 S.W.2d 599 (1997). But see *Stewart v. State*, 59 Ark. App. 77, 953 S.W.2d 599 (1997).

Without some evidence other than suspicion or a hunch that a matchbox contained a controlled substance, it was patently inappropriate for the officer, under the guise of maintaining his or others' safety, to take a matchbox and open it. *Stewart v. State*, 59 Ark. App. 77, 953 S.W.2d 599 (1997).

A pat-down search violated the defendant's constitutional right to be free from unreasonable search and seizure because the totality of the evidence did not establish that the police had objective, specific, and articulated facts that justified a reasonable suspicion that the defendant was armed and presently dangerous so as to present a threat as prescribed by the rule. *Pettigrew v. State*, 64 Ark. App. 339, 984 S.W.2d 72 (1998).

An officer was justified in searching the defendant to ensure his own safety where the officer suspected that the defendant was armed based on his extreme nervousness, his rigid posture, his trembling lips, his manner of dress, and his criminal background. *Muhammad v. State*, 64 Ark. App. 352, 984 S.W.2d 822 (1998).

It was reasonable to frisk the defendant for weapons after he gave permission for a search of his car in light of the officer's knowledge of the defendant's criminal record, which included aggravated robbery and illegal drug charges, the defendant's persistent nervousness, and his manner of dress, which included a loose pull-over shirt. *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999).

Where a frisk of the defendant for weapons yielded no weapons, the search of the defendant should have ended and the officer could not validly remove a bag from the defendant's rear pocket after manipulating the pocket and determining that it felt like a plastic bag containing a vegetable-like substance. *Bell v. State*, 68 Ark. App. 288, 7 S.W.3d 343 (1999).

The trial court did not err in finding that a police officer was justified in conducting a pat-down frisk of the defendant where (1) a woman notified the police that the defendant had been following her for several weeks and that she felt that he was stalking her, (2) when the officer arrived at the scene, he noticed that the defendant repeatedly turned around and looked at him through the back window of his truck, (3) when the defendant returned to the vehicle at the officer's command, he began fumbling with something in the seat, and (4) noticing the defendant's furtive movement, the officer drew his weapon when the defendant reached behind



the seat to get his wallet. *Potter v. State*, 342 Ark. 621, 30 S.W.3d 701 (2000).

The fact that a search exceeded the scope of a frisk permitted after a Terry stop did not require the suppression of evidence seized from the defendant since the officers had probable cause to arrest the defendant and, therefore, also had the authority to conduct a search incident to arrest, which is permissibly more intrusive than a Terry frisk. *Blockman v. State*, 69 Ark. App. 192, 11 S.W.3d 562 (2000).

An officer was authorized to conduct a weapons search of the defendant where (1) the officer legally stopped the defendant for a traffic violation and obtained consent from his girlfriend to search the car, (2) a drug dog alerted the officer to the possibility of drugs in the car, (3) the defendant was visibly nervous during the entire stop and walked around unsteadily and talked very fast, and (4) at one point in time, the defendant raised his shirt and the officer then saw a bulge on the left side of his groin. *Newton v. State*, 73 Ark. App. 285, 43 S.W.3d 170 (2001).

After defendant and a suspect left defendant's home, the officer frisked the suspect for weapons; the officer's subsequent warrantless entry into defendant's home was not justified under this rule, as the intrusion was more extensive than was reasonably necessary to ensure the safety of the officer or others. *Holmes v. State*, 75 Ark. App. 46, 54 S.W.3d 121 (2001), *aff'd* 347 Ark. 530, 65 S.W.3d 860 (2002).

Pat-down search of defendant was justified under the totality of the circumstances as the testimony revealed that the police officer was concerned about the possibility of drugs and weapons violations; defendant was in a high crime area, the officer had seen defendant and another man engaged in a hand-to-hand transaction, defendant appeared nervous and the officer did not know what was in defendant's pocket. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003).

Although the searching officer testified that defendant did not present a danger to him because defendant was in the custody of a fellow officer, it was still possible that defendant could have broken away from police and obtained access to any weapons in the truck; moreover, unlike *Long* and *Reeves*, defendant was stopped because his vehicle met the description of the police broadcast regarding shots being fired from the described vehicle and, thus, it was reasonable for the officer to search the passenger compartment of the automobile for the safety of the officers and the safety of others. *Saulsberry v. State*, 81 Ark. App. 419, 102 S.W.3d 907 (2003).

Pursuant to a report of a drug related disturbance, officer stopped defendant's vehicle and conducted a pat-down of defendant

without any objective, factual basis for a reasonable belief that defendant was dangerous or might have gained immediate control of a weapon, moreover, the illegal frisk was not cured by defendant's purported consent in turning over the small bottle in his pocket as the lapse of time between the pat-down and the request to see what was in his pocket was not sufficient to dissipate the taint; thus, the methamphetamine seized as a result of the illegal frisk was the fruit of the poisonous tree and had to be suppressed. *Hill v. State*, 89 Ark. App. 126, 206 S.W.3d 300 (2005), *reversed* 363 Ark. 505, 215 S.W.3d 586 (2005).

Trial court erred in denying defendant's motion to suppress where the officer provided no reasons for frisking defendant other than that it was "policy" and admitted he had not seen anything that led him to believe that defendant had a weapon; thus, while the officer had a reasonable basis to stop defendant under Ark. R. Crim. P. 3.1, the officer lacked specific, objective, and articulable facts to support a reasonable suspicion that defendant was armed and presently dangerous to warrant a search. *Hill v. State*, 89 Ark. App. 126, 206 S.W.3d 300 (2005).

Pat-down search was properly conducted, as trial testimony indicated defendant consented to the search, under a totality of the circumstances the search was justified by officers' reasonable suspicion that defendant was armed and dangerous, as defendant was suspected of selling drugs and was carrying a screwdriver, and the search occurred incident to defendant's arrest for which the officers had probable cause. *Franklin v. State*, 2010 Ark. App. 792, — S.W.3d —, 2010 Ark. App. LEXIS 846 (Dec. 1, 2010).

Trial court properly denied defendant's motion to suppress because an officer had reasonable suspicion that defendant was carrying a weapon and, therefore, a frisk of defendant was not an illegal search; the officer testified that defendant's shrugged shoulders, no eye contact, and tightening up indicated to the officer that defendant was lying about not having any weapons or anything illegal. *Gilbert v. State*, 2010 Ark. App. 857, — S.W.3d —, 2010 Ark. App. LEXIS 894 (Dec. 15, 2010).

**Cited:** *Holmes v. State*, 262 Ark. 683, 561 S.W.2d 56 (1978); *State v. Barter*, 310 Ark. 94, 833 S.W.2d 372 (1992); *Williams v. State*, 321 Ark. 344, 902 S.W.2d 767 (1995), *cert. denied* 516 U.S. 1030, 116 S. Ct. 676, 133 L. Ed 2d 525 (1995); *Brunson v. State*, 54 Ark. App. 248, 925 S.W.2d 434 (1996), *aff'd* 327 Ark. 567, 940 S.W.2d 440 (1997), *questioned* *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999); *Hill v. State*, 81 Ark. App. 178, 100 S.W.3d 84 (2003).

**Rule 3.5. Stop of witness to crime.**

Whenever a law enforcement officer has reasonable cause to believe that any person found at or near the scene of a felony is a witness to the offense, he may stop that person. After having identified himself, the officer must advise the person of the purpose of the stopping and may then demand of him his name, address, and any information he may have regarding the offense. Such detention shall in all cases be reasonable and shall not exceed fifteen (15) minutes unless the person shall refuse to give such information, in which case the person, if detained further, shall immediately be brought before any judicial officer or prosecuting attorney to be examined with reference to his name, address, or the information he may have regarding the offense.

**CASE NOTES****Reasonable Suspicion.**

In a murder case, the trial court properly denied a motion to suppress because, although defendant was seized when she was told she could not leave the crime scene, in light of the remoteness of the crime scene and the circumstances existing at the time, requesting defendant to remain at the crime scene was reasonable, and defendant's state-

ments were not incriminating as defendant said that she had last seen the victim the night before when he got into a van with some other people to go and drink beer. *Flanagan v. State*, 368 Ark. 143, 243 S.W.3d 866 (2006).

**Cited:** *Holmes v. State*, 262 Ark. 683, 561 S.W.2d 56 (1978); *Baxter v. State*, 274 Ark. 539, 626 S.W.2d 935, cert. denied 457 U.S. 1118, 102 S. Ct. 2930, 73 L. Ed 2d 1331 (1982).

**ARTICLE III. ARREST, CITATION, SUMMONS AND PRETRIAL RELEASE****Commentary to Article III**

Article III encompasses six rules that establish arrest, citation, and summons authority and prescribe procedures to be followed in making an arrest and issuing a citation or summons. Existing statutory authority in this area is found at Ark. Stat. Ann. § 43-401 *et seq.* (Repl. 1964).

It should be pointed out at this time that beginning in Article III, the terms "person," "accused," and "defendant" are terms of art. With very few exceptions, for the purposes of the rules a "person" does not become an "accused" until an arrest warrant or summons is issued, or until cited; he becomes a "defendant" only after first appearance.

Rule 4 is addressed to the subject of arrest. Rule 4.1 is drawn both from existing statutory authority found at § 43-403 (Repl. 1964) and from A.L.I. § 120.1. The present requirement that a warrantless arrest be supported by "reasonable cause" is retained.

Private persons are empowered to make felony arrests by Rule 4.1(b), which adopts the language of § 43-404 (Repl. 1964). Rule 4.1(c) is designed to make it clear that knowledge of the precise offense committed is not an essential element of a valid arrest.

Rule 4.1(d) provides that an officer making an arrest need not personally have informa-

tion furnishing reasonable cause so long as the arrest is made on instructions from a police agency collectively having the requisite quantum of knowledge.

Lastly the reader will observe that use of the term "probable cause" has been studiously avoided both in Rule 4 and in the remainder of the rules. In eschewing this term the Commission aligns itself with the A.L.I. Reporters who explain their partiality as follows:

Of the several formulations of the standard of belief necessary for an arrest, the draft adopts reasonable cause. This formulation seems better than "probable cause," with its implication that guilt must be more probable than not. Although "probable cause" is the term used in the Fourth Amendment to describe the basis for the issuance of a warrant, the Reporters believe that it is inappropriate to use that term in a modern statute. The word "probable" in an earlier time meant that which was capable of being proved or worthy of belief, and was not linked to more recent notions of probabilities measured mathematically. "Reasonable cause," or its analogue, "reasonable ground," is the term used by statutes in every United States jurisdiction defining the authority to arrest without a warrant.



In the arrest cases "reasonable cause" appears to be the more usual term. *Commentary to A.L.I. § 120.1 at 132* [footnotes omitted].

Rules 4.2 and 4.3 deal with arrest under warrant. They provide that such an arrest may be made in any county and regardless of whether the arresting officer has physical possession of the warrant. Parallel Arkansas statutory authority is found at §§ 43-411, 43-416 (Repl. 1964). See, also, A.L.I. § 120.3; Fed. R. Crim. P. § 4 (c). Matters such as bases for issuance of arrest warrants and warrant forms are dealt with by Rule 7 discussed *infra*.

Rule 4.4 obliges a law enforcement officer making an arrest to identify himself, to inform the arrested person that he is under arrest, and to indicate the cause of arrest. As the *Comment* indicates, the rule makes no effort to exhaustively enumerate all of the warnings which might be constitutionally required. Recent decisions indicate, however, the advisability of giving full *Miranda* warnings on arrest. *Orozco v. Texas*, 394 U.S. 324, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969). Cf., *Johnson v. State*, 252 Ark. 1113, 482 S.W.2d 600 (1972); *Ouletta v. State*, 246 Ark. 1130, 442 S.W.2d 216 (1969); *Haire v. Sarver*, 437 F.2d 1262 (8th Cir.), cert. denied, 404 U.S. 910, 92 S. Ct. 235, 30 L. Ed. 2d 182 (1971); and Ark. Stat. Ann. § 43-416 (Repl. 1964).

Rule 4.5 has no statutory counterpart in Arkansas law. It prohibits the questioning of an arrested person who has indicated in any manner that he does not wish to be questioned.

Rule 4.6 requires that an arrested person be promptly taken to a police station or other place of detention unless the exigencies of the particular case require delay.

Rule 5 provides for release, pursuant to citation, of a person taken into custody for a misdemeanor offense by an officer acting without an arrest warrant.

The initial subpart of Rule 5.1 defines the pivotal terms employed throughout the remaining provisions of Article III. The terms and their definitions are drawn almost word for word from ABA *Standards, Pretrial Release* § 1.4 (Approved Draft, 1968), designated hereafter as *Standards, Pretrial Release*. Except with regard to bail, Arkansas statutory and case law do not provide definitions of these terms, at least as they are here employed. See, e.g., Ark. Stat. Ann. § 43-701 *et seq.* (Repl. 1964). A brief discussion of the terms appears in the *Standards* commentary to *Pretrial Release* at 29, 30.

Rule 5.2 is central to the entire Article and breaks new ground. In authorizing an officer to issue a citation under specified circumstances, the provision follows the lead of

*Standards, Pretrial Release*, although the rule stops short of its suggested requirement that issuance of citations be mandatory in some instances. The proposed rule is permissive in that it gives the officer in the field latitude to determine whether citation or arrest is more appropriate. The *Comment* following the provision announces that citation is to be the rule and arrest the exception absent circumstances discussed by the rule. Subsection (d) supplies guidelines to be considered by the officer making the decision.

In conferring discretion to issue citations upon the law enforcement officer, the Commission also brings the proposed rule in line with A.L.I. § 120.2. Like the A.L.I. provision, Rule 5.2 supplies a solution to the problem facing an officer who must deal with the petty misdemeanor and his victim:

[I]t permits the issuance of a citation in a case in which the officer is not empowered to make an arrest without a warrant. An officer called to the place where a petty misdemeanor has been committed may not have authority to make an arrest under [Rule 4.1], because though there is reasonable cause, the offense did not take place in his presence. The victim of the crime may seek to have the officer make an arrest and not understand why the officer cannot do so. In many situations of this kind officers now may respond by characterizing the offense as a felony for the purpose of justifying an arrest, even though they realize that nothing more than a misdemeanor is involved. The power to take the formal step of issuing a citation to appear should reduce the pressure for arrest. *A.L.I. at 143*.

Subpart (b) of 5.2 is patterned after *Standards, Pretrial Release* § 2.2(b) and permits the release of persons arrested for misdemeanors. As the commentary to *Pretrial Release* points out at pages 34, 35, in most instances the accused will have been identified by the time the question arises as to whether he should be released. Since "... custody is costly both in monetary and human terms," in most cases continued custody will serve no purpose, unless it is determined that there is a likelihood that the defendant will not reappear if released. A.L.I. commentary at 19.

Subpart (c) of Rule 5.2 is fashioned to permit the release of a person charged with a felony where the prosecutor feels this to be appropriate.

Rule 5.3 prescribes in detail the requisite form of all citations. It has no complement in either statutory or case law and is drawn from Rule 4 of the *Proposed Uniform Rules of Criminal Procedure* (Second Tentative Draft: July-August, 1973) designated hereafter as the *Uniform Rules*. Every citation will speak with a particularity which will preclude con-

fusion as to matters such as the offense alleged, the appearance date, and the cited person's right to representation by counsel.

The procedure for issuing citations is set out by Rule 5.4 which is, in turn, modeled after A.L.I. § 120.2(3). The procedure is similar to that currently employed in Arkansas for traffic offenses.

One aspect of the procedure established by this provision is particularly noteworthy. Although all citation forms will have a space for the signature of the accused (Rule 5.3(a)(vi)), mere delivery of the citation will suffice to formally charge the accused and require court appearance. Of course, an officer may require an accused to sign, and arrest upon refusal. But the language of the rule is calculated to avoid requiring an officer to arrest a person who refuses to sign out of momentary anger or irritation. If the officer feels that an accused will respond to the citation, he can avoid a confrontation and a pointless arrest by simply delivering the citation without any mention of a signature.

It will also be noted that citation and custody are not mutually exclusive. An officer may issue a citation and temporarily retain custody of a person where it appears that the person cited is mentally or physically incapable of caring for himself.

The last subpart of Rule 5 is drawn from *Standards, Pretrial Release* § 2.4 and reflects the Commission's concern that the citation procedures not be interpreted to restrict in any way the permissible scope of searches incident to "arrest" or, here, restraint pending issuance of a citation in lieu of arrest.

Rule 6 provides authority for the issuance of a summons in lieu of an arrest warrant. Existing authority is ambiguous and perhaps contradictory respecting this authority. Ark. Stat. Ann. § 43-102 (Repl. 1964) permits issuance of summons in cases within the jurisdiction of city, police, or justice of the peace courts. Contrariwise, Ark. Stat. Ann. § 43-408 (Repl. 1964) imposes upon "magistrates" the duty of issuing arrest warrants where it appears there are reasonable grounds to believe an offense has been committed.

Rule 6.1 resolves matters by providing that any official who may issue an arrest warrant may also issue a "criminal summons" in its stead, where a complaint or information has been filed or an indictment has been returned. As was the case with Rule 5.2, Rule 6.1 brings the code into substantial conformity with *Standards* recommendations, although summons procedure is never compulsory under the new rules.

In so providing, the proposed rule recognizes that the logic supporting release of a

defendant on order to appear also supports compelling attendance by summons in the first instance.

In establishing the requisite form for summons, Rule 6.2 incorporates all but one of the requirements of Rule 5.3(a) and (b) and, like 5.3, ensures that the defendant knows the nature of the charges against him and the consequences of failure to appear. The requirement not carried forward is that of the signature space.

Rule 6.3 is in accord with *Standards, Pretrial Release* § 3.4. By allowing service by certified mail it goes slightly further than most modern statutes gearing service of criminal summons to civil procedures. *Cf.*, Ark. Stat. Ann. § 27-330 (Repl. 1962). [SuperseDED].

Rule 7 governs the issuance of warrants. It is largely derived from *Uniform Rule* 3(b).

Rule 7.1(a) is the necessary corollary of Rules 5.3(b) and 6.2(b): it authorizes the issuance of a warrant for the arrest of a person failing to appear in response to citation or summons.

Rule 7.1(b) sets out standards regulating warrant procedure in all cases not covered by 7.1(a). Issuance of a warrant may be grounded upon written affidavit, recorded testimony, or information, the latter term embracing also an indictment (Rule 1.6(d)). Further, under 7.1(b)(i), it must appear not only that there is reasonable cause to believe an offense was committed by the party sought to be accused, but also that the manner in which it was committed involved violence to persons or the threat or risk of bodily injury. Alternatively, 7.1(b)(ii) authorizes warrant procedure where it appears, upon adverting to criteria set out at 7.1(b)(ii)(A)-(J), that a summons would go unheeded.

Ark. Stat. Ann. §§ 22-751, 22-722 (Repl. 1962) have been compressed into a single provision, Rule 7.1(c), which substantially restates present law permitting court clerks to issue arrest warrants.

Rule 7.2 sets out the required form of a warrant. Like 7.1, it is fashioned from the *Uniform Rules*, specifically *Uniform Rule* 4(e). Existing statutory authority is found at Ark. Stat. Ann. § 43-407 (Repl. 1964). A discussion of the provision is found in the Comment to *Uniform Rule* 4(e) at pages 29-31.

Rule 7.3 is concerned with return of warrants and summonses, as well as execution after return. Rules 7.3(a) and (b) are taken, respectively, from *Uniform Rules* 6(c) and 6(b). Rule 7.3(c) is designed to allow service of an unexecuted, uncanceled warrant or summons at any time during the pendency of an information, complaint, or indictment. *Cf.*, Ark. Stat. Ann. §§ 43-421, 43-422 (Repl. 1964).



Rule 8 establishes procedures and guidelines designed to result in expeditious determination of a defendant's eligibility for release.

Analogues to Rule 8.1 are found at Ark. Stat. Ann. §§ 43-601, 43-605 (Repl. 1964). The rule is in accord with the *Standards*. See, *Standards, Pretrial Release* § 4.1. As is the case in the *Standards*, "[n]o attempt is made here to resolve the many difficult issues involved in determining the duration and conditions of permissible in-custody investigation." *Id.* at 43.

Rule 8.2 brings Arkansas in line with both *Standards, Pretrial Release* and the thrust of recent decisions of the United States and Arkansas Supreme Courts. See, *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972); *Kitchens v. Smith*, 401 U.S. 847, 91 S. Ct. 1089, 28 L. Ed. 2d 519 (1971); *Coleman v. Alabama*, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970); *Graves v. State*, 256 Ark. 117, 505 S.W.2d 748 (1974).

The rule treats the subjects of waiver and appointment of counsel for indigents more thoroughly than does Arkansas statutory or decisional law. See, Ark. Stat. Ann. §§ 43-605, 43-1203 (Repl. 1964); *Cableton v. State*, 243 Ark. 351, 420 S.W.2d 534 (1967).

Subpart (a) of Rule 8.2 encourages prearrest determination of an accused's ability to retain, and his desire for, counsel. Moreover, Rule 8.2(a) requires that an indigent defendant who does not waive representation by counsel be afforded counsel except when the trial judge determines that incarceration will in no event be imposed upon conviction.

As the *Comment* indicates, it was not intended that the rule be interpreted to indorse or criticize any contemplated or currently operational defense service systems.

Moreover, procedures now having only the status of routine practices under present statutory law governing first appearances are explicitly imposed as requirements by Rule 8. See, Ark. Stat. Ann. § 43-601 *et seq.* (Repl. 1964). The defendant is to be informed of his rights to remain silent, to the assistance of counsel, and to communication with friends or counsel.

Rules 8.4 and 8.5, dealing with the circumstances requiring and time of pretrial inquiry, are innovative; they appear to have no counterparts in statutory or decisional authority. Although Ark. Stat. Ann. § 43-603 (Repl. 1964) confers certain latitude for a magis-

trate's exercise of discretion in determining whether to commit, bail, or discharge the accused, no existing statute sets out with specificity the factors to be considered.

The provisions of Rule 9 provide authority to release and enumerate factors and conditions which properly play a role in the release process.

Rules 9.1(a) and (b) provide for release under greater or lesser restrictive conditions, Rule 9.1(a) recognizing the propriety of personal recognizance and release on order to appear, and (b) permitting release on more stringent conditions. Rule 9.1 formally recognizes and encourages nonmonetary release conditions not presently countenanced explicitly by Arkansas statutory law. *Cf.*, Ark. Stat. Ann. § 43-709 (Repl. 1964); and Article 2, sections 8 and 9 of the Arkansas Constitution.

Rule 9.2 allows money bail to be set, but does so only in the event that no other condition will assure the appearance of a defendant. Rule 9.2(b) sets out the types of secured and unsecured bonds which are acceptable. *Cf.*, Ark. Stat. Ann. § 43-702 *et seq.* (Repl. 1964). Appropriate subjects of inquiry in determining the amount of bail are enumerated by Rule 9.2(c), in which the provisions of *Standards, Pretrial Release* § 5.3(d) are adopted virtually verbatim. Rule 9.2 is accompanied by a policy statement in the form of a *Comment*.

Rule 9.3 provides the court granting release authority to enter orders prohibiting a variety of kinds of conduct on the part of the defendant.

Rule 9.4 is calculated to avoid misunderstandings as to release conditions. Written recordation of such conditions should serve to discourage meritless petitions seeking release from incarceration imposed as a result of disobedience of them.

Rule 9.5 complements 9.3 by providing remedies for violations of release conditions. Prosecutors and law enforcement officers are given authority to initiate revocation procedures on verified application or reasonable cause.

Rule 9.6 partakes of the rationale underlying 9.5 by making provision for revocation of release by any court upon a showing that reasonable cause exists to believe that a defendant has committed a felony while released pending adjudication of another charge.

## RULE 4. ARREST: GENERAL PROVISIONS

### Rule 4.1. Authority to arrest without warrant.

- (a) A law enforcement officer may arrest a person without a warrant if:

(i) the officer has reasonable cause to believe that such person has committed a felony;

(ii) the officer has reasonable cause to believe that such person has committed a traffic offense involving:

(A) death or physical injury to a person; or

(B) damage to property; or

(C) driving a vehicle while under the influence of any intoxicating liquor or drug;

(iii) the officer has reasonable cause to believe that such person has committed any violation of law in the officer's presence;

(iv) the officer has reasonable cause to believe that such person has committed acts which constitute a crime under the laws of this state and which constitute domestic abuse as defined by law against a family or household member and which occurred within four (4) hours preceding the arrest if no physical injury was involved or 12 (twelve) hours preceding the arrest if physical injury, as defined in Ark. Code Ann. § 5-1-102, was involved;

(v) the officer is otherwise authorized by law.

(b) A private person may make an arrest where he has reasonable grounds for believing that the person arrested has committed a felony.

(c) An arrest shall not be deemed to have been made on insufficient cause hereunder solely on the ground that the officer or private citizen is unable to determine the particular offense which may have been committed.

(d) A warrantless arrest by an officer not personally possessed of information sufficient to constitute reasonable cause is valid where the arresting officer is instructed to make the arrest by a police agency which collectively possesses knowledge sufficient to constitute reasonable cause.

(e) A person arrested without a warrant shall not be held in custody unless a judicial officer determines, from affidavit, recorded testimony, or other information, that there is reasonable cause to believe that the person has committed an offense. Such reasonable cause determination shall be made promptly, but in no event longer than forty-eight (48) hours from the time of arrest, unless the prosecuting attorney demonstrates that a bona fide emergency or other extraordinary circumstance justifies a delay longer than forty-eight (48) hours. Such reasonable cause determination may be made at the first appearance of the arrested person pursuant to Rule 8.1. (Amended June 6, 1994; amended October 17, 1994; amended June 21, 2001, effective August 13, 2001.)

**Publisher's Notes.** The Per Curiam Order dated June 6, 1994, provided, in part: "In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the United States Supreme Court ruled that a person arrested without a warrant is entitled to a prompt judicial determination of probable cause. In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Court held that a judicial determination of probable cause within 48 hours of arrest will generally satisfy the promptness requirement of *Gerstein*, but the court recognized that a longer delay may be justified by 'bona fide emergency or other extraordinary circumstance.' The change to Rule 4.1 codifies *Gerstein* as modified by *Riverside*. This new rule is to be

applied retroactively to all criminal cases currently pending trial on the merits and to all direct appeals currently in progress. See *Powell v. Nevada*, 114 S. Ct. 1280 (1994)."

**Cross References.** Warrantless arrest for violation of probation, § 5-4-309.

Warrantless arrest for shoplifting, § 5-36-116.

Warrantless arrest for violation of protective order, § 5-53-134.

Warrantless arrest for domestic abuse, § 16-81-113.

Warrantless arrest for gas theft, § 16-81-114.

Warrantless arrest for violation of parole, § 16-93-705.



**Reporter's Notes, 2001 Amendment:** Concerning subsection (a)(iv), see Ark. Code Ann. § 16-81-113(a)(1), as amended by Act 1421 of 2001. Subsection (a)(v) is intended to incorporate current and future statutes authorizing an arrest without a warrant. Examples of such statutory authority include Ark. Code Ann. § 5-4-309 (warrantless arrest for

violation of probation); Ark. Code Ann. § 5-36-116 (warrantless arrest for shoplifting); Ark. Code Ann. § 5-53-134 (warrantless arrest for violation of protective order); Ark. Code Ann. § 16-81-114 (warrantless arrest for gas theft); and Ark. Code Ann. § 16-93-705 (warrantless arrest for violation of parole).

### 1987 Unofficial Supplementary Commentary to Rule 4.1

Rule 2.1 defines the term "reasonable suspicion" as it is used in Article II. "Reasonable cause," as used in Rule 4.1(a), remains undefined, however, it being left to the courts to give content to this concept on a case by case basis.

#### Suppression of Confession Following Illegal Warrantless Arrest.

Not every confession following an illegal warrantless arrest will be suppressed, the theory being that illegally arrested persons sometimes divulge criminal conduct of their own "free will." *Brown v. Illinois*, 422 U.S. 590, 45 L. Ed. 2d 416 (1975); *Roderick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986). But the state's burden of proving the absence of all causal connection between an illegal arrest and a subsequent confession of crime is heavy. Not even a showing that adequate *Miranda* warnings were given before a confession will always sever the causal connection and permit introduction of the evidence. *Roderick*, *supra*.

#### Developments Curing Original Illegality.

The character of detention pursuant to an illegal arrest is not immutably fixed. A statement given during detention pursuant to an originally illegal arrest is admissible where circumstances giving rise to reasonable cause intervene between the illegal warrantless arrest and the statement. For instance, in *Brewer v. State*, 271 Ark. 810, 611 S.W.2d 179 (1981), after a warrantless arrest attacked as illegal for lack of reasonable cause, defendant was implicated in a statement given by a friend, who was also a suspect. After receiving multiple *Miranda* warnings, defendant first gave an exculpatory statement and, then, after being told by his girlfriend that she had implicated him, an incriminating one. The Arkansas Supreme Court held that the information received from appellant's girlfriend was "a sufficient intervening circumstance" that "attenuated any taint of [the unlawful] arrest." *Id.* at 813, 814, 611 S.W.2d at 182.

The Arkansas Supreme Court held that defendant confessed "as an act of free will" as a result of being told that his friend had implicated him in the crime. The "free will"

doctrine has been recognized by the U.S. Supreme Court. See *Brown v. Illinois*, and *Roderick v. State*:

It is entirely possible ... that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the *Miranda* warnings, alone and per se, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession.

*Roderick* at 365, 705 S.W.2d at 436, quoting *Brown v. Illinois* at 603, 45 L.Ed.2d at 427.

A more reasonable approach would be to distinguish between arrests and detentions following arrests, focusing on the legality of the detention rather than the legality of the original arrest, since the latter is an instantaneous event, the character of which can be affected only by indulging in legal fictions. Whether the *Brewer* court recognized this distinction and found that illegal detention can be transmuted into lawful detention as a result of information lawfully obtained from a third party after an illegal arrest is uncertain, but *Brewer* is susceptible to this reading.

In any event, when a statement following an arrest is sought to be excluded, it is clear that Arkansas law requires separate determinations on the legality of the arrest and the excludability of the evidence.

#### Warrantless Entry of Premises.

The Arkansas Supreme Court's decision in *Gaylor v. State*, 284 Ark. 215, 681 S.W.2d 348 (1984) discusses exigent circumstances rendering a warrantless entry of premises to make an arrest reasonable and permissible under *Payton v. New York*, 445 U.S. 573, 63 L. Ed. 2d 639 (1980) and *Riddick v. New York*, 445 U.S. 573, 63 L. Ed. 2d 639 (1980), which prohibited police officers from making a warrantless, nonconsensual entry into a suspect's home in order to make a routine felony arrest absent exigent circumstances.

#### Warrantless Arrests for Misdemeanors.

While Rule 4.1(a) permits a warrantless arrest for the misdemeanor traffic offense of DWI, *Wright v. State*, 17 Ark. App. 24, 702 S.W.2d 811 (1986), it does not permit a warrantless arrest for other misdemeanors in-

volving threatened or actual physical harm to persons. As early as 1974, the Code Revision Commission felt that operating a vehicle while intoxicated was an offense of sufficient gravity to bring it within an exception to the common law in-presence requirement for warrantless arrests. This concern was not, however, great enough to lead it to permit warrantless arrests for this offense by private citizens. *Brewer v. State*, 286 Ark. 1, 688 S.W.2d 736 (1985).

### **Presumptive Legality of Arrests; Standard of Review.**

Though warrantless vehicular searches (and, *a fortiori*, residential searches) are presumptively unlawful, *Leopold v. State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985) and *Jackson v. State*, 274 Ark. 317, 624 S.W.2d 437 (1981) (home search), warrantless arrests are presumptively legal, with appellant bearing the burden of proving otherwise on appeal. *Freeman v. State*, 6 Ark. App. 240, 640 S.W.2d 456 (1982), relying on *Thorne v. State*, 274 Ark. 102, 622 S.W.2d 178 (1981). On appeal, the Arkansas Supreme Court makes an independent determination and will reverse the trial court's decision on the legality of a search if it is clearly erroneous. *Smith v. State*, 265 Ark. 104, 576 S.W.2d 957 (1979); *State v. Osborn*, 263 Ark. 554, 566 S.W.2d 139 (1978). In arrest

cases, all presumptions on appeal are favorable to the trial court's ruling, and the burden of establishing error rests on appellant. *Gaylor v. State*, 284 Ark. 215, 681 S.W.2d 348 (1984).

### **Arrests Pursuant to Information from Another Jurisdiction.**

Though officers in one locality may justifiably make an arrest in reliance upon information reasonable on its face received from officials in another place, this does not preclude a subsequent attack on the legality of the arrest grounded on lack of reasonable cause. In *Whiteley v. Warden*, 401 U.S. 560, 28 L. Ed. 2d 306 (1971), the Court said:

"We do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest."

401 U.S. at 568, 28 L. Ed. 2d at 313.

## **RESEARCH REFERENCES**

**Ark. L. Rev.** Introduction [1976 Criminal Code], 30 Ark. L. Rev. 105.

Arrest, Citation and Summons — The Supreme Court Takes a Giant Step Forward, 30 Ark. L. Rev. 137.

**U. Ark. Little Rock L.J.** Survey, Criminal Procedure, 13 U. Ark. Little Rock L.J. 349.

## **CASE NOTES**

### **ANALYSIS**

Burden of proof.  
Collective police information.  
Due process.  
Illegal arrest.  
Informants.  
Knowledge of out-of-state warrant.  
Law enforcement officer.  
Offense committed.  
Private persons.  
Reasonable cause.  
Separation of powers.  
Statement after illegal arrest.  
Statement after warrantless arrest.  
Supersession of statute.  
Violation of law in officer's presence.  
Warrantless arrest justified.  
Warrantless arrest not justified.

### **Burden of Proof.**

Probable cause to arrest without a warrant does not require the degree of proof sufficient to sustain a conviction. *Hudson v. State*, 316 Ark. 360, 872 S.W.2d 68 (1994).

This rule protects the federal constitutional right of a person to a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest; at this preliminary stage, the state is required to present proof that justifies the accused's arrest, not to establish the accused's guilt. *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114, cert. denied 519 U.S. 847, 117 S. Ct. 134, 136 L. Ed. 2d 83 (1996).

### **Collective Police Information.**

This rule embodies the principle that a warrantless arrest is to be evaluated on the



basis of the collective information of the police. *Jackson v. State*, 274 Ark. 317, 624 S.W.2d 437 (1981).

The test of probable cause for the stopping of an automobile rests upon the collective information of the police officers and not upon the information of the officer actually stopping the vehicle. *Gass v. State*, 17 Ark. App. 176, 706 S.W.2d 397 (1986); *Mock v. State*, 20 Ark. App. 117, 725 S.W.2d 1 (1987).

#### **Due Process.**

Defendant was not constitutionally entitled to a verbatim transcription of the probable-cause proceeding; officer's affidavit and the bench warrant satisfied defendant's constitutional requirements to due process at this most preliminary stage of the criminal proceedings. *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114, cert. denied 519 U.S. 847, 117 S. Ct. 134, 136 L. Ed. 2d 83 (1996).

#### **Illegal Arrest.**

An illegal arrest is not grounds for dismissal of criminal charges. *State v. Fore*, 46 Ark. App. 27, 876 S.W.2d 278 (1994).

#### **Informants.**

Where a confidential informant had reported that defendant and another person had been processing and packaging marijuana and that defendant had departed in his car with cocaine in his possession and earlier information indicated that defendant was engaged in drug trafficking the police officer had reasonable cause to believe that defendant had committed a felony. *Hudson v. State*, 316 Ark. 360, 872 S.W.2d 68 (1994).

#### **Knowledge of Out-of-State Warrant.**

Where two state police officers were aware that the county sheriff's office had an out-of-state warrant charging defendant with assault and battery with intent to kill, the officers had probable cause for defendant's arrest. *Woodall v. State*, 260 Ark. 786, 543 S.W.2d 957 (1976).

#### **Law Enforcement Officer.**

Where a defendant was arrested and issued a citation by two unsupervised auxiliary deputies for the misdemeanor of driving while intoxicated, the defendant could not be tried or convicted of the offense because the unsupervised auxiliary deputies lacked the authority to lawfully charge the defendant with a misdemeanor offense. *Brewer v. State*, 286 Ark. 1, 688 S.W.2d 736 (1985).

#### **Offense Committed.**

An arrest shall not be deemed to have been made on insufficient cause solely on the ground that an officer was unable to determine the particular offense which may have been committed; reasonable cause to arrest without a warrant exists when the facts and

circumstances within the officers' collective knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant in a man of reasonable caution the belief that an offense has been committed by the person to be arrested. *Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996).

#### **Private Persons.**

A private person has the authority to make an arrest where he has reasonable grounds for believing that the person arrested has committed a felony, but no such authority in case of a misdemeanor. *Perry v. State*, 303 Ark. 100, 794 S.W.2d 141 (1990).

#### **Reasonable Cause.**

Probable cause, or reasonable cause, exists where facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy knowledge are sufficient in themselves to warrant a man of reasonable caution to conclude that an offense has been or is being committed. *McGuire v. State*, 265 Ark. 621, 580 S.W.2d 198 (1979); *Gaylor v. State*, 284 Ark. 215, 681 S.W.2d 348 (1984); *Wright v. State*, 17 Ark. App. 24, 702 S.W.2d 811 (1986); *Roderick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986); *Gass v. State*, 17 Ark. App. 176, 706 S.W.2d 397 (1986); *Mock v. State*, 20 Ark. App. 117, 725 S.W.2d 1 (1987); *Johnson v. State*, 21 Ark. App. 211, 730 S.W.2d 517 (1987); *Vega v. State*, 26 Ark. App. 172, 762 S.W.2d 1 (1988).

Officers had reasonable cause to arrest defendant. *Davis v. State*, 271 Ark. 492, 609 S.W.2d 109 (1980); *Washington v. Simpson*, 806 F.2d 192 (8th Cir. 1986), questioned *McIntosh v. Arkansas Republican Party-Frank White Election Comm.*, 816 F.2d 409 (8th Cir. 1987); *Gass v. State*, 17 Ark. App. 176, 706 S.W.2d 397 (1986); *Johnson v. State*, 21 Ark. App. 211, 730 S.W.2d 517 (1987); *Chism v. State*, 312 Ark. 559, 853 S.W.2d 255 (1993).

In determining whether there is reasonable cause to arrest a defendant without a warrant, the issue is not whether there is sufficient evidence to sustain a conviction, but rather whether there is sufficient evidence for the police officers to believe, in good faith, that they had probable cause to make the arrest. *Washington v. Simpson*, 806 F.2d 192 (8th Cir. 1986), questioned *McIntosh v. Arkansas Republican Party-Frank White Election Comm.*, 816 F.2d 409 (8th Cir. 1987).

The district court was not clearly erroneous in concluding that the parolee's attempt to conceal herself in the defendant's room, with his knowledge, coupled with the defendant's assertion of ignorance regarding the parolee's whereabouts, constituted reasonable belief by the officers that the defendant was attempting to hinder the apprehension of the parolee in violation of § 5-54-105; therefore, the offi-

cers had reasonable cause to arrest the defendant. *Washington v. Simpson*, 806 F.2d 192 (8th Cir. 1986), questioned *McIntosh v. Arkansas Republican Party-Frank White Election Comm.*, 816 F.2d 409 (8th Cir. 1987).

Probable cause to arrest without a warrant does not require that degree of proof sufficient to sustain a conviction; however, a mere suspicion is not enough and even a "strong reason to suspect," will not suffice. *Roderick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986); *Gass v. State*, 17 Ark. App. 176, 706 S.W.2d 397 (1986); *Vega v. State*, 26 Ark. App. 172, 762 S.W.2d 1 (1988).

Where the only proof was that the victim and the defendant were seen together in public, there was not probable cause to charge the defendant with murder. *Roderick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986).

Where there was sufficient reasonable cause to believe defendant had committed a felony to support a warrantless arrest, any possible defect in either the information or warrant would therefore not render his arrest unlawful. *Van Daley v. State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987).

A determination of probable cause to arrest exists where a reasonable ground of suspicion is supported by circumstances sufficiently strong to warrant a cautious person to believe the suspect committed a crime, yet the degree of proof that would sustain a conviction is not required. *Stout v. State*, 304 Ark. 610, 804 S.W.2d 686 (1991).

Even if the officer could not open a matchbox, which contained crack cocaine, because he could not reasonably suspect it contained "any weapon or other dangerous thing," he could certainly know from its sound and feel that it did not contain matches. And under all the circumstances shown by the evidence, the officer would have reasonable cause to believe the box contained a controlled substance of some type. With the matchbox lawfully in his hand and with reasonable cause to believe it contained a controlled substance, the officer could arrest the appellant and, as incident to the arrest, he could seize the contraband in the matchbox. *Jackson v. State*, 34 Ark. App. 4, 804 S.W.2d 735 (1991), criticized *Stewart v. State*, 59 Ark. App. 77, 953 S.W.2d 599 (1997). But see *Stewart v. State*, 59 Ark. App. 77, 953 S.W.2d 599 (1997).

When the defendant would not identify objects in his hand when asked to do so by a police officer, but ate them, the officer had reasonable cause to suspect the substance was a prohibited substance, even if the officer did not know exactly what. *Crail v. State*, 309 Ark. 120, 827 S.W.2d 157 (1992).

The same standards govern reasonable (that is to say, probable) cause determinations, whether the question is the validity of

an arrest or the validity of a search and seizure. *Hudson v. State*, 316 Ark. 360, 872 S.W.2d 68 (1994).

Reasonable, or probable, cause for a warrantless arrest exists when the facts and circumstances within an officer's knowledge are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person to be arrested. *Hudson v. State*, 316 Ark. 360, 872 S.W.2d 68 (1994).

A violation of § 27-14-306 provides a police officer with reasonable cause to believe that the driver of the vehicle is committing a violation of the law in his presence. *Wilburn v. State*, 317 Ark. 73, 876 S.W.2d 555 (1994).

The conduct of the defendant gave reasonable cause to believe that he was in violation of § 5-71-207, the disorderly conduct statute; thus his subsequent warrantless arrest was legal under subdivision (c)(iii) of this rule. *Williams v. State*, 47 Ark. App. 143, 887 S.W.2d 312 (1994).

The smell of marijuana or its smoke emanating from a vehicle constitutes facts and circumstances sufficient to warrant a person of reasonable caution to believe that a controlled substance has been or is being possessed and/or delivered, thus giving an officer probable cause to arrest. *Brunson v. State*, 327 Ark. 567, 940 S.W.2d 440 (1997), cert. denied 522 U.S. 898, 118 S. Ct. 244, 139 L. Ed. 2d 173 (1997).

Where the officers indisputably observed defendant violate several laws while in their presence, there was a factual basis for the stop and reasonable cause for the arrest. *Hazelwood v. State*, 328 Ark. 602, 945 S.W.2d 365 (1997).

The court did not err in determining that the defendant was afforded a probable cause determination within 48 hours of his arrest where (1) it was undisputed that the determination was made at about 9:30 A.M., two days after his arrest, and (2) although there was conflicting evidence as to the time of arrest, the arrest report stated that he was arrested at 10:50 A.M. *Britt v. State*, 344 Ark. 13, 38 S.W.3d 363 (2001), questioned *Cook v. State*, 77 Ark. App. 20, 73 S.W.3d 1 (2002).

There was probable cause to support defendant's arrest because defendant was exceeding the posted speed limit, defendant was driving a car with fictitious tags, which was a crime, and both the vehicle and defendant matched the description of the robbery suspect that the police were given; thus, the officer had reasonable cause to believe that an offense had been committed by defendant. *Medlock v. State*, 79 Ark. App. 447, 89 S.W.3d 357 (2002).

On appeal of the denial of defendant's motion to suppress evidence, the state's argument that an officer could have arrested de-



fendant for loitering and searched him incident to that arrest failed; at the time the officer detained defendant, the officer could not have reasonably suspected defendant of loitering because he had not observed defendant long enough to determine if he had been “lingering” or “remaining” outside the liquor store, as was required by § 5-71-213. *Brazwell v. State*, 354 Ark. 281, 119 S.W.3d 499 (2003).

The officer’s observations with regard to the smell of alcohol and defendant’s bloodshot eyes, in addition to defendant’s refusal to take the portable breath test and his admission that he had been drinking, was sufficient to sustain the finding that there was probable cause to arrest defendant for driving while intoxicated. *Hilton v. State*, 80 Ark. App. 401, 96 S.W.3d 757 (2003).

Police officers who obtained a warrant authorizing them to arrest defendant on a charge of theft also had probable cause to arrest defendant without a warrant on charges of capital murder and aggravated robbery, thus, the trial court properly rejected defendant’s claim that statements he made to police about his participation in a capital murder and an aggravated robbery should have been suppressed. *Romes v. State*, 356 Ark. 26, 144 S.W.3d 750 (2004).

Where police discovered marijuana in a vehicle in which defendant was an occupant, the police had probable cause to arrest defendant, and the discovery of marijuana in defendant’s shoe was the result of a legal search incident to his arrest; the search was valid even though conducted before the actual arrest since the arrest and search were substantially contemporaneous and there was probable cause to arrest prior to the search. *Thornton v. State*, 85 Ark. App. 31, 144 S.W.3d 766 (2004).

No error was committed by the trial court in refusing to suppress evidence that was seized incident to defendant’s arrest because, given all the information known to the police officers, they had reasonable cause to believe that defendant had committed a felony, and they had authority under this rule, Ark. R. Crim. P. 12.1, and 12.2 to make the warrantless arrest and to conduct a limited search. *Edwards v. State*, 360 Ark. 413, 201 S.W.3d 909 (2005).

Trial court did not err in denying defendant’s motion to suppress evidence of bags of cocaine that were found in his mouth because, once an officer found a crack pipe in the backseat of the vehicle in which defendant was riding, he had probable cause to arrest defendant; after the valid arrest, the officer could search defendant’s person. *Swan v. State*, 94 Ark. App. 115, 226 S.W.3d 6 (2006).

Defendant’s arrest for DWI and search incident to arrest were proper under the stan-

dards set forth in subdivision (a)(ii)(C) of this rule and Ark. R. Crim. P. 12.1(d) because a restaurant manager had reported that defendant was intoxicated, the officer discovered defendant sitting in his vehicle, with the keys in the ignition, and he failed two field sobriety tests, thus providing probable cause for arrest. *Stewart v. State*, 2010 Ark. App. 9, — S.W.3d —, 2010 Ark. App. LEXIS 15 (Jan. 6, 2010).

Trial court committed no error in denying defendant’s motion to suppress his custodial statement and in concluding that police officers had reasonable cause to arrest him without a warrant because the facts and circumstances gave the officers reasonable cause to believe that defendant was the escaped driver who had engaged in multiple felonies earlier that day; the police were given information that a man covered in mud and shivering was in a wooded area where people normally did not go; upon investigating, the police found defendant; and his items of clothing matched the description of those worn by the driver who had escaped into the woods. *Barber v. State*, 2010 Ark. App. 210, — S.W.3d —, 2010 Ark. App. LEXIS 177 (Mar. 3, 2010).

Trial court did not err in denying defendant’s motion to suppress his statements and the items found in his possession at his arrest because his arrest was valid under this rule since the facts and circumstances were sufficient to permit a person of reasonable caution to believe that defendant had committed a felony; law enforcement officers testified that they personally believed or knew that the property to be searched under a warrant was defendant’s residence, that they found mail addressed to him and a court order from a case involving him, and that defendant and his parents began to pull into the driveway but changed course and drove off as soon as they saw that law enforcement was there. *Smith v. State*, 2011 Ark. App. 539, — S.W.3d —, 2011 Ark. App. LEXIS 563 (Sept. 14, 2011).

Denial of motion to suppress was not clearly against the preponderance of the evidence, because the inventory search of defendant’s vehicle was proper upon defendant’s lawful arrest, and it was standard police policy to inventory the contents of any vehicle before having it towed; at the time of defendant’s arrest theft of property was a Class C felony if the value of the property was less than \$2,500 but more than \$500, and criminal attempt was a Class D felony if the offense attempted was a Class C felony. *Boykin v. State*, 2012 Ark. App. 274, — S.W.3d —, 2012 Ark. App. LEXIS 369 (Apr. 18, 2012).

#### **Separation of Powers.**

Order authorizing police officers to pick up the parties’ child from the mother and deliver the child to the father for visitation did not violate the separation-of-powers doctrine. The

trial court directed officers to assist in the implementation of its order by transporting the child; as such, they were officers of the court for that purpose and were authorized to make arrests for violation thereof under subdivision (a)(iii) of this rule and § 16-81-106(c)(1). *Brock v. Eubanks*, 102 Ark. App. 165, 288 S.W.3d 272 (2008).

#### **Statement After Illegal Arrest.**

Where the defendant was jailed merely on suspicion and told to “think it over,” there was a lapse of only a few hours between the arrest and the statement, and the defendant was alternately threatened and coaxed with assurances of assistance, the state failed to demonstrate that the illegal arrest and the ensuing statement were separate and independent of each other; accordingly, the statement should have been suppressed. *Roderick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986).

#### **Statement After Warrantless Arrest.**

Where defendant may have been illegally arrested for burglary of a store, incriminating statements which he made relating to a robbery and murder at another store, after his girlfriend visited him in jail, and police informed him that she had incriminated him in the murder and robbery, were admissible in evidence at his trial for aggravated robbery, since he had twice been given his Miranda rights and had had approximately 24 hours for reflection and deliberation before giving his incriminating statement. *Brewer v. State*, 271 Ark. 810, 611 S.W.2d 179 (1981).

#### **Supersession of Statute.**

Section 16-81-114, which allows a warrantless arrest for gas theft, is not superseded by this rule. *State v. Lester*, 343 Ark. 662, 38 S.W.3d 313 (2001).

#### **Violation of Law in Officer's Presence.**

Where deputy sheriff stopped defendant's truck because the Texas license plate did not display an expiration sticker, and the deputy believed that the law of Texas, like the law of Arkansas, required license plates to display expiration stickers, then even though the deputy was erroneous, he had probable cause to make a traffic stop; it does not matter whether the defendant is actually guilty of the violation that was the basis for the stop, all that is required is that the officer had probable cause to believe that a traffic violation had occurred. *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998).

#### **Warrantless Arrest Justified.**

Circumstances justified a warrantless arrest by police summoned by the alert observer based upon exigent circumstances, or upon the “fresh pursuit” exception as defined in § 16-81-303; in any event, the defendant's failure to show that the arrest was not based

on reasonable cause under this rule prevented him from overcoming the presumption on appeal that the arrest was legal. *Thorne v. State*, 274 Ark. 102, 622 S.W.2d 178 (1981), cert. denied 455 U.S. 1024, 102 S. Ct. 1726, 72 L. Ed 2d 144 (1982).

Where the officer had personal observations sufficient to warrant his belief that the defendant was intoxicated, and he had reasonably trustworthy information from a deputy sheriff that he had observed the defendant operating a motor vehicle in that condition a few minutes earlier, the arresting officer had reasonable cause for the arrest without a warrant. *Wright v. State*, 17 Ark. App. 24, 702 S.W.2d 811 (1986).

Where officers witnessed defendant carrying freshly-cut marijuana stalks across his yard, clearly giving them reasonable cause to believe he was committing a felony, they were authorized to arrest without a warrant under subdivision (a)(i) of this rule. *Johnson v. State*, 291 Ark. 260, 724 S.W.2d 160, cert. denied 484 U.S. 830, 108 S. Ct. 101, 98 L. Ed. 2d 61 (1987).

Warrantless arrest of defendant at his motel was not illegal. *Ross v. State*, 300 Ark. 369, 779 S.W.2d 161 (1989).

Arrest without a warrant was in violation of subsection (d) of this rule, where the arrest was made by an officer who did not personally possess the information constituting reasonable cause and who was not instructed by officers of another jurisdiction, who did possess the information constituting reasonable cause, to arrest defendant but only requested other law enforcement agencies to stop defendant and hold him for questioning. *Friend v. State*, 315 Ark. 143, 865 S.W.2d 275 (1993).

Officers who collectively were aware that victim had been killed, that defendant's voice was heard at the time victim was murdered, and that defendant was apparently the assailant, had reasonable cause to arrest without a warrant. *Williams v. State*, 321 Ark. 344, 902 S.W.2d 767, cert. denied 516 U.S. 1030, 116 S. Ct. 676, 133 L. Ed 2d 525 (1995).

Officers had reasonable cause to believe, at the time of defendant's arrest, that he had committed a felony by working together with codefendant in the trafficking of drugs; an informant had implicated both defendant and codefendant in the trafficking of cocaine and, acting on that information, officers arrested codefendant, who admitted to all allegations, including codefendant's having worked with defendant in the purchase and sale of cocaine, and when officers asked codefendant to arrange a meeting with defendant, codefendant had no trouble in doing so. *Baxter v. State*, 324 Ark. 440, 922 S.W.2d 682 (1996).

The warrantless arrest of the defendant for robbery was justified where the defendant matched the description of one of the robbers,



and where he was seen within a block of the scene of the robbery within minutes of its commission provided the police with reasonable cause to believe that he had committed the crime. *McKenzie v. State*, 69 Ark. App. 186, 12 S.W.3d 250 (2000).

There was probable cause to arrest the defendant without regard to the validity of a warrant where (1) the arresting officers had information that the defendant was seen at the site of a multiple-killing homicide at about the same time that the victims were allegedly killed, with one of the victims being his girlfriend who had recently accused him of battery, and (2) before the police could even approach the defendant to detain him for investigatory purposes, he fled from them while armed with a weapon. *Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001).

Trial court did not err in finding that defendant's arrest was valid; given that defendant was the last person seen at the crime scene, defendant's girlfriend gave police the murder weapon, and defendant had access to a gun, the police had probable cause to arrest defendant without a warrant pursuant to this rule. *Winston v. State*, 355 Ark. 11, 131 S.W.3d 333 (2003).

Police officer's inability to determine at the time of the arrest the particular offense that defendant had committed did not make the arrest illegal, especially where defendant's statement regarding his attempt to contact his wife, coupled with his statement that there was an updated order of protection, provided the officer with probable cause to believe that defendant was committing the offense of violation of an order of protection by attempting to harass his wife. *West v. State*, 82 Ark. App. 165, 120 S.W.3d 100 (2003).

Where defendant confessed to the shooting shortly after being brought to the police station, the officers had sufficient evidence to justify his arrest. *Otis v. State*, 364 Ark. 151, 217 S.W.3d 839 (2005).

Judgment notwithstanding the verdict was properly granted in a malicious prosecution case where the passenger of a truck was arrested when the vehicle bumped a key-card entry gate; even if there was no damage to the gate or a mistake about such, there was still probable cause for an arrest for criminal mischief or attempt under subsection (c) of this rule. *Coombs v. Hot Springs Vill. Prop. Owners Ass'n*, 98 Ark. App. 226, 254 S.W.3d 5 (2007).

Motion to suppress evidence was properly denied based on an allegedly illegal arrest because, where officers saw two defendants enter two retail stores and purchase pseudoephedrine, there was probable cause to arrest them under subdivision (a)(iii) of this rule; the officers suspected that defendants were over the legal limit due to their pur-

chases. *Champlin v. State*, 98 Ark. App. 305, 254 S.W.3d 780 (2007).

Police officer had reasonable cause to believe that defendant had committed an offense involving the domestic abuse of his wife and child, even if he did not articulate the specific offense, and thus was entitled to arrest defendant without a warrant. The police officer, who was dispatched to defendant's home after receiving a domestic-disturbance call, arrested defendant after learning from defendant's wife and neighbors that defendant had thrown dishes and candles at his wife and child, had shaken his wife to the extent of leaving marks on her, and threatened her. *Koster v. State*, 374 Ark. 74, 286 S.W.3d 152 (2008).

Where a confidential informant appeared at a drug dealer's home to buy drugs, the drug dealer's wife contacted defendant, and defendant immediately left his home carrying a package, drove to the dealer's home, entered the home without knocking, and left a short time thereafter without the package, the police had probable cause to effect a warrantless arrest of defendant because the evidence essentially established a call by a known drug dealer requesting the delivery of narcotics from a supplier, immediate movement by a known drug supplier who was the suspected supplier, direct travel by that supplier to the source of the supply request, and the apparent delivery of a package. While this proof may not have been sufficient to convict defendant, it provided sufficient probable cause to make an arrest. *Pullan v. State*, 104 Ark. App. 78, 289 S.W.3d 180 (2008).

Evidence seized upon defendant's arrest did not violate his rights under the U.S. Constitution, Ark. Const., Art. 2, § 15, or Ark. R. Crim. P. 3.1 and this rule because defendant's erratic driving in a high crime area provided a reasonable suspicion to stop him, and defendant's attempts to hide his identity from the officer provided probable cause for his arrest. *Mosley v. Ark.*, 2009 Ark. App. 799, — S.W.3d —, 2009 Ark. App. LEXIS 989 (2009).

#### **Warrantless Arrest Not Justified.**

Defendant's motion to suppress should have been granted where the officers lacked probable cause to arrest him for driving under a suspended or revoked driver's license and consequently were precluded from inventorying his impounded vehicle in which 60 kilograms (130 pounds) of cocaine were discovered. *Mounts v. State*, 48 Ark. App. 1, 888 S.W.2d 321 (1994).

**Cited:** *Thompson v. City of Little Rock*, 264 Ark. 213, 570 S.W.2d 262 (1978); *Moore v. State*, 265 Ark. 20, 576 S.W.2d 211 (1979); *United States v. Davis*, 785 F.2d 610 (8th Cir. 1986); *Campbell v. State*, 294 Ark. 639, 746 S.W.2d 37 (1988); *Guinn v. State*, 27 Ark. App. 260, 771 S.W.2d 290 (1989); *Gonzalez v. State*,

32 Ark. App. 10, 794 S.W.2d 620 (1990); *Ray v. State*, 304 Ark. 489, 803 S.W.2d 894, cert. denied 501 U.S. 1222, 111 S. Ct. 2837, 115 L. Ed. 2d 1005 (1991); *State v. Pulaski County Circuit-Chancery Court*, 316 Ark. 473, 872 S.W.2d 854 (1994); *State v. Pulaski County Circuit Court*, 326 Ark. 886, 934 S.W.2d 915

(1996), reaff'd in part 327 Ark. 287, 938 S.W.2d 815 (1997); *Brown v. State*, 54 Ark. App. 44, 924 S.W.2d 251 (1996); *Williams v. State*, 327 Ark. 97, 938 S.W.2d 547 (1997); *Humphrey v. State*, 327 Ark. 753, 940 S.W.2d 860 (1997).

## Rule 4.2. Authority to arrest with warrant.

Any law enforcement officer may arrest a person pursuant to a warrant in any county in the state.

### 1987 Unofficial Supplementary Commentary to Rule 4.2

#### Warrantless Extraterritorial Arrests.

Though authority to make arrests with warrants is precisely defined by Rule 4.2, questions about the legality of warrantless arrests by local officers beyond the boundaries

of their political subdivisions must be resolved by reference to less certain "fresh pursuit" standards. Ark. Stat. Ann. §§ 43-501, 503 (Repl. 1977); *Logan v. State*, 264 Ark. 920, 576 S.W.2d 203 (1979).

## RESEARCH REFERENCES

**Ark. L. Rev. Arrests, Citation and Summons — The Supreme Court Takes a Giant Step Forward**, 30 Ark. L. Rev. 137.

## CASE NOTES

### ANALYSIS

Arrest without warrant.  
Illegal arrest.

#### Arrest Without Warrant.

Where two officers from one county were accompanied by a police officer of the county in which the arrest was made, at the time of the arrest, no warrant was needed. *Logan v.*

*State*, 264 Ark. 920, 576 S.W.2d 203 (1979).

#### Illegal Arrest.

An illegal arrest is not grounds for dismissal of criminal charges. *State v. Fore*, 46 Ark. App. 27, 876 S.W.2d 278 (1994).

**Cited:** *Stephens v. State*, 342 Ark. 151, 28 S.W.3d 260 (2000), cert. denied 531 U.S. 1199, 121 S. Ct. 1206, 149 L. Ed. 2d 120 (2001).

## Rule 4.3. Arrest pursuant to warrant: possession of warrant unnecessary.

A law enforcement officer need not have a warrant in his possession at the time of an arrest, but upon request he shall show the warrant to the accused as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall inform the accused of the fact that the warrant has been issued.

## RESEARCH REFERENCES

**Ark. L. Rev. Arrest, Citation and Summons — The Supreme Court Takes a Giant Step Forward**, 30 Ark. L. Rev. 137.

## CASE NOTES

**Cited:** *Stephens v. State*, 342 Ark. 151, 28 S.W.3d 260 (2000), cert. denied 531 U.S. 1199, 121 S. Ct. 1206, 149 L. Ed. 2d 120 (2001).



**Rule 4.4. Procedures on arrest.**

Upon making an arrest, a law enforcement officer shall

- (a) identify himself as such unless his identity is otherwise apparent;
- (b) inform the arrested person that he is under arrest; and
- (c) as promptly as is reasonable under the circumstances, inform the arrested person of the cause of the arrest.

**Comment to Rule 4.4**

This rule does not attempt to set out all warnings which might be required or advisable in an arrest context. Accordingly, the rule should not be interpreted as relaxing any obligation to provide constitutionally required warnings.

**1987 Unofficial Supplementary Commentary to Rule 4.4**

**Failure to Inform Defendant that He Is Under Arrest.**

In *Williams v. State*, 278 Ark. 9, 642 S.W.2d 887 (1982), the appellant sought to suppress evidence seized after an arrest, arguing that no one told him that he had been arrested. The Court rejected the argument, holding that formal words of arrest are not essential. Implicit in the *Williams* decision is the notion

that the state will not be permitted to rely on an officer's failure to utter "magic words" to avoid the constitutional circumscriptions on questioning that come into being after arrest. Interrogations following restraint clearly constituting arrest cannot be characterized as non-custodial simply because the officer did not take the time to verbally apprise a defendant of his arrest.

**RESEARCH REFERENCES**

**Ark. L. Rev.** Arrest, Citation and Summons — The Supreme Court Takes a Giant Step Forward, 30 Ark. L. Rev. 137.

**CASE NOTES**

**ANALYSIS**

**Illegal arrest.**  
**Interrogation.**

**Illegal Arrest.**

An illegal arrest is not grounds for dismissal of criminal charges. *State v. Fore*, 46 Ark. App. 27, 876 S.W.2d 278 (1994).

**Interrogation.**

Officers did not reinitiate further communication with defendant simply by telling him

that he was going to be held overnight. The officers had a duty to inform appellant that he was under arrest under subsection (b). Words or conduct on the part of the police normally attendant to arrest and custody do not constitute interrogation. *Brunson v. State*, 41 Ark. App. 39, 848 S.W.2d 936 (1993).

**Rule 4.5. Limitations on questioning.**

No law enforcement officer shall question an arrested person if the person has indicated in any manner that he does not wish to be questioned, or that he wishes to consult counsel before submitting to any questioning.

**RESEARCH REFERENCES**

**Ark. L. Rev.** Arrest, Citation and Summons — The Supreme Court Takes a Giant Step Forward, 30 Ark. L. Rev. 137.

## CASE NOTES

## ANALYSIS

Invocation of right to remain silent.  
Waiver.

**Invocation of Right to Remain Silent.**

Circuit court erroneously denied defendant's motion to suppress his statement given after he was apprehended by police on the night of a murder because (1) defendant indicated, "I don't want to say anything right now," immediately upon being advised of his Miranda rights; (2) defendant's response was an invocation of his right to remain silent and an initial indication that he did not wish to be questioned; (3) having invoked his Miranda rights under both Miranda and this rule, law enforcement was obligated to scrupulously honor defendant's assertion of his rights and should have refrained from continuing to ask defendant about the crime; and (4) defendant's subsequent conversation with a police officer was not initiated by defendant. *Robinson v. State*, 373 Ark. 305, 283 S.W.3d 558 (2008).

None of defendant's statements unambiguously and unequivocally indicated defendant's right to remain silent or a right to counsel; defendant was conscious of his Miranda rights and he continued to talk to the officer and answer his questions even though he knew it was against his best interest, and there was no error in allowing the indicated portions of the custodial statement. *Sykes v. State*, 2009 Ark. 522, 357 S.W.3d 882 (2009).

Appellant argued that the circuit court should have suppressed his statement because he invoked his right to remain silent; however, viewing that statement in context, it was made after appellant repeatedly denied sexually assaulting the victim and the detective repeatedly refused to believe appellant. In essence, appellant and the detective were arguing and appellant was informing the detective that if he did not believe him, then there was nothing left to discuss; however, appellant kept talking, denying involvement, so appellant's statement was not an unequiv-

ocal request invoking his right to remain silent and pursuant to Bowen, his willingness to continue the conversation implicitly waived any attempt to invoke that right. *Bryant v. State*, 2010 Ark. 7, — S.W.3d —, 2010 Ark. LEXIS 22 (Jan. 14, 2010).

Defendant's question to an interrogating officer — "How soon can I talk to an attorney?" — was not an unambiguous and unequivocal request for an attorney. Further, the officer informed defendant of the process by which he could obtain an attorney, and defendant continued with his confession without further referencing his desire for an attorney. *Davis v. State*, 2011 Ark. App. 686, — S.W.3d —, 2011 Ark. App. LEXIS 722 (Nov. 9, 2011).

**Waiver.**

Trial court did not err in denying defendant's motion to suppress certain statements she made during questioning regarding her missing child; although defendant claimed that she had done the best she could to convey to the officer that she was concerned about continuing to talk to him without a lawyer present, when the officer asked defendant whether she was asking for a lawyer, she did not answer that question but continued answering other questions and did not mention a lawyer again during the interview. *Gilbert v. State*, 88 Ark. App. 296, 198 S.W.3d 561 (2004).

Defendant's in-custody statement was voluntary and admissible because defendant waived her Miranda rights by implication because defendant was advised of her Miranda rights by an Arkansas state trooper prior to an interrogation by a county sheriff, the county sheriff specifically asked defendant if she had been advised of her rights, and when she answered that she had, the county sheriff asked if keeping that in mind she wished to speak with him, and defendant responded that she did. *Young v. State*, 373 Ark. 41, 281 S.W.3d 255 (2008).

**Rule 4.6. Procedures on arrest: prompt taking to police station.**

Any person arrested, if not released pursuant to these rules, shall be brought promptly to a jail, police station, or other similar place. The arresting officer may, however, first take the person to some other place, if:

- (a) the person so requests; or
- (b) such action is reasonably necessary for the purpose of having the person identified:
  - (i) by a person who is otherwise unlikely to be able to make the identification; or



(ii) by a person near the place of the arrest or near the scene of a recently committed offense.

#### RESEARCH REFERENCES

**Ark. L. Rev.** Arrest, Citation and Summons — The Supreme Court Takes a Giant Step Forward, 30 Ark. L. Rev. 137.

#### CASE NOTES

**Cited:** Pursley v. State, 302 Ark. 471, 791 S.W.2d 359 (1990).

### **Rule 4.7. Recording Custodial Interrogations [Effective September 1, 2012].**

(a) Whenever practical, a custodial interrogation at a jail, police station, or other similar place, should be electronically recorded.

(b)(1) In determining the admissibility of any custodial statement, the court may consider, together with all other relevant evidence and consistent with existing law, whether an electronic recording was made; if not, why not; and whether any recording is substantially accurate and not intentionally altered.

(2) The lack of a recording shall not be considered in determining the admissibility of a custodial statement in the following circumstances:

(A) a statement made by the accused in open court at his or her trial, before a grand jury, or at a preliminary hearing,

(B) a statement made during a custodial interrogation that was not recorded because electronic recording was not practical,

(C) a voluntary statement, whether or not the result of a custodial interrogation, that has a bearing on the credibility of the accused as a witness,

(D) a spontaneous statement that is not made in response to a question,

(E) a statement made after questioning that is routinely asked during the processing of the arrest of the suspect,

(F) a statement made during a custodial interrogation by a suspect who requests, prior to making the statement, to respond to the interrogator's questions only if an electronic recording is not made of the statement, provided that an electronic recording is made of the statement of agreeing to respond to the interrogator's question, only if a recording is not made of the statement, or

(G) a statement made during a custodial interrogation that is conducted out-of-state.

(3) Nothing in this rule precludes the admission of a statement that is used only for impeachment and not as substantive evidence.

(c) An electronic recording must be preserved until the later of:

(1) the date on which the defendant's conviction for any offense relating to the statement is final and all direct and post-conviction proceedings are exhausted, or

(2) the date on which the prosecution for all offenses relating to the statement is barred by law.

(d) In this rule, “electronic recording” includes motion picture, audiotape, or videotape, or digital recording. (Adopted June 22, 2012, effective September 1, 2012.)

**Reporter’s Notes, 2012:** This rule was added in 2012 in response to the decision in *Clark v. State*, 374 Ark. 292, 287 S.W.3d 567 (2008). The rule does not mandate the record-

ing of all custodial statements. Instead, it allows the trial court to consider the failure to record a statement in determining the admissibility of the statement.

## RULE 5. RELEASE BY A LAW ENFORCEMENT OFFICER ACTING WITHOUT AN ARREST WARRANT

### Rule 5.1. Definitions.

For the purposes of this Article, unless the context otherwise plainly requires:

(a) “Citation” means a written order, issued by a law enforcement officer who is authorized to make an arrest, requiring a person accused of violating the law to appear in a designated court or governmental office at a specified date and time.

(b) “Summons” means an order issued by a judicial officer or, pursuant to the authorization of a judicial officer, by the clerk of a court, requiring a person against whom a criminal charge has been filed to appear in a designated court at a specified date and time.

(c) “Order to appear” means an order issued by a judicial officer at or after the defendant’s first appearance releasing him from custody or continuing him at large pending disposition of his case but requiring him to appear in court or in some other place at all appropriate times.

(d) “Release on own recognizance” means the release of a defendant without bail upon his promise to appear at all appropriate times, sometimes referred to as “personal recognizance.”

(e) “Release on bail” means the release of a defendant upon the execution of a bond, with or without sureties, which may be secured by the pledge of money or property.

(f) “First appearance” means the first proceeding at which a defendant appears before a judicial officer.

### RESEARCH REFERENCES

**Ark. L. Rev.** Arrest, Citation and Summons — The Supreme Court Takes a Giant Step Forward, 30 Ark. L. Rev. 137.

### CASE NOTES

#### ANALYSIS

Citation.  
Release on own recognizance.  
Speedy trial.

#### Citation.

The traffic bureau is a “governmental office” as that term is used in subdivision (a) of this rule, and therefore, a written order issued by a police officer commanding the defendant to

appear at the traffic bureau at the police department anytime before a specified date, sufficiently complied with the requirements of ARCrP 5.3 by designating a time, place, and court for the appearance of the accused. *Gullett v. State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986).

Citation to appear in court was not an arrest. *Mosley v. State*, 22 Ark. App. 29, 732 S.W.2d 861 (1987).



**Release on Own Recognizance.**

When petitioner refused to make a single, direct response to the court that he would appear for trial or hearing as directed, he was not entitled to release prior to trial other than by bail. *Wade v. Tomlinson*, 284 Ark. 432, 682 S.W.2d 751 (1985).

**Speedy Trial.**

Where the deputy sheriff issued a citation to appear in court in lieu of arrest, as authorized under ARCrP 5.2(a) and subsection (a)

of this rule, and the defendant was arrested when he appeared on his court date, the twelve-month speedy-trial time commenced from the date of arrest, not from the citation date. *Clifton v. State*, 326 Ark. 251, 930 S.W.2d 354 (1996).

**Cited:** *Manatt v. State*, 311 Ark. 17, 842 S.W.2d 845 (1992), cert. denied 507 U.S. 1005, 113 S. Ct. 1647, 123 L. Ed. 2d 268 (1993); *Whitaker v. State*, 37 Ark. App. 112, 825 S.W.2d 827 (1992).

**Rule 5.2. Authority to issue citations.**

(a) A law enforcement officer in the field acting without a warrant who has reasonable cause to believe that a person has committed any misdemeanor may issue a citation in lieu of arrest or continued custody.

(b) When a person is arrested for any misdemeanor, the ranking officer on duty at the place of detention to which the arrested person is taken may issue a citation in lieu of continued custody.

(c) Upon the recommendation of a prosecuting attorney, the ranking officer on duty at the place of detention to which the arrested person is taken may issue a citation in lieu of continued custody when the person has been arrested for a felony.

(d) In determining whether to continue custody or issue a citation under (a) or (b) above, the officer shall inquire into and consider facts about the accused, including but not limited to:

- (i) place and length of residence;
- (ii) family relationships;
- (iii) references;
- (iv) present and past employment;
- (v) criminal record; and
- (vi) other relevant facts such as:
  - (A) whether an accused fails to identify himself satisfactorily;
  - (B) whether an accused refuses to sign a promise to appear pursuant to citation;
  - (C) whether detention is necessary to prevent imminent bodily harm to the accused or to another;
  - (D) whether the accused has ties to the jurisdiction reasonably sufficient to assure his appearance and there is a substantial likelihood that he will respond to a citation;
  - (E) whether the accused previously has failed to appear in response to a citation.

**Comment to Rule 5.2**

Maximum use of citations should be encouraged in circumstances where issuance of a citation is consistent with the effective enforcement of the law. Accordingly, a law enforcement officer having grounds for making an arrest should take the accused into custody or, already having done so, detain him

further only when such action is required by the need to carry out legitimate investigative functions, to protect the accused or others where his continued liberty would constitute a risk of immediate harm or when there are reasonable grounds to believe that the accused will fail to respond to a citation.

## RESEARCH REFERENCES

**Ark. L. Rev.** Arrest, Citation and Summons — The Supreme Court Takes a Giant Step Forward, 30 Ark. L. Rev. 137.

## CASE NOTES

**Speedy Trial.**

Where the deputy sheriff issued a citation to appear in court in lieu of arrest, as authorized under ARCrP 5.1(a) and subsection (a) of this rule, and the defendant was arrested when he appeared on his court date, the twelve-month speedy-trial time commenced from the date of arrest, not from the citation date. *Clifton v. State*, 326 Ark. 251, 930 S.W.2d 354 (1996).

**Cited:** *Thompson v. City of Little Rock*, 264 Ark. 213, 570 S.W.2d 262 (1978); *Mosley v. State*, 22 Ark. App. 29, 732 S.W.2d 861 (1987); *Asher v. State*, 300 Ark. 57, 776 S.W.2d 816 (1989), criticized *Key v. State*, 300 Ark. 66, 776 S.W.2d 820 (1989); *McDaniel v. State*, 309 Ark. 20, 826 S.W.2d 286 (1992); *Manatt v. State*, 311 Ark. 17, 842 S.W.2d 845 (1992), cert. denied 507 U.S. 1005, 113 S. Ct. 1647, 123 L. Ed. 2d 268 (1993).

**Rule 5.3. Form of citation.**

- (a) Every citation issued to a person shall:
  - (i) be in writing;
  - (ii) state the name of the officer issuing it with the title of his office;
  - (iii) state the date of issuance and the municipality or county where issued;
  - (iv) specify the name of the accused and the offense alleged;
  - (v) designate a time, place, and court for the appearance of the accused; and
  - (vi) except in case of an electronic citation, provide a space for the signature of the accused acknowledging his promise to appear.

(b) Every citation shall inform the accused that failure to appear at the stated time, place, and court may result in his arrest and shall constitute a separate offense for which he may be prosecuted. (Amended February 23, 2012, effective April 1, 2012.)

**Reporter's Notes, 2012 Amendment:** Prior to the 2012 amendment, subsection (a)(ii) required the issuing officer to sign a citation. As amended, the subsection requires only that the citation state the name of the

issuing officer. This change, as well as addition of the exception clause to subsection (a)(vi), was prompted by Act 908 of 2011, which authorizes the use of electronic citations.

## RESEARCH REFERENCES

**Ark. L. Rev.** Arrest, Citation and Summons — The Supreme Court Takes a Giant Step Forward, 30 Ark. L. Rev. 137.

## CASE NOTES

**Sufficiency of Citation.**

The traffic bureau is a "governmental office" as that term is used in ARCrP 5.1(a), and therefore, a written order issued by a police officer commanding the defendant to appear at the traffic bureau at the police department anytime before a specified date, sufficiently

complied with the requirements of this rule by designating a time, place, and court for the appearance of the accused. *Gullett v. State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986).

Where the traffic ticket that the defendant received clearly apprised him of the charges against him and the time during which he



could appear before the traffic bureau to have his court date set, and the defendant did not show how he was prejudiced by the failure of the police officer to write the title of his office on the ticket, the trial court did not err in refusing to grant defendant's motion to dismiss. *Gullett v. State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986).

Where defendant had actual notice of the DWI charge against her, she was given copies of documents indicating the charge and the court and date on which she was to appear,

and a completed citation was filed in the municipal court, the defendant was properly charged even though the copy of the citation given to her was only partially filled out. *Leroy v. City of Springdale*, 47 Ark. App. 18, 883 S.W.2d 847 (1994).

**Cited:** *Thompson v. City of Little Rock*, 264 Ark. 213, 570 S.W.2d 262 (1978); *Mosley v. State*, 22 Ark. App. 29, 732 S.W.2d 861 (1987); *Jones v. City of Newport*, 29 Ark. App. 42, 780 S.W.2d 338 (1989); *Whitaker v. State*, 37 Ark. App. 112, 825 S.W.2d 827 (1992).

#### Rule 5.4. Procedure for issuing citations.

(a) In issuing a citation the officer shall deliver one (1) copy of the citation to the accused.

(b) The officer shall thereupon release the accused or, if the person appears mentally or physically unable to care for himself, take him to an appropriate medical facility.

(c) As soon as practicable, one (1) copy of the citation shall be filed with the court specified therein, and one (1) copy shall be delivered to the prosecuting attorney. If an electronic citation is issued, (i) either a written or electronic copy of the citation shall be filed with the court specified therein as designated by the clerk of that court, and (ii) either a written or electronic copy of the citation shall be delivered to the prosecuting attorney as designated by the prosecuting attorney. (Amended February 23, 2012, effective April 1, 2012.)

**Reporter's Notes, 2012 Amendment:** The 2012 amendment added the final sen-

tence of subsection (c). See Act 908 of 2011 authorizing the use of electronic citations.

#### RESEARCH REFERENCES

**Ark. L. Rev.** Arrest, Citation and Summons — The Supreme Court Takes a Giant Step Forward, 30 Ark. L. Rev. 137.

#### CASE NOTES

##### Sufficiency of Copy.

Where defendant had actual notice of the DWI charge against her, she was given copies of documents indicating the charge and the court and date on which she was to appear, and a completed citation was filed in the municipal court, the defendant was properly

charged even though the copy of the citation given to her was only partially filled out. *Leroy v. City of Springdale*, 47 Ark. App. 18, 883 S.W.2d 847 (1994).

**Cited:** *Thompson v. City of Little Rock*, 264 Ark. 213, 570 S.W.2d 262 (1978).

#### Rule 5.5. [Abolished.]

**Publisher's Notes.** In light of the United States Supreme Court's decision in *Knowles v. Iowa*, 525 U.S. 113, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998) Rule 5.5 of the Rules of Criminal Procedure was repealed, effective June 24, 1999. In *Knowles v. Iowa*, the Supreme Court held that the full search of an automo-

bile, with neither the automobile driver's consent nor probable cause to conduct the search, by a police officer who stops the driver for speeding and issues the driver a citation rather than arresting the driver, as authorized by state statute, violates the Federal Constitution's Fourth Amendment.

## RULE 6. ISSUANCE OF SUMMONS IN LIEU OF ARREST WARRANT

### Rule 6.1. Authority to issue summons.

(a) A judicial officer with the authority to issue an arrest warrant may issue, or authorize the clerk of the court to issue, a criminal summons in lieu thereof in any case in which a complaint, information, or indictment is filed or returned against a person not already in custody.

(b) A prosecuting attorney who files an information or approves the filing of a complaint against a person not already in custody may authorize the clerk of a court to issue a criminal summons in lieu of an arrest warrant.

(c) A summons shall not be issued pursuant to this Rule if:

(i) the offense, or the manner in which it was committed, involved violence to a person or the risk or threat of imminent serious bodily injury; or

(ii) it appears that the person charged would not respond to a summons.

In determining whether the defendant would respond to a summons, appropriate considerations include, but are not limited to:

(A) the nature and circumstances of the offense charged;

(B) the weight of the evidence against the person;

(C) place and length of residence;

(D) present and past employment;

(E) family relationship;

(F) financial circumstances;

(G) apparent mental condition;

(H) past criminal record;

(I) previous record of appearance at court proceedings; and

(J) any other relevant information. (Amended November 8, 2007.)

#### Reporter's Notes, 2007 Amendment:

The 2007 amendments made minor editorial changes to subsection (a) and rephrased subsection (b). Subsection (c), which was added in 2007, is based on language originally found in Rule 7.1.

In *Johnson v. State*, 98 Ark. App. 245, 254 S.W.3d 794 (2007), the Court of Appeals held

that issuance of a summons is mandatory unless the defendant is charged with a violent offense or it appears that the defendant will not respond to a summons. The 2007 changes to Rule 6.1 and Rule 7.1 were intended to make clear that use of a summons rather than an arrest warrant is discretionary.

### Comment to Rule 6.1

In determining whether to issue a criminal summons or arrest warrant, the official should require the applicant for the arrest warrant or criminal summons to provide such information as may be reasonably obtained concerning the accused's:

(i) residence;

(ii) employment;

(iii) family relationship;

(iv) past history of response to legal process; and

(v) past criminal record.

A summons should be issued in lieu of an arrest warrant when the prosecuting attorney so requests.

### Rule 6.2. Form of summons.

(a) A summons shall:

(i) be in writing;

(ii) be signed by the officer issuing it with the title of his office;



(iii) state the date of issuance and the municipality or county where issued;

(iv) specify the name of the accused and the offense alleged;

(v) designate a time, place, and court for the appearance of the accused; and

(vi) have attached a copy of the information, complaint or indictment.

(b) Every summons shall inform the accused that failure to appear at the stated time, place, and court may result in his arrest and shall constitute a separate offense for which he may be prosecuted.

#### RESEARCH REFERENCES

**Ark. L. Rev.** Arrest, Citation and Summons — The Supreme Court Takes a Giant Step Forward, 30 Ark. L. Rev. 137.

### Rule 6.3. Service of criminal summons.

Criminal summons may be served by:

(a) any method prescribed for personal service of civil process; or

(b) certified mail, for delivery to addressee only with return receipt requested.

#### CASE NOTES

##### ANALYSIS

Burden of proof.

Criminal contempt.

##### Burden of Proof.

Trial court erred in denying defendant's motion for a directed verdict because the prosecution failed to present sufficient evidence that defendant had actual notice that she was to appear for her arraignment; given that the state failed to prove that defendant was set at liberty upon condition that she

appear at a specified time, place, and court or that the attempted summons was served in compliance with this rule, the state failed to meet its burden of proof of notice. *Stewart v. State*, 89 Ark. App. 86, 200 S.W.3d 465 (2004).

##### Criminal Contempt.

Service in a criminal contempt proceeding was governed by § 16-10-108, rather than this rule. *Arkansas Dep't of Human Servs. v. R.P.*, 333 Ark. 516, 970 S.W.2d 225 (1998).

## RULE 7. ARREST WITH A WARRANT

### Rule 7.1. Arrest with a warrant: basis for issuance of arrest warrant.

(a) A judicial officer may issue an arrest warrant for a person who has failed to appear in response to a summons or citation.

(b) In addition, a judicial officer may issue a warrant for the arrest of a person if, from affidavit, recorded testimony, or other information, it appears there is reasonable cause to believe an offense has been committed and the person committed it. A judicial officer may issue a summons in lieu of an arrest warrant as provided in Rule 6.1.

(c) A judicial officer who has determined in accordance with Rule 7.1(b) that an arrest warrant should be issued may authorize the clerk of the court or his deputy to issue the warrant. (Amended June 6, 1994; November 8, 2007.)

**Reporter's Notes, 2007 Amendment:** The 2007 amendments deleted language that

addressed at length the issuance of a criminal summons in lieu of an arrest warrant. The

amendments were intended to overturn *Johnson v. State*, 98 Ark. App. 245, 254 S.W.3d 794 (2007), insofar as that case held that issuance

of a summons was mandatory in certain cases.

### 1987 Unofficial Supplementary Commentary to Rule 7.1

#### Standard of Review.

On appeal, all presumptions are favorable to the trial court's ruling on the legality of an arrest, the burden being on appellant to demonstrate error. *Hines v. State*, 289 Ark. 50, 709 S.W.2d 65 (1986).

#### Pretextual Arrests.

A pretextual arrest is one made solely to permit exploration for evidence where no reasonable cause exists for a search. The Arkansas Supreme Court has recognized that an arrest may not be used as a pretext to search for evidence. *Richardson v. State*, 288 Ark. 407, 706 S.W.2d 363 (1986), relying upon *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877 (1932). The Court will inquire into an arresting officer's actual motivation to ascertain whether he had an ulterior motive. A "but for" standard is employed:

Confusion can be avoided by applying a "but for" approach, that is, would the arrest not have occurred but for the other, typically the more serious, crime. Where the police have a dual motive in making an arrest, what might be termed the covert [sic] motive is not tainted by the overt [sic] motive, even though the covert motive may be dominant, so long as the arrest would have been carried out had the covert motive been absent ... Because the action would have been taken in any event, [Professor La Fave] states, "There is no conduct which ought to have been deterred and, thus, no reason to bring the Fourth Amendment exclusionary rule into play." (Citations omitted.)

*Hines v. State*, 289 Ark. 50, 55, 709 S.W.2d 65, 68 (1986).

As might be expected, stating the standard is simpler than applying it. In *Hines*, the Court noted that appellant, who had been convicted of murder, was originally arrested on a misdemeanor warrant for an unrelated offense after he appeared at a police station voluntarily, perhaps having heard that his sister-in-law had been arrested for the same minor offense. While in custody for the misdemeanor, he confessed to the murder. The Court noted that an arrest under the warrant for the misdemeanor would have occurred in any event, a finding undercut somewhat by the Court's recognition that the prosecuting attorney signing the information for the warrant knew that appellant was under investigation for the murder, so his motivation for issuing the misdemeanor warrant was subject to question. It should also be noted that the

Court might have avoided the issue entirely by taking the position that appellant's arrest under the warrant was irrelevant and a warrantless arrest justified, given his sister-in-law's statement that he had told her he killed decedent. See *Allen v. State*, 277 Ark. 380, 641 S.W.2d 710 (1982) and discussion below. But, because appellant was arrested pursuant to a warrant obtained by a private citizen without contrivance by any police agency, the Court found that whatever covert motive might have existed was not such as to taint the arrest and call for exclusion of the confession.

In *Richardson v. State*, the Court found that an arrest for public intoxication at a sheriff's office was pretextual and suppressed physical evidence seized from appellant's person in a search incident to the arrest. Appellant had come to the sheriff's office in the course of an investigation of the death of a relative the preceding evening. Drinking from a bottle concealed in his boot during frequent trips to a bathroom, appellant became intoxicated and was ultimately arrested by officers who found incriminating evidence in a search of his pockets. After he had been jailed, his clothes were sent to a crime lab where bloodstains were matched to the blood type of decedent. Citing authority from a number of jurisdictions, the Court found pretext from the fact that the searches had no relation to the nature and purpose of the arrest for public intoxication and from the circumstance that each law enforcement officer testified at trial that appellant could not have left the sheriff's office because he was a suspect in a murder and arson investigation. The officers' failure to comply with Rule 2.3 — they did not advise claimant that he did not have to appear at the station — was seen as indicative that he was under investigation and was not really considered a witness.

How *Richardson* would have been decided under the "but for" standard subsequently adopted in *Hines* is not free from doubt. The problematical aspect of the "but for" approach is that it is not clear that a justifiable arrest founded on reasonable cause will in all cases satisfy the rule. Thus, the Court in *Richardson* might have concluded that the police had grounds for arresting appellant for public intoxication but that the arrest would not have been made in the absence of a covert motive. This analysis would result in a finding that the arrest was pretextual and call for exclusion of the evidence.

How the "but for" standard is to be applied



in practice is also uncertain. Suppose a defendant is convicted of a felony based on evidence seized after an intoxication arrest. May he, in questioning whether the arrest was pretextual, adduce testimony that because of manpower and budgetary constraints law enforcement officers in a community do not customarily arrest persons for misdemeanor intoxication violations?

#### **Independent Adequate Grounds for Warrantless Arrest.**

The Arkansas Supreme Court has held that an arrest pursuant to a defective warrant is not illegal where independent adequate grounds justify a warrantless arrest. *Allen v. State*, 277 Ark. 380, 641 S.W.2d 710 (1982). Appellant argued that his arrest was unlawful on grounds that no judge had entered an order under Rule 7.1(c) authorizing the clerk to issue an arrest warrant upon the filing of an information. After finding that there were grounds supporting appellant's warrantless arrest, the Court explicitly reserved findings on whether a judicial officer must enter an order to authorize this procedure and whether authorizations must be made on a case by case basis. *Id.* at 386, 641 S.W.2d at 713. These questions remain unanswered.

#### **"Good Faith Exception".**

In *United States v. Leon*, 468 U.S. 897, 82 L. Ed. 2d 677 (1984), the United States Supreme Court held that evidence seized under a defective search warrant is admissible so long as it is shown that officers acted in good faith in procuring the warrant and executing it. The Arkansas Supreme Court has announced that it will adhere to the relaxed standards formulated in *Leon*. *Lincoln v. State*, 285 Ark. 107, 685 S.W.2d 166 (1985); *State v. Anderson*, 286 Ark. 58, 688 S.W.2d 947 (1985). The Court has also applied the *Leon* standards in an arrest warrant case. *Stewart v. State*, 289 Ark. 272, 711 S.W.2d 787 (1986). While the Court may overlook some technical deficiencies in warrants, known misstatements of fact made to procure an arrest warrant and in the warrant itself, however well intentioned, will not pass constitutional muster and will result in the warrant's invalidation.

Appellant in *Stewart* was convicted of capital murder after giving a confession following his arrest for an unrelated misdemeanor. He

was arrested pursuant to a warrant issued by a municipal court clerk who did not require the affiant to swear to the supporting affidavit. The warrant itself was one of fifty in a pad that had been signed in blank by the municipal judge, who testified that he had authorized the clerk to issue arrest warrants over his name upon receiving a supporting affidavit. Finding that the affiant had not made an accusation under oath, that the "issuing official" (the judge) made no finding of reasonable cause for the arrest, and that the police officers executing the warrant were aware of these deficiencies, the Arkansas Supreme Court found that the "good faith" exception permitted by *Leon* could not save the evidence admitted at trial. The decision was unanimous, a concurring opinion by Justice Purtle being in complete agreement except with regard to the Court's failure to rule on suppression of other evidence that he opined should have been excluded. *Id.* at 275, 711 S.W.2d at 789.

The *Stewart* decision should be compared to *Brown v. State*, 276 Ark. 20, 631 S.W.2d 829 (1982), a pre-*Leon* case in which appellant was convicted of one robbery on the basis of a confession given after his arrest for another robbery. The arrest was made pursuant to a warrant that appears to have been facially invalid. Issues relating to legality of appellant's custody were not raised at the trial. On the subject of appellant's arrest, the majority simply observed that appellant was already in custody after his arrest for the first robbery when he confessed to the second robbery. He was then arrested for and was ultimately convicted of committing the second robbery.

Advocating invocation of the plain error doctrine, Justice Purtle pointed out that the evidence demonstrated that the appellant had been arrested pursuant to a warrant issued by a court clerk without requiring an affidavit sworn to by the complainant, one of the defects relied upon by the Court in its *Stewart* reversal four years later. Because appellant's confession to the second robbery came after two days' custody under an invalid warrant for another offense, the dissent cogently argues that the confession should have been suppressed.

See, also, supplementary commentary to Rule 13.

#### **RESEARCH REFERENCES**

**Ark. L. Rev.** Arrest, Citation and Summons — The Supreme Court Takes a Giant Step Forward, 30 Ark. L. Rev. 137.

**U. Ark. Little Rock L.J.** Survey — Criminal Procedure, 11 U. Ark. Little Rock L.J. 187.

## CASE NOTES

## ANALYSIS

Purpose.  
Affidavit.  
Approval by judge.  
Defective warrant.  
Illegal arrest.  
Issuing officer.  
Presumption of legality.  
Probable cause.

**Purpose.**

The only purpose of an arrest warrant is to have an accused arrested and brought before the justice or other officer issuing the warrant so that he may be dealt with according to law. When that has been done, the warrant has performed its function and has no operation whatever on the subsequent proceedings. *Van Daley v. State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987).

**Affidavit.**

Burden is on state to show affidavit is in compliance with law. *Davis v. State*, 293 Ark. 472, 739 S.W.2d 150 (1987).

This section does not require that statements in an arrest warrant's supporting affidavit be made under oath. *Newman v. State*, 327 Ark. 339, 939 S.W.2d 811 (1997).

**Approval by Judge.**

The appearance of the traffic judge's initials on the corner of a warrant of arrest would not cause court to take judicial notice that such judge must have approved the issuance of the warrant by the clerk. *Webb v. State*, 269 Ark. 415, 601 S.W.2d 848 (1980).

**Defective Warrant.**

Arrest warrant for contempt of court which was issued by court clerk without authorization of judge and without accompanying affidavit or proof that an information was issued and which was not executed for over two years after its issuance was invalid as being both defective and "stale." *Webb v. State*, 269 Ark. 415, 601 S.W.2d 848 (1980).

Where a police officer knew that the affiant had not made her accusation under oath, an essential element of an affidavit, he could not have acted in good faith, for purposes of the good faith exception to the exclusionary rule, in obtaining the arrest warrant on the strength of that spurious affidavit. *Stewart v. State*, 289 Ark. 272, 711 S.W.2d 787 (1986).

In view of the police officer's knowledge of the illegal procedure involved in the procurement of the arrest warrant, and the issuing magistrate's abdication of his responsibility by signing blank arrest warrants and authorizing his clerk to read the supporting affidavit and fill in the blanks, the arrest could not be upheld and the trial court should have

suppressed the subsequent confession under the poisonous tree principle. *Stewart v. State*, 289 Ark. 272, 711 S.W.2d 787 (1986).

Warrant requirements were not met. *Davis v. State*, 293 Ark. 472, 739 S.W.2d 150 (1987); *Lamb v. State*, 23 Ark. App. 115, 743 S.W.2d 399 (1988).

The failure to meet the warrant requirements of this rule did not require reversal of the defendant's conviction as the case did not involve the admission of evidence seized pursuant to the warrant. *Donovan v. State*, 71 Ark. App. 226, 32 S.W.3d 1 (2000).

Although an arrest warrant was allegedly defective on the ground that a judicial officer did not issue or authorize a circuit clerk's issuance of the warrant, the charges against the defendant should not have been dismissed because an invalid arrest did not entitle a defendant to be discharged from responsibility for the offense charged. *State v. Richardson*, 373 Ark. 1, 280 S.W.3d 20 (2008), appeal dismissed, 2009 Ark. 206, 306 S.W.3d 11 (2009).

Although an arrest warrant signed by a court clerk was defective as not issued by a neutral magistrate, defendant's charges should not have been dismissed because an invalid arrest did not entitle a defendant to be discharged from responsibility for the offense. *State v. Holden*, 373 Ark. 5, 280 S.W.3d 23 (2008).

**Illegal Arrest.**

An illegal arrest, without more, has never been viewed as either a bar to subsequent prosecution or a defense to a valid conviction. *Van Daley v. State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987).

Defendant's arrest was illegal because, although there was reasonable cause to believe that defendant committed the offense of owning an illegal drug paraphernalia business, that was a misdemeanor offense, for which a summons, and not an arrest warrant, should have issued under subdivision (b)(i) of this rule. There was no information tending to show that defendant would not respond to a summons, the offense of owning a store that sold drug paraphernalia was, in itself, not a violent offense and did not involve the risk of imminent serious bodily injury, and the good-faith exception did not apply because there was no good-faith reliance that an arrest warrant, as opposed to a summons, could be issued for the misdemeanor; therefore, the incriminating evidence obtained as a result of the illegal arrest was the fruit of the poisonous tree. *Johnson v. State*, 98 Ark. App. 245, 254 S.W.3d 794 (2007).



**Issuing Officer.**

Warrant issued under subsection (c) of this rule must be issued by a detached, neutral officer who makes an independent determination of probable cause. *Davis v. State*, 293 Ark. 472, 739 S.W.2d 150 (1987); *Lamb v. State*, 23 Ark. App. 115, 743 S.W.2d 399 (1988).

**Presumption of Legality.**

The reviewing court should follow a liberal rather than a strict course and all presumptions are favorable to the trial court's ruling on the legality of the arrest; the burden of demonstrating error rests upon the defendant. *Reed v. State*, 9 Ark. App. 164, 656 S.W.2d 249 (1983).

Presumption of legality of bench warrant not overcome. *Munnerlyn v. State*, 292 Ark. 467, 730 S.W.2d 895 (1987).

**Probable Cause.**

The existence of probable cause for arrest must be determined upon either the facts and circumstances of which the arresting officer has knowledge of at the moment of the arrest or those which are made known to the magistrate at the time the warrant is issued, and this determination is based upon the factual and practical considerations of everyday life upon which reasonable and prudent men act. *Reed v. State*, 9 Ark. App. 164, 656 S.W.2d 249 (1983).

Probable cause for an arrest is only a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man to believe that the accused committed a felony but not tantamount to the quantum of proof required to support a conviction and arrests are to be appraised from the viewpoint of a prudent and cautious police officer at the time the arrest is made. *Reed v. State*, 9 Ark. App. 164, 656 S.W.2d 249 (1983).

When the arrest is based upon a judicial officer's, rather than a police officer's, determination of probable cause, the reviewing court should not require evidence of more "judicially competent or persuasive character as would have justified an officer in acting on his own without a warrant," and should sustain a judicial determination as long as there is a "substantial basis" for the conclusion that the accused person has committed a felony. *Reed v. State*, 9 Ark. App. 164, 656 S.W.2d 249 (1983).

Where the fact that a felony had been committed was clearly established and neighbors saw a man fleeing from the scene and where two witnesses identified the defendant as the person they saw a short distance away running down the street in the same direction as the neighbors who were pursuing him, although there was no proof that they were one and the same person, reasonable minds could conclude that the defendant probably was the same person as the one the neighbors were pursuing and there was probable cause for his arrest. *Reed v. State*, 9 Ark. App. 164, 656 S.W.2d 249 (1983).

Determination of probable cause is said to be based on factual and practical considerations of everyday life upon which reasonable and prudent men, rather than legal technicians, act. *Hines v. State*, 289 Ark. 50, 709 S.W.2d 65 (1986).

There was probable cause to arrest the defendant for criminal mischief where the defendant's brother admitted pouring formaldehyde on the victim's couch, the defendant was present at the time of the incident, and the formaldehyde belonged to the defendant. *Hines v. State*, 289 Ark. 50, 709 S.W.2d 65 (1986).

The technical invalidity of an arrest warrant is irrelevant when the arrest has been made upon probable cause. *Mitchell v. State*, 295 Ark. 341, 750 S.W.2d 936 (1988), overruled on other grounds, *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998), criticized by *Colbert v. State*, 304 Ark. 250, 801 S.W.2d 643 (1990).

Trial court did not err in denying defendant's motion to suppress evidence where defendant was searched pursuant to an arrest warrant because no contemporaneous recording of oral testimony was necessary to support a bench warrant's probable cause requirement; in this case, the arrest warrant was issued upon the sworn testimony of an investigator, which fell into the category of other information within this rule. *Blanchett v. State*, 368 Ark. 492, 247 S.W.3d 477 (2007).

**Cited:** *McGee v. State*, 280 Ark. 347, 658 S.W.2d 376 (1983); *Fairchild v. Lockhart*, 675 F. Supp. 469 (E.D. Ark. 1987), aff'd 857 F.2d 1204 (8th Cir. 1988); *Starr v. State*, 297 Ark. 26, 759 S.W.2d 535 (1988), cert. denied 489 U.S. 1100, 109 S. Ct. 1578, 103 L. Ed. 2d 944 (1989), rev'd 23 F.3d 1280 (8th Cir. 1994).

**Rule 7.2. Form of warrant.**

(a) Every arrest warrant shall:

- (i) be in writing and in the name of the state;
- (ii) be directed to all law enforcement officers in the state;
- (iii) be signed by the issuing official with the title of his office and the date of issuance;

(iv) specify the name of the accused or, if his name is unknown, any name or description by which he can be identified with reasonable certainty;

(v) have attached a copy of the information, if filed, or, if not filed, a copy of any affidavit supporting issuance; and

(vi) command that the accused be arrested and that unless he complies with the terms of release specified in the warrant he be brought before a judicial officer without unnecessary delay.

(b) The warrant may specify the manner in which it is to be executed, and may specify terms of release and requirements for appearance.

### 1987 Unofficial Supplementary Commentary to Rule 7.2

See Unofficial Supplementary Commentary to Rule 7.1.

In *Van Daley v. State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987), the Court of Appeals held that where a prosecuting attorney drew up an

information, signed it, and mailed it to the court clerk, there was compliance with Rule 7.2(c), there being no statutory, constitutional, or rule requirement that an information be filed under oath.

### RESEARCH REFERENCES

**Ark. L. Rev.** Arrest, Citation and Summons — The Supreme Court Takes a Giant Step Forward, 30 Ark. L. Rev. 137.

**U. Ark. Little Rock L.J.** Survey — Criminal Procedure, 12 U. Ark. Little Rock L.J. 193.

### CASE NOTES

#### ANALYSIS

Defective warrant.

Information or affidavit.

Suppression of evidence.

#### Defective Warrant.

In view of the police officer's knowledge of the illegal procedure involved in the procurement of an arrest warrant, and of the issuing magistrate's abdication of his responsibility by signing blank arrest warrants and authorizing his clerk to read the supporting affidavit and fill in the blanks, the arrest could not be upheld and the trial court should have suppressed the subsequent confession under the poisonous tree principle. *Stewart v. State*, 289 Ark. 272, 711 S.W.2d 787 (1986).

#### Information or Affidavit.

It is not customary in Arkansas that every arrest warrant have attached the information

or affidavit. It is not even necessary for an officer to have an arrest warrant in his hand to make an arrest. *Starr v. State*, 297 Ark. 26, 759 S.W.2d 535 (1988), cert. denied 489 U.S. 1100, 109 S. Ct. 1578, 103 L. Ed. 2d 944 (1989), rev'd 23 F.3d 1280 (8th Cir. 1994).

#### Suppression of Evidence.

State supreme court refused to consider defendant's argument that statements he made to police should have been suppressed because he was not brought before a judicial officer for more than two months after he was arrested, in violation of ARCrP 4.1 and 8.1, because, although he made that argument in the context of discussing this rule, he did not obtain a clear ruling on his argument from the trial court. *Romes v. State*, 356 Ark. 26, 144 S.W.3d 750 (2004).

### Rule 7.3. Return of warrant and summons; execution after return.

(a) The law enforcement officer executing a warrant shall make return thereof to the court before which the accused is brought, and notice thereof shall be given to the prosecuting attorney.

(b) On or before the date for appearance the officer to whom a summons was delivered for service shall make return thereof to the judicial officer before whom the summons is returnable.

(c) At any time while a complaint, information or indictment is pending, the issuing official may deliver a warrant returned unexecuted and not



cancelled, or a summons returned unserved, or a duplicate of either to a law enforcement officer or other authorized person for execution or service.

### RESEARCH REFERENCES

**Ark. L. Rev.** Arrest, Citation and Summons — The Supreme Court Takes a Giant Step Forward, 30 Ark. L. Rev. 137.

## RULE 8. RELEASE BY JUDICIAL OFFICER AT FIRST APPEARANCE

### Rule 8.1. Prompt first appearance.

An arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer without unnecessary delay.

#### 1987 Unofficial Supplementary Commentary to Rule 8.1

##### Effect of Violation.

Though Rule 8.1 is mandatory, *Bolden v. State*, 262 Ark. 718, 561 S.W.2d 281 (1978), for its violation there may well be no remedy in most cases. A defendant is not *ipso facto* entitled to a dismissal of the charge on which he is arrested when the rule is contravened. *Bolden*, *supra*. See, also *Cook v. State*, 274 Ark. 244, 623 S.W.2d 820 (1981), quoting with approval the following language from *Gerstein v. Pugh*, 420 U.S. 103, 119, 43 L. Ed. 2d 54, 68 (1975):

"Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction."  
274 Ark. at 246, 623 S.W.2d at 821-22.

And, more generally, as recognized by both the United States Supreme Court and the Arkansas Supreme Court, a judgment of conviction will not be vacated on grounds that a defendant was detained pending trial without a determination of probable cause. *Harris v. State*, 259 Ark. 187, 532 S.W.2d 423 (1976), relying upon *Gerstein v. Pugh*.

Civil suits over failure to comply with the rule will likely prove fruitless, too. Judges have absolute immunity in virtually every

conceivable case. So do prosecutors, unless they are acting in an investigatory capacity. *Imbler v. Pachtman*, 424 U.S. 409, 47 L. Ed. 2d 128 (1976); *Ginter v. Stallcup*, 641 F. Supp. 939 (E.D. Ark. 1986).

Even though the cases routinely state that this rule is mandatory, not discretionary, and that its violation does not require dismissal of the charges, a more precise statement of the law might be that dismissal of charges is not an appropriate remedy, the proper remedy being suppression of evidence flowing from violation of the rule. *Cook v. State*.

Moreover, though a defendant is not entitled to dismissal for failure of the prosecution to bring him before a judicial officer without unnecessary delay, the Arkansas Supreme Court will consider such a delay in ruling on a defense motion for dismissal on grounds of prejudice resulting from unreasonable prosecutorial delay. Some periods of delay are so unreasonable that the Court will impute to the state a purpose of gaining a tactical advantage over the accused. *Scott v. State*, 263 Ark. 669, 566 S.W.2d 737 (1978). See, also, *United States v. Lovasco*, 431 U.S. 783, 52 L. Ed. 2d 752 (1977).

### RESEARCH REFERENCES

**Ark. L. Notes.** Malone, The Availability of a First Appearance and Preliminary Hearing, 1983 Ark. L. Notes 41.

**Ark. L. Rev.** Notes, Richardson v. State: Ark. R. Crim. P. 8.1 — A Rule in Need of a Standard, 38 Ark. L. Rev. 842 (1985).

**U. Ark. Little Rock L.J.** Survey — Criminal Procedure, 10 U. Ark. Little Rock L.J. 149.

## CASE NOTES

## ANALYSIS

Purpose.  
Appeals.  
Delay permissible.  
Failure to comply.  
Preservation of transcript for trial.  
Suppression of evidence.

**Purpose.**

This rule was designed to afford an arrestee protection against an unfounded invasion of liberty and privacy. *Bates v. McNeil*, 318 Ark. 764, 888 S.W.2d 642 (1994).

This rule protects the federal constitutional right of a person to a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest; at this preliminary stage, the state is required to present proof that justifies the accused's arrest, not to establish the accused's guilt. *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114, cert. denied 519 U.S. 847, 117 S. Ct. 134, 136 L. Ed. 2d 83 (1996).

The purpose of this rule is to deter police misconduct. *Landrum v. State*, 326 Ark. 994, 936 S.W.2d 505 (1996), aff'd, 328 Ark. 361, 944 S.W.2d 101 (1997).

**Appeals.**

Where the pretrial suppression motion is not based upon violation of this rule, an appellate court will not consider the argument that it should have been granted on that basis pursuant to former ARCrP 36.21 relating to exceptions and motion for new trial being unnecessary. *Allen v. State*, 297 Ark. 155, 760 S.W.2d 69 (1988).

**Delay Permissible.**

The fact that a prosecuting attorney filed an information directly against the defendant without a pretrial hearing, such as a grand jury, was not an unconstitutional practice where the defendant was arraigned eight days after the crime, at which time the charges, penalty and his constitutional rights were explained to him. *McCree v. State*, 266 Ark. 465, 585 S.W.2d 938 (1979).

Where the defendant was held from the time of his arrest late Friday afternoon through the weekend before he was taken before a magistrate on Monday morning, such a delay did not violate this rule. *Brown v. State*, 276 Ark. 20, 631 S.W.2d 829 (1982).

Where defendant was detained approximately six and one-half hours, there was no violation of this rule. *Sparrow v. State*, 284 Ark. 396, 683 S.W.2d 218 (1985).

Three and one-half day period of delay between defendant's arrest and arraignment was reasonable. *Owens v. State*, 300 Ark. 73, 777 S.W.2d 205 (1989).

The delay in defendant's arraignment was

permissible where he was arrested at 10:30 p.m. on Thursday, and arraigned at 9:00 a.m. on Monday, because the record indicated the county municipal court did not ordinarily sit on Friday unless specified arrangements were made in advance. *Johnson v. State*, 307 Ark. 525, 823 S.W.2d 440 (1992).

There was no improper delay in taking the defendant before a magistrate, notwithstanding that she was arrested on a Thursday night and was not taken before a magistrate until Monday morning, where (1) there was no evidence that a magistrate was available during the period of delay, (2) there was no evidence that the defendant's statements were reasonably related to the delay, especially as she began requesting to talk to the sheriff from the moment she was arrested and repeatedly asked to speak with law enforcement officers during the period of the delay, (3) the defendant was repeatedly informed of her right to an attorney and her right to remain silent before every statement was taken, (4) the defendant's last statement was made on Saturday evening and (5) there was no suggestion that the delay was caused so that police officers could conduct further investigation. *Arnett v. State*, 342 Ark. 66, 27 S.W.3d 721 (2000).

There was no proof that a delay in juvenile defendant's appearance was for the purpose of obtaining a confession where, although the police questioned defendant several times after arresting him, there was testimony that his grandmother, mother, and step-father were present at the police station, defendant sat with them part of the time, and he was not held incommunicado. *Otis v. State*, 364 Ark. 151, 217 S.W.3d 839 (2005).

**Failure to Comply.**

Although this rule, which is designed to afford an arrestee protection against an unfounded invasion of liberty and privacy, is mandatory in scope, the court's failure to afford an arrestee a preliminary hearing does not require a dismissal of the charges. *Bolden v. State*, 262 Ark. 718, 561 S.W.2d 281 (1978), rev'd on other grounds, 267 Ark. 504, 593 S.W.2d 156 (1980); *Smith v. State*, 296 Ark. 451, 757 S.W.2d 554 (1988).

Where a murder charge was not filed until three years after the crime, but the defendant was in the penitentiary at the time of filing and one continuance was granted at the request of defense counsel, the charges would not be dismissed for failure to bring the defendant before a judicial officer as required by this rule. *Scott v. State*, 263 Ark. 669, 566 S.W.2d 737 (1978); *Smith v. State*, 296 Ark. 451, 757 S.W.2d 554 (1988); *Allen v. State*, 297 Ark. 155, 760 S.W.2d 69 (1988).



This rule is mandatory rather than discretionary, but the remedy for violation of the rule is to suppress any incustodial statement instead of dismissing the charges; accordingly, where a defendant was held in custody for over 30 days before appearing before a judicial officer, the trial court acted properly in suppressing a statement made during that period but not dismissing the charges against the defendant. *Cook v. State*, 274 Ark. 244, 623 S.W.2d 820 (1981).

A delay of 56 days between the time of the defendant's arrest and his first appearance before a judicial officer was clearly improper, however, it did not automatically require that the defendant's custodial statements be excluded, and where the defendant failed to abstract or include the statements in the appellate record, the Supreme Court could not determine whether the statements were prejudicial or harmless. *Richardson v. State*, 283 Ark. 82, 678 S.W.2d 772 (1984).

Delay of three and one-half days was held unnecessary where there was no evidence in the record to suggest a reason for the delay in taking the defendant before a judicial officer in accordance with this rule, nor did the state offer any explanation in its brief, and the record showed the delay was purposeful and that the prosecutor made a deliberate decision to hold defendant in detention and ignore the prompt appearance requirement. *Duncan v. State*, 291 Ark. 521, 726 S.W.2d 653 (1987).

Where deceased was arrested on suspicion of theft and police promptly notified the prosecuting attorney of the arrest, even if the police were not responsible for the delay in arraignment, they could still be answerable for the constitutional violation under 42 U.S.C. § 1983. *Wayland v. City of Springdale*, 933 F.2d 668 (8th Cir. 1991).

Defendant is not entitled to a dismissal of the charge on which he is arrested when this rule is contravened, nor does an illegal arrest or detention necessarily void a subsequent conviction. *Hudgens v. State*, 324 Ark. 169, 919 S.W.2d 939 (1996).

In determining whether an inculpatory statement is reasonably related to the delay in taking the accused before a judicial officer, the court considers: (1) any proof that the delay was for the purpose of obtaining a confession; (2) the frequency of police interrogation; (3) whether the accused was incommunicado; and (4) the passage of time. *Landrum v. State*, 328 Ark. 361, 944 S.W.2d 101 (1997).

Where individual failed to appear on traffic citations, was arrested, and remained in jail for 38 days before the individual's first court appearance, it constituted an "unnecessary delay" under former ARCrP 8.1 and a violation of the individual's due process rights under 42 U.S.C.S. § 1983, and the county was

liable for the unconstitutional policies and customs adopted by the county sheriff and the jail administrator in their official capacities; the jail administrator was also liable individually because he had a duty to ensure that the prisoners were taken before a court without unnecessary delay, however, the sheriff was not liable because he did not possess the level of personal knowledge and awareness typically required to hold a county official liable in their individual capacity. *Hayes v. Faulkner County*, 285 F. Supp. 2d 1132 (E.D. Ark. 2003), *aff'd* 388 F.3d 669 (8th Cir. 2004).

County's policy of submitting the names of pretrial detainees to the court and then waiting for the court to schedule a hearing was deliberately indifferent to a detainee's due process rights where the policy attempted to delegate the responsibility of taking the detainee promptly before a court and ignored the jail's authority for long-term confinement; thus, detainee's detention for 38 days without having a first appearance with the court violated his Fourteenth Amendment right to due process. *Hayes v. Faulkner County*, 388 F.3d 669 (8th Cir. 2004).

#### **Preservation of Transcript for Trial.**

A preliminary hearing under ARCrP 8.1 et seq., is not the full-fledged hearing involving extensive cross-examination from which a transcript can be admitted at trial under Evid. Rule 804. *Scott v. State*, 272 Ark. 88, 612 S.W.2d 110 (1981).

#### **Suppression of Evidence.**

Statements taken after the defendant had been held in jail for 35 days in violation of this rule should have been suppressed. *Richardson v. State*, 283 Ark. 82, 678 S.W.2d 772 (1984).

Although compliance with this rule is mandatory, a breach does not compel a dismissal of the charges; rather, it requires that evidence gained as a result of the unnecessary delay be suppressed. *Richardson v. State*, 283 Ark. 82, 678 S.W.2d 772 (1984).

Statements reasonably related to a delay in violation of this rule must be excluded. *Duncan v. State*, 291 Ark. 521, 726 S.W.2d 653 (1987).

Where the delay is unnecessary, the evidence is prejudicial, and the evidence is reasonably related to the delay, the evidence will be excluded. *Duncan v. State*, 291 Ark. 521, 726 S.W.2d 653 (1987).

Where the evidence is completely unrelated to the delay, suppression of the evidence is not required. *Branscomb v. State*, 299 Ark. 482, 774 S.W.2d 426 (1989); *Lemons v. State*, 307 Ark. 12, 817 S.W.2d 411 (1991).

A statement should be excluded under this rule when: (1) the delay is unnecessary, (2) the evidence is prejudicial, and (3) the evidence is reasonably related to the delay.

Owens v. State, 300 Ark. 73, 777 S.W.2d 205 (1989); Landrum v. State, 328 Ark. 361, 944 S.W.2d 101 (1997).

Inculpatory statements given by the defendant to federal officials during a conference, while waiting for his arraignment, were not reasonably related to any delay in the arraignment but were apparently prompted by defendant's desire to negotiate a bargain with authorities to his advantage, and are, thus, not inadmissible. Ryan v. State, 303 Ark. 595, 798 S.W.2d 679 (1990).

There was no causal connection between defendant's statements and any delays, where he made it clear at the outset of his questioning that he was willing to talk to the police about crimes he had been involved in. Johnson v. State, 307 Ark. 525, 823 S.W.2d 440 (1992).

Incriminating statements, given before there was any possibility that they were given as a result of an unreasonable delay in being taken before a magistrate, held admissible. Bryant v. State, 314 Ark. 130, 862 S.W.2d 215 (1993).

Where defendant was arrested on August 26, but not taken to court until August 29, the statement made on August 26 was admissible, because there was no relationship between that statement and the subsequent delay in taking defendant before a judge, but the August 28 statement should have been suppressed. Clay v. State, 318 Ark. 122, 883 S.W.2d 822 (1994).

Where no police misconduct occurred during the defendant's incarceration, there was no policy reason to apply the exclusionary rule to his statement. Landrum v. State, 326 Ark. 994, 936 S.W.2d 505 (1996), *aff'd*, 328 Ark. 361, 944 S.W.2d 101 (1997).

The trial court did not err in refusing to suppress a statement concerning the charged crimes where (1) the delay was not for the purpose of obtaining a confession but due to the defendant's desire to negotiate a favorable bargain, (2) there was no evidence of police misconduct, and (3) the defendant was well apprised of his Miranda rights. Landrum v. State, 328 Ark. 361, 944 S.W.2d 101 (1997).

The defendant was denied a prompt first appearance and, therefore, suppression of statements he made was warranted since (1) the delay in bringing him before a judicial officer was unnecessary as he was transported to a detention center on Sunday night and could have been brought before a judicial officer on Monday, rather than on Tuesday, (2) the statements at issue, which were made on Monday, were prejudicial as they were more detailed than his prior statements and were more inculpatory, and (3) the statements were reasonably related to the delay as the defendant did not initiate contact with the police to give a statement or negotiate and as the delay was deliberate and was for the purpose of further investigation. Britt v. State, 334 Ark. 142, 974 S.W.2d 436 (1998).

Suppression of defendant's custodial confession was not warranted where there was no evidence that the delay between his arrest and his first appearance was deliberate or for the purpose of obtaining an incriminating statement, defendant was informed of his right to an attorney and his right to remain silent before the statement was taken, and the delay in the case was necessary to record the preliminary confession that defendant had completed almost an hour before his first appearance was scheduled. Green v. State, 80 Ark. App. 199, 92 S.W.3d 687 (2002).

State supreme court refused to consider defendant's argument that statements he made to police should have been suppressed because he was not brought before a judicial officer for more than two months after he was arrested, in violation of ARCrP 4.1 and this rule, because he did not obtain a clear ruling on his argument from the trial court. Romes v. State, 356 Ark. 26, 144 S.W.3d 750 (2004).

**Cited:** Thomas v. State, 260 Ark. 512, 542 S.W.2d 284 (1976); Spivey v. State, 299 Ark. 412, 773 S.W.2d 446 (1989); Smith v. State, 300 Ark. 330, 778 S.W.2d 947 (1989); Moore v. State, 303 Ark. 514, 798 S.W.2d 87 (1990); Duncan v. State, 309 Ark. 218, 831 S.W.2d 115 (1992); Milholland v. State, 319 Ark. 604, 893 S.W.2d 327 (1995); Williams v. State, 55 Ark. App. 156, 934 S.W.2d 931 (1996).

## Rule 8.2. Appointment of counsel.

(a) An accused's desire for, and ability to retain, counsel should be determined by a judicial officer before the first appearance, whenever practicable.

(b) Whenever an indigent is charged with a criminal offense and, upon being brought before any court, does not knowingly and intelligently waive the appointment of counsel, the court shall appoint counsel to represent the indigent, unless the indigent is charged with a misdemeanor and the court has determined that under no circumstances will incarceration be imposed as a part of the punishment if the indigent is found guilty. A suspended or



probationary sentence to incarceration shall be considered a sentence to incarceration if revocation of the suspended or probationary sentence may result in the incarceration of the indigent without the opportunity to contest guilt of the offense for which incarceration is imposed.

(c) Attorneys appointed by district courts may receive fees for services rendered upon certification by the presiding judicial officer if provision therefor has been made by the county or municipality in which the offense is committed or the services are rendered. Attorneys so appointed shall continue to represent the indigent accused until relieved for good cause or until substituted by other counsel. (Amended April 15, 1999; amended May 17, 2001, effective July 1, 2001; amended October 2, 2003; amended June 22, 2012.)

**Cross References.** Prosecutions in name of state, ARCrP 1.5.

**Reporter's Notes, 1999 Amendment:** The addition of the last sentence to Rule 8.2(c) is intended to ensure that where counsel is appointed in municipal court, the appointment continues for purposes of this rule even in circuit court proceedings unless and until appointed counsel is relieved or new counsel is appointed.

**Reporter's Notes, 2003 Amendment:**

The amendments made two changes to subsection (b). The word "imprisonment" was replaced with the word "incarceration" to avoid any implication that the right to counsel attaches only when the defendant faces confinement in state prison. The final sentence was added to incorporate the United States Supreme Court holding in *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002).

### Comment to Rule 8.2

This provision seeks to ensure compliance with constitutional requirements respecting the rights of indigent defendants to representation by counsel. It should not be construed

to indorse or to criticize any existing or contemplated system designed to provide defense services.

### 1987 Unofficial Supplementary Commentary to Rule 8.2

#### Constitutional Requirements.

In *Sutton v. State*, 262 Ark. 492, 559 S.W.2d 16 (1977), no attorney was appointed for appellant at his first appearance. He confessed to burglary after almost three weeks' incarceration and after being advised by a postal inspector of *Miranda* warnings in connection with questioning about violations of federal postal laws. Reversing and remanding, the Court found several deficiencies necessitating the exclusion of a confession, including a defective *Miranda* warning. Significantly, the opinion of the Court does contain language suggesting that Rule 8.2(a) and (b) have constitutional dimensions so that failure to com-

ply with these provisions may result in exclusion of evidence if the state does not show that failure to comply was harmless. After quoting Rule 8.2(a) and (b) as well as Rule 8.3(b), the Court observed:

The burden is clearly on the state to establish that [appellant] waived his rights. All doubts must be resolved in favor of the individual rights and *constitutional safeguards*...

We cannot say in this case the state met the burden of proving that it complied with the Rules of Criminal Procedure. *Sutton* at 495, 559 S.W.2d at 18 (emphasis added) (citations omitted).

### RESEARCH REFERENCES

**Ark. L. Rev.** Davis, Indigency: What Test? 33 Ark. L. Rev. 544.

## CASE NOTES

## ANALYSIS

Absence of counsel harmless.  
Defendant found not indigent.  
Financial ability.  
Immunity for judicial officer.  
Indigent accused.  
Prejudice presumed.

**Absence of Counsel Harmless.**

Absence of counsel at defendant's preliminary hearing, if error, was harmless beyond a reasonable doubt, where the absence of counsel did not in any way affect the outcome of his state trial. *Reeves v. Mabry*, 480 F. Supp. 529 (W.D. Ark. 1979), *aff'd* 615 F.2d 489 (8th Cir. 1980).

**Defendant Found Not Indigent.**

When, at the time defendant was determined to be capable of employing his own attorney, he owned seven automobiles, had received \$13,679.00 in salary during the year, and had over \$1,200.00 in cash on his person, the determination that defendant was not entitled to court-appointed counsel was clearly correct. *Reeves v. Mabry*, 480 F. Supp. 529 (W.D. Ark. 1979), *aff'd* 615 F.2d 489 (8th Cir. 1980).

**Financial Ability.**

Forcing a criminal defendant to go to trial pro se without conducting an appropriate inquiry into his financial ability to afford counsel constitutes a denial of that defendant's Sixth Amendment right to counsel. *Kincade v. State*, 303 Ark. 331, 796 S.W.2d 580 (1990).

When trial court asked defendant why he did not have an attorney, and defendant stated that he could not afford to hire one, the

trial court was under a duty to make further inquiry, by whatever means appropriate, into defendant's financial condition in order to satisfactorily determine whether he could, in fact, hire an attorney. *Kincade v. State*, 303 Ark. 331, 796 S.W.2d 580 (1990).

**Immunity for Judicial Officer.**

A county prosecutor who denied the defendant counsel as an indigent was immune from liability, as his participation was part of his quasi-judicial duties. *Ginter v. Stallcup*, 641 F. Supp. 939 (E.D. Ark. 1986), dismissed without opinion 802 F.2d 462 (8th Cir. 1986), dismissed without opinion 802 F.2d 462 (8th Cir. 1986), *aff'd* in part and *rev'd* in part 869 F.2d 384 (8th Cir. 1989).

**Indigent Accused.**

Where no attorney was appointed for indigent defendant at preliminary hearing, the state failed to show that defendant specifically waived that right and defendant was improperly informed of his rights, court erred in permitting police lieutenant to testify regarding oral confession of defendant. *Sutton v. State*, 262 Ark. 492, 559 S.W.2d 16 (1977).

**Prejudice Presumed.**

No showing of prejudice is necessary when a trial court erroneously denies appointment of counsel altogether because prejudice to the defendant is presumed. *Kincade v. State*, 303 Ark. 331, 796 S.W.2d 580 (1990).

**Cited:** *Honor v. Yamuchi*, 307 Ark. 324, 820 S.W.2d 267 (1991); *Bradford v. State*, 325 Ark. 278, 927 S.W.2d 329 (1996), cert. denied 519 U.S. 1028, 117 S. Ct. 583, 136 L. Ed 2d 513 (1996); *Haley v. State*, 96 Ark. App. 256, 240 S.W.3d 615 (2006).

**Rule 8.3. Nature of first appearance.**

(a) Upon the first appearance of the defendant the judicial officer shall inform him of the charge. The judicial officer shall also inform the defendant that:

(i) he is not required to say anything, and that anything he says can be used against him;

(ii) he has a right to counsel; and

(iii) he has a right to communicate with his counsel, his family, or his friends, and that reasonable means will be provided for him to do so.

(b) No further steps in the proceedings other than pretrial release inquiry may be taken until the defendant and his counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived his right to counsel or has refused the assistance of counsel.

(c) The judicial officer, if unable to dispose of the case at the first appearance, shall proceed to decide the question of the pretrial release of the defendant. In so doing, the judicial officer shall first determine by an informal, non-adversary hearing whether there is probable cause for detain-



ing the arrested person pending further proceedings. The standard for determining probable cause at such hearing shall be the same as that which governs arrests with or without a warrant.

### RESEARCH REFERENCES

**Ark. L. Notes.** Malone, The Availability of a First Appearance and Preliminary Hearing, 1983 Ark. L. Notes 41.

### CASE NOTES

#### ANALYSIS

In general.  
Burden of proof.  
Escape in first degree.  
Failure to explain rights.  
Pretrial release inquiry.  
Probable cause.  
Release on other condition.

#### In General.

Under this rule, an attorney for an indigent defendant should be appointed at the probable cause hearing, or the state must show that right to have counsel appointed at the hearing was specifically waived. *Bradford v. State*, 325 Ark. 278, 927 S.W.2d 329, cert. denied 519 U.S. 1028, 117 S. Ct. 583, 136 L. Ed. 2d 513 (1996).

#### Burden of Proof.

This rule protects the federal constitutional right of a person to a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest; at this preliminary stage, the state is required to present proof that justifies the accused's arrest, not to establish the accused's guilt. *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114, cert. denied 519 U.S. 847, 117 S. Ct. 134, 136 L. Ed. 2d 83 (1996).

#### Escape in First Degree.

Where information charged county sheriff with permitting escape in the first degree under § 5-54-113, sheriff was not entitled to a preliminary hearing to see if probable cause existed since the sheriff had not been incarcerated following his arrest, and both this rule and § 16-85-207 apply only where the defendant is in custody, and there must be a determination of probable cause to further detain him and there is no constitutional provision or requirement for such a hearing under Const. Amend. 21. *State v. Garrison*, 272 Ark. 470, 615 S.W.2d 371 (1981).

#### Failure to Explain Rights.

Where no attorney was appointed for indigent defendant at preliminary hearing, the state failed to show that defendant specifically waived that right and defendant was improperly informed of his rights, court erred

in permitting police lieutenant to testify regarding oral confession of defendant. *Sutton v. State*, 262 Ark. 492, 559 S.W.2d 16 (1977).

#### Pretrial Release Inquiry.

Where accused was arrested for possessing marijuana for sale and bail was fixed by the municipal court solely upon the offense charged without regard to individual responsibility of accused, the municipal court's deficiency in failing to hold a pretrial release inquiry before setting money bail was not cured by circuit court which, in proceeding on accused's petition for supervisory writ of mandamus and certiorari, conducted a hearing restricted to consideration of the nature of the charges. *Thomas v. State*, 260 Ark. 512, 542 S.W.2d 284 (1976).

The circuit court in proceeding on accused's petition for writ of mandamus and certiorari erred in refusing to direct the municipal court to conduct a pretrial release inquiry before setting money bail for accused who was arrested for possessing marijuana for sale and whose bail was reduced from a preset \$20,000 for drug arrests to \$5,000 solely on the showing that accused was a state resident. *Thomas v. State*, 260 Ark. 512, 542 S.W.2d 284 (1976).

#### Probable Cause.

The issue is whether there is probable cause to continue detaining the suspect, not whether the state will be able to prove every element of its case on each of the charges. Probable cause is said to be "only a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that a crime has been committed by the person suspected." *Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988).

#### Release on Other Condition.

In view of mandate in Rule 9.2 that money bail should be used only as a last resort to ensure the court appearance of an accused, the circuit court erred in refusing to require the municipal court to make a determination that no other condition would ensure accused's court appearance before setting money bail. *Thomas v. State*, 260 Ark. 512, 542 S.W.2d 284 (1976).

**Cited:** *Allen v. State*, 260 Ark. 466, 541 S.W.2d 675 (1976); *Honor v. Yamuchi*, 307 Ark. 324, 820 S.W.2d 267 (1991); *Moore v. State*, 323 Ark. 529, 915 S.W.2d 284 (1996);

*State v. Pulaski County Circuit Court*, 326 Ark. 886, 934 S.W.2d 915 (1996), *reaff'd* in part 327 Ark. 287, 938 S.W.2d 815 (1997).

#### **Rule 8.4. Pretrial release inquiry: in what circumstances conducted.**

(a) An inquiry by the judicial officer into the relevant facts which might affect the pretrial release decision shall be made:

(i) in all cases where the maximum penalty for the offense charged exceeds one (1) year and the prosecuting attorney does not stipulate that the defendant may be released on his own recognizance;

(ii) in those cases where the maximum penalty for the offense charged is less than one (1) year and in which a law enforcement officer gives notice to the judicial officer that he intends to oppose release of the defendant on his own recognizance.

(b) In all other cases, the judicial officer may release the defendant on his own recognizance or on order to appear without conducting a pretrial release inquiry.

#### **CASE NOTES**

##### **Failure to Conduct Inquiry.**

The circuit court in proceeding on accused's petition for writ of mandamus and certiorari erred in refusing to direct the municipal court to conduct a pretrial release inquiry before setting money bail for accused who was arrested for possessing marijuana for sale and

whose bail was reduced from a preset \$20,000 for drug arrests to \$5,000 solely on the showing that accused was a state resident. *Thomas v. State*, 260 Ark. 512, 542 S.W.2d 284 (1976).

**Cited:** *Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988).

#### **Rule 8.5. Pretrial release inquiry: when conducted; nature of.**

(a) A pretrial release inquiry shall be conducted by the judicial officer prior to or at the first appearance of the defendant.

(b) The inquiry should take the form of an assessment of factors relevant to the pretrial release decision, such as:

(i) the defendant's employment status, history and financial condition;

(ii) the nature and extent of his family relationships;

(iii) his past and present residence;

(iv) his character and reputation;

(v) persons who agree to assist him in attending court at the proper times;

(vi) the nature of the current charge and any mitigating or aggravating factors that may bear on the likelihood of conviction and the possible penalty;

(vii) the defendant's prior criminal record, if any, and, if he previously has been released pending trial, whether he appeared as required;

(viii) any facts indicating the possibility of violations of law if the defendant is released without restrictions; and

(ix) any other facts tending to indicate that the defendant has strong ties to the community and is not likely to flee the jurisdiction.

(c) The prosecuting attorney should make recommendations to the judicial officer concerning:

(i) the advisability and appropriateness of pretrial release;



- (ii) the amount and type of bail bond;
- (iii) the conditions, if any, which should be imposed on the defendant's release.

### RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey of Arkansas Law, Criminal Law, 1 U. Ark. Little Rock L.J. 153.

Legislative Survey, Juvenile Law, 4 U. Ark. Little Rock L.J. 599.

### CASE NOTES

#### ANALYSIS

Defendant's motive.

Failure to conduct inquiry.

#### Defendant's Motive.

Pursuant to Ark. R. Evid. 804(b)(1), the circuit court erred in admitting a witness's testimony from the bond-reduction hearing at trial because defendant did not have a similar motive to develop the witness's testimony at that hearing; the purpose of this rule was not solely to attack the State's proof; rather, the judicial officer's inquiry also included an assessment of defendant's connection to the community, familial relationships, and history of appearing in court after a pretrial release, and defendant's motive at the bond-reduction hearing was to obtain a pretrial release from jail. *Beasley v. State*, 370 Ark. 238, 258 S.W.3d 728 (2007).

#### Failure to Conduct Inquiry.

The circuit court in proceeding on accused's petition for writ of mandamus and certiorari erred in refusing to direct the municipal court

to conduct a pretrial release inquiry before setting money bail for accused who was arrested for possessing marijuana for sale and whose bail was reduced from a preset \$20,000 for drug arrests to \$5,000 solely on the showing that accused was a state resident. *Thomas v. State*, 260 Ark. 512, 542 S.W.2d 284 (1976).

Where accused was arrested for possessing marijuana for sale and bail was fixed by the municipal court solely upon the offense charged without regard to individual responsibility of accused, the municipal court's deficiency in failing to hold a pretrial release inquiry before setting money bail was not cured by circuit court which, in proceeding on accused's petition for supervisory writ of mandamus and certiorari, conducted a hearing restricted to consideration of the nature of the charges. *Thomas v. State*, 260 Ark. 512, 542 S.W.2d 284 (1976).

**Cited:** *Municipal Court v. Casoli*, 294 Ark. 37, 740 S.W.2d 614 (1987); *Duncan v. State*, 308 Ark. 205, 823 S.W.2d 886 (1992).

### Rule 8.6. Time for filing formal charge.

If the defendant is continued in custody subsequent to the first appearance, the prosecuting attorney shall file an indictment or information in a court of competent jurisdiction within sixty days of the defendant's arrest. Failure to file an indictment or information within sixty days shall not be grounds for dismissal of the case against the defendant, but shall, upon motion of the defendant, result in the defendant's release from custody unless the prosecuting attorney establishes good cause for the delay. If good cause is shown, the court shall reconsider bail for the defendant. (Adopted April 15, 1999, effective July 1, 1999.)

**Reporter's Notes:** This rule is intended to address the problem identified in *State v. Pulaski County Circuit Court*, 326 Ark. 886, 934 S.W.2d 915 (1996), *modified on rehearing*, 327 Ark. 287, 938 S.W.2d 815 (1997), wherein the person was arrested without a warrant, was continued in custody beyond his first appearance in municipal court, but waited over two months before his case was formally

filed in circuit court by the filing of an information. This rule contemplates that, in the typical case, formal charges should be filed within a reasonable time following an arrest with sufficient latitude being given for circumstances that are beyond the prosecuting attorney's control and which necessitate a delay in the filing of formal charges. Nothing in this rule shall be construed to abrogate the

defendant's privilege to file an application for writ of habeas corpus or any other applicable extraordinary remedy.

## RULE 9. THE RELEASE DECISION

### Rule 9.1. Release on order to appear or on defendant's own recognition.

(a) At the first appearance the judicial officer may release the defendant on his personal recognizance or upon an order to appear.

(b) Where conditions of release are found necessary, the judicial officer should impose one (1) or more of the following conditions:

(i) place the defendant under the care of a qualified person or organization agreeing to supervise the defendant and assist him in appearing in court;

(ii) place the defendant under the supervision of a probation officer or other appropriate public official;

(iii) impose reasonable restrictions on the activities, movements, associations, and residences of the defendant;

(iv) release the defendant during working hours but require him to return to custody at specified times; or

(v) impose any other reasonable restriction to ensure the appearance of the defendant.

### RESEARCH REFERENCES

**Ark. L. Rev.** Killenbeck, And Then They Did ... ? Abusing Equity in the Name of Justice, 44 Ark. L. Rev. 235.

**U. Ark. Little Rock L.J.** Legislation of the 1983 General Assembly, Criminal Law, 6 U. Ark. Little Rock L.J. 613.

### CASE NOTES

**Cited:** Grey v. State, 276 Ark. 331, 634 S.W.2d 392 (1982); Bates v. Bates, 303 Ark. 89, 793 S.W.2d 788 (1990).

### Rule 9.2. Release on money bail.

(a) The judicial officer shall set money bail only after he determines that no other conditions will reasonably ensure the appearance of the defendant in court.

(b) If it is determined that money bail should be set, the judicial officer shall require one (1) of the following:

(i) the execution of an unsecured bond in an amount specified by the judicial officer, either signed by other persons or not;

(ii) the execution of an unsecured bond in an amount specified by the judicial officer, accompanied by a deposit of cash or securities equal to ten per cent (10%) of the face amount of the bond. Ninety per cent (90%) of the deposit shall be returned at the conclusion of the proceedings, provided the defendant has not defaulted in the performance of the conditions of the bond; or

(iii) the execution of a bond secured by the deposit of the full amount in cash, or by other property, or by obligation of qualified sureties.



(c) In setting the amount of bail the judicial officer should take into account all facts relevant to the risk of wilful nonappearance including:

(i) the length and character of the defendant's residence in the community;

(ii) his employment status, history and financial condition;

(iii) his family ties and relationship;

(iv) his reputation, character and mental condition;

(v) his past history of response to legal process;

(vi) his prior criminal record;

(vii) the identity of responsible members of the community who vouch for the defendant's reliability;

(viii) the nature of the current charge, the apparent probability of conviction and the likely sentence, in so far as these factors are relevant to the risk of nonappearance; and

(ix) any other factors indicating the defendant's roots in the community.

(d) Nothing in this rule shall be construed to prohibit a judicial officer from permitting a defendant charged with an offense other than a felony from posting a specified sum of money which may be forfeited or applied to a fine and costs in lieu of any court appearance.

(e) An appearance bond and any security deposit required as a condition of release pursuant to subsection (b) of this rule shall serve to guarantee all subsequent appearances of a defendant on the same charge or on other charges arising out of the same conduct before any court, including appearances relating to appeals and upon remand. If the defendant is required to appear before a court other than the one ordering release, the order of release together with the appearance bond and any security or deposit shall be transmitted to the court before which the defendant is required to appear. This subsection shall not be construed to prevent a judicial officer from:

(i) decreasing the amount of bond, security or deposit required by another judicial officer; or

(ii) upon making written findings that factors exist increasing the risk of wilful nonappearance, increasing the amount of bond, security, or deposit required by another judicial officer.

Upon an increase in the amount of bond or security, a surety may surrender a defendant.

#### Comment to Rule 9.2

Money bail in any form ought to be a last resort and should be used only to assure the defendant's appearance. It is believed that

damage to the integrity of the legal process will best be avoided by limiting bail to its lawful function.

#### 1987 Unofficial Supplementary Commentary to Rule 9.2

Though Rule 9.2(e) provides that appearance bonds set by one court serve to guarantee all subsequent appearances of a defendant on the same charge, "including appearances relating to appeals," the Arkansas Supreme Court has held that appeal bonds are governed by Rules 36.5-36.7. *Perry v. State*, 275 Ark. 170, 628 S.W.2d 304 (1982). So, "even though the pretrial bond guarantees the defendant's appearance in appellate proceed-

ings if the bond is still enforced, that does not make it an appeal bond." 275 Ark. at 171, 628 S.W.2d at 305.

Yet, in *Zoeller v. State*, 284 Ark. 118, 680 S.W.2d 87 (1984), decided after *Perry v. State*, *supra*, the Court flatly stated that "the law is clear that an appearance bond once approved remains in effect through appeal, and this includes any appearances on remand." *Id.* at 119, 680 S.W.2d at 88.

Rules 9.2 and 36.5-36.7 overlap, giving rise to ambiguity that might best be resolved by amending Rule 9.2 to alert the practitioner

that making bail pending appeal after a conviction in circuit court is governed exclusively by Rule 36.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey of Arkansas Law, Criminal Law, 1 U. Ark. Little Rock L.J. 153.

## CASE NOTES

### ANALYSIS

Constitutionality.  
Construction with other laws.  
Amount of bail.  
Appeal bond separate.  
Contractual language of bond.  
Failure to set bond.  
Judgment on bond.  
Jurisdiction.  
New trial.  
Period of effectiveness.  
Preset bail.  
Refund.  
Refusal to set bond.  
Supersedeas bond separate.

### Constitutionality.

The bail provisions of this rule provide the process or procedure by which a defendant may obtain pretrial release on a charge arising out of his alleged violation of substantive law and, as such, are not unconstitutional or outside the enabling act. *Miller v. State*, 262 Ark. 223, 555 S.W.2d 563 (1977).

### Construction with Other Laws.

There is no conflict between § 16-84-111(b) and subsection (e) of this rule. *Bobby Cox Bail Bonds, Inc. v. State*, 71 Ark. App. 119, 36 S.W.3d 752 (2000).

### Amount of Bail.

Amount of bail rests in reasonable discretion of the trial court. *Municipal Court v. Casoli*, 294 Ark. 37, 740 S.W.2d 614 (1987).

Where the circuit court set bond for defendant in the amount of \$1,000,000, "cash only," explicitly for the purpose of putting it out of reach, and where the court failed to consider the factors set forth in subsection (c) of this rule, it exceeded the bounds of its discretion in arbitrarily setting bail at such a level. *Foreman v. State*, 317 Ark. 146, 875 S.W.2d 853 (1994).

### Appeal Bond Separate.

Where prior to this trial the defendant had been free on a \$10,000 pretrial release bond but at his trial the defendant was sentenced to concurrent terms of 40 and six years after a jury found him guilty of first-degree murder and second-degree battery, the circuit judge

could properly fix his appeal bond at \$50,000 without making written findings to support the increased bond because the two types of bonds were clearly distinguishable, and in fixing the appeal bond the circuit judge knew the actual sentence imposed and therefore was in an improved position to weigh the risk of the defendant's nonappearance pending appeal. *Perry v. State*, 275 Ark. 170, 628 S.W.2d 304 (1982).

Even if a pretrial release bond under this rule continues pending appeal, that does not make it an appeal bond as governed by ARCrP Rules 36.5, 36.6, and 36.7. *Garrett v. State*, 294 Ark. 556, 744 S.W.2d 731 (1988).

### Contractual Language of Bond.

Statutory requirement of this rule that appearance bond shall guarantee all subsequent appearances of defendant in any court superseded the limitation of liability in the contractual language of the bond to assuring defendant's presence in the municipal court. *Miller v. State*, 262 Ark. 223, 555 S.W.2d 563 (1977).

### Failure to Set Bond.

Failure to set bond would not vitiate an otherwise valid conviction. *Orsini v. State*, 281 Ark. 348, 665 S.W.2d 245 (1984), cert. denied 469 U.S. 847, 105 S. Ct. 162, 83 L. Ed. 2d 98 (1984).

### Judgment on Bond.

Where bond guaranteed defendant's appearance until he was discharged or surrendered himself for execution of final judgment, trial court could not extend bond after time of sentencing without surety's consent and it was error to render judgment on such bond when defendant failed to surrender himself. *Liberty Bonding Co. v. State*, 270 Ark. 434, 604 S.W.2d 956 (1980).

### Jurisdiction.

Where probable cause for detention in a felony matter had been found in municipal court, and the case had been bound over to circuit court, then the circuit court had jurisdiction to reduce the bail set by the municipal court. *State v. Pulaski County Circuit Court*, 326 Ark. 886, 934 S.W.2d 915 (1996), reaff'd in part 327 Ark. 287, 938 S.W.2d 815 (1997).



See also *State v. Pulaski County Circuit Court*, 327 Ark. 287, 938 S.W.2d 815 (1997).

#### **New Trial.**

Where a case was clearly reversed and remanded for a new trial, the trial court erred in requiring a new appearance bond; this in no way implies however that a new bond cannot be required or that a bond cannot be raised in an appropriate situation. *Zoller v. State*, 284 Ark. 118, 680 S.W.2d 87 (1984).

#### **Period of Effectiveness.**

Subsection (e) of this rule guarantees that a bond approved in municipal court will be sufficient for circuit court, only to the extent that a judge cannot refuse the bond simply because it was made in municipal court; as the rule provides, the judge can decrease or increase the bond, but if he increases it, he must have reasons to do so. *Miller v. Pulaski County Circuit Court*, 284 Ark. 55, 679 S.W.2d 187 (1984).

An appearance bond once approved remains in effect through appeal, and this includes any appearances on remand. *Zoller v. State*, 284 Ark. 118, 680 S.W.2d 87 (1984); *Garrett v. State*, 294 Ark. 556, 744 S.W.2d 731 (1988).

Order of forfeiture against a bail bond company after a criminal defendant failed to surrender or appear was upheld because under subsection (e) of this rule, an appearance bond remained in effect through the defendant's appeal. A written confirmation from the bail bond company was not necessary for the bond to continue. *Bob Cole Bail Bonds, Inc. v. State*, 99 Ark. App. 354, 260 S.W.3d 754 (2007).

Appearance bond shall serve to guarantee all subsequent appearances of a defendant on the same charge or on other charges arising out of the same conduct before any court, including appearances relating to appeals and upon remand. *Bob Cole Bail Bonds, Inc. v. State*, 99 Ark. App. 354, 260 S.W.3d 754 (2007).

#### **Preset Bail.**

Since this rule contemplates that in fixing money bail the judicial officer will use the least restrictive type of money bail arrangement, the municipal court was in error in reducing a preset \$20,000 money bail to \$5,000 money bail based only on a showing that accused was a state resident without further inquiry into his individual circumstances to determine whether any other condition would ensure his court appearance. *Thomas v. State*, 260 Ark. 512, 542 S.W.2d 284 (1976).

#### **Refund.**

Circuit court erred in ordering the bond set by municipal court refunded. *Municipal Court v. Casoli*, 294 Ark. 37, 740 S.W.2d 614 (1987).

#### **Refusal to Set Bond.**

Where, at the bond hearing, the state produced sufficient facts to establish probable cause to file capital murder charges against defendant, the court properly refused to set bond. *Orsini v. State*, 281 Ark. 348, 665 S.W.2d 245 (1984), cert. denied 469 U.S. 847, 105 S. Ct. 162, 83 L. Ed. 2d 98 (1984).

#### **Supersedeas Bond Separate.**

The regimens of this rule have no practicable application to the setting of a supersedeas bond contemplated by § 16-96-504, nor are they constitutionally required. There is a marked difference between the purpose of supersedeas, which is to stay the effect of the judgment, and those bonds which operate to guarantee the appearance of the person. *Gober v. Daniels*, 295 Ark. 199, 748 S.W.2d 29 (1988).

**Cited:** *Miller v. Lofton*, 279 Ark. 461, 652 S.W.2d 627 (1983); *Cessna Fin. Corp. v. Skelton*, 287 Ark. 378, 700 S.W.2d 44 (1985); *D.J. v. State*, 308 Ark. 37, 821 S.W.2d 782 (1992); *Duncan v. State*, 308 Ark. 205, 823 S.W.2d 886 (1992); *Bates v. McNeil*, 318 Ark. 764, 888 S.W.2d 642 (1994); *Hudgens v. State*, 324 Ark. 169, 919 S.W.2d 939 (1996).

### **Rule 9.3. Prohibition of wrongful acts pending trial.**

If it appears that there exists a danger that the defendant will commit a serious crime or will seek to intimidate witnesses, or will otherwise unlawfully interfere with the orderly administration of justice, the judicial officer, upon the release of the defendant, may enter an order:

(a) prohibiting the defendant from approaching or communicating with particular persons or classes of persons, except that no such order shall be deemed to prohibit any lawful and ethical activity of defendant's counsel;

(b) prohibiting the defendant from going to certain described geographical areas or premises;

(c) prohibiting the defendant from possessing any dangerous weapon, or engaging in certain described activities or indulging in intoxicating liquors or in certain drugs;

(d) requiring the defendant to report regularly to and remain under the supervision of an officer of the court.

#### RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Notes, Constitutional Law — The Domestic Abuse Act of 1989 — An Impermissible Expansion of Chancery

Jurisdiction. *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990), 13 U. Ark. Little Rock L.J. 537.

#### CASE NOTES

##### Right to Bail.

A noncapital defendant's absolute right to bail may only be curbed by the setting of certain conditions upon his release, and not its complete denial; thus, although mental examination provided a basis for setting stringent conditions on release of defendant

charged with attempted murder and aggravated assault, it did not give the judge the option of refusing to release him from incarceration. *Henley v. Taylor*, 324 Ark. 114, 918 S.W.2d 713 (1996).

**Cited:** *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990).

#### Rule 9.4. Notice of penalties.

(a) When the conditions of the release of a defendant are determined or an order is entered under Rule 9.3, the judicial officer shall inform the defendant of the penalties for failure to comply with the conditions or terms of such order.

(b) All conditions of release and terms of orders under Rule 9.3 shall be recorded in writing and a copy given to the defendant.

#### Rule 9.5. Violations of conditions of release.

(a) A judicial officer shall issue a warrant directing that the defendant be arrested and taken forthwith before any judicial officer having jurisdiction of the charge for a hearing when the prosecuting attorney submits a verified application alleging that:

(i) the defendant has wilfully violated the conditions of his release or the terms of an order under Rule 9.3; or

(ii) pertinent information which would merit revocation of the defendant's release has become known to the prosecuting attorney.

(b) A law enforcement officer having reasonable grounds to believe that a released defendant has violated the conditions of his release or the terms of an order under Rule 9.3 is authorized to arrest the defendant and to take him forthwith before any judicial officer having jurisdiction when it would be impracticable to secure a warrant.

(c) After a hearing, and upon finding that the defendant has wilfully violated reasonable conditions or the terms of an order under Rule 9.3 imposed on his release, the judicial officer may impose different or additional conditions of release upon the defendant or revoke his release.

[Order for Issuance of Arrest Warrant and Summons/Order for Surety to Appear]

IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, ARKANSAS

\_\_\_\_\_ DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

NO. CR \_\_\_\_\_



**DEFENDANT****ORDER FOR ISSUANCE OF ARREST WARRANT  
AND SUMMONS/ORDER FOR SURETY TO APPEAR**

On this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, comes on for consideration the oral motion of the State of Arkansas, by its Prosecuting Attorney for this County, requesting the forfeiture of the defendant's bail bond and issuance of an alias bench warrant for the immediate arrest of the defendant.

From the statements of the Prosecuting Attorney, a review of the records applicable to this case, and the applicable law, the Court finds that:

(1) The defendant had been directed to appear before the Court on this date at \_\_\_\_\_ o'clock \_\_\_\_ m. but failed to respond or to appear before the Court as directed.

(2) The defendant has been released from custody, having caused a bail bond to be executed in favor of \_\_\_\_\_ County, Arkansas in the penal sum of \$ \_\_\_\_\_, with said defendant as principal and \_\_\_\_\_ as surety thereon, which bond guaranteed the defendant's appearance on said date and on all dates as directed by the Court in these proceedings.

(3) No reasonable excuse has been advanced to justify the defendant's failure to appear as directed.

**THEREFORE**, it is herein considered, ordered and adjudged that the Circuit Clerk be, and hereby is directed to promptly cause an alias bench warrant to be issued for the immediate arrest of the defendant, and to cause the warrant to be delivered to the Sheriff of this Court for service upon the defendant. Upon the apprehension or surrender of the defendant, the initial appearance (bail) bond shall be \$ \_\_\_\_\_; and

**IT IS FURTHER ORDERED** that the Circuit Clerk be, and hereby is directed to promptly notify the surety (one or more) that the defendant should be surrendered to the Sheriff of this Court as required by the terms of the bail bond and notify the surety (one or more) to appear before the Circuit Court on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_ m. to show cause why the full amount specified in the bail bond or the money, if any, deposited in lieu of bail should not be forfeited to \_\_\_\_\_ County.

If the surety (one or more) does not appear at the hearing scheduled by the Court, each surety on the bond shall be liable, jointly and severally, for payment of the amount forfeited. If the surety desires to be represented by an attorney, such attorney should appear at the hearing.

Entry of the Order of Forfeiture by the Court shall constitute a personal judgment against each surety on the bond, for which execution and other lawful process may issue.

The officer who is responsible for taking the bail bond is also ordered to appear before the Court on the date and at the time noted above, unless (1) the surety is a bail bondsman, or (2) the officer accepted cash in the amount of bail.

**IT IS SO ORDERED** on this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_, **CIRCUIT JUDGE**

\_\_\_\_\_, **CIRCUIT CLERK**

**BY:** \_\_\_\_\_

**Deputy Circuit Clerk**

**CASE NOTES**

**Evidence.** Trial court properly revoked appellant's appeal bond where the evidence established that appellant violated one of the conditions of his appeal bond by testing positive for amphetamine. *Cherry v. State*, 79 Ark. App. 274, 86 S.W.3d 407 (2002).

**Cited:** *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990).

**Rule 9.6. Commission of felony while awaiting trial.**

If it is shown that any court has found reasonable cause to believe that a defendant has committed a felony while released pending adjudication of a prior charge, the court which initially released him may revoke his release.

**RESEARCH REFERENCES**

**Ark. L. Rev.** Case Note, *United States v. Salerno: The Validation of Preventive Detention and the Denial of a Presumed Constitutional Right to Bail*, 41 Ark. L. Rev. 697.

**CASE NOTES**

**ANALYSIS**

**Jurisdiction.**  
Nature of hearing.  
Right to bail.

**Jurisdiction.**  
The pendency of an interlocutory appeal from a denial of defendant's motion to dismiss for lack of a speedy trial did not divest the trial court of its jurisdiction to determine under this rule if there was reasonable cause for revocation of defendant's bail. *Reeves v. State*, 261 Ark. 384, 548 S.W.2d 822 (1977).

**Nature of Hearing.**  
A hearing in which the circuit court found probable cause existed that defendant, who was free on bail, had committed two subsequent offenses was not a hearing of an adversary nature which required representation by counsel. *Reeves v. State*, 261 Ark. 384, 548 S.W.2d 822 (1977).

The liberty interest at stake at a bond-revocation hearing is not equivalent to the liberty interest at stake in a criminal trial, as is reflected in the lower standard of proof required to revoke a defendant's bond, so it follows that a defendant may not have the

same motive and opportunity in developing or attacking testimony in a non-adversarial bond-revocation hearing as he would in a trial, which is undisputably adversarial in nature. *Proctor v. State*, 76 Ark. App. 48, 60 S.W.3d 486 (2001), *aff'd in part and rev'd in part* 349 Ark. 648, 79 S.W.3d 370 (2002).

**Right to Bail.**

In view of the fact that a defendant has an absolute right before conviction, except in capital cases, to a reasonable bail, this rule would not preclude the trial court from setting a new and reasonable bail with appropriate terms and restrictions. *Reeves v. State*, 261 Ark. 384, 548 S.W.2d 822 (1977).

Petitioner was awarded certiorari relief after a trial court denied petitioner bail after petitioner was charged with violating an order of protection because petitioner was not charged with a capital offense; the trial court should have set a reasonable bail with whatever terms and restrictions were deemed appropriate. *Hobbs v. Reynolds*, 375 Ark. 313, 289 S.W.3d 917 (2008).

**Cited:** *Johnson v. Hicks*, 288 Ark. 158, 702 S.W.2d 797 (1986).



## ARTICLE IV. SEARCH AND SEIZURE

### RULE 10. GENERAL PROVISIONS

#### Commentary to Article IV

Article IV establishes a general statutory scheme which defines the permissible limits of searches and seizures. The Article focuses on "conventional" searches and seizures. Because the pace of technological advancement makes it difficult to anticipate future problems in the area of electronic surveillance, this Article does not encompass wiretapping, bugging, and similar forms of surveillance. Inspectorial searches (health, housing, port, etc.) are also beyond the scope of this Article.

The Article is organized according to the traditional justifications for a search and seizure: consent (Rule 11); arrest (Rule 12); warrant (Rule 13); and vehicle or emergency situations (Rule 14). Rule 15 sets out procedures for the disposition of seized things, and Rule 16 governs the admissibility of seized things at a criminal trial.

As the title indicates, Rule 10 contains general provisions applicable to Article IV as a whole.

Rule 10.1 defines several key terms. The definition of "search" is of critical importance since it determines the substantive scope of Article IV. There is no Arkansas statutory precedent for a definition of search, and judicial attempts to develop a definition have been piecemeal since the issue whether particular action did or did not constitute a "search" seldom arises. The key word in the definition is "intrusion," a term sufficiently broad to encompass any legally cognizable interference with an individual's right to privacy. The remainder of the definition limits the scope of this initial term.

An arrest is an intrusion within the scope of the Fourth Amendment, but it is excluded from the definition of search since it is covered both by Article III and existing authority. The phrase "by an officer under color of authority" limits the coverage of the Article to official intrusions. *See, Walker v. State*, 244 Ark. 1150, 429 S.W.2d 121 (1968).

Most searches are challenged as intrusions upon an individual's person or property. However, in *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), the Supreme Court repudiated a Fourth Amendment analysis based on "constitutionally protected areas." Consequently, the definition of "search" is extended to cover any intrusions upon the privacy of an individual.

With respect to "purpose," the definition makes it clear that the Article encompasses searches for persons and information, as well as searches for tangible physical "things."

Since there are various types of activities which meet the foregoing criteria, but which are nevertheless permissible under current law, the final clause limits the scope of the definition to those intrusions which in the absence of authority or consent would be violative of constitutional or other legal rights. Hence, traditional police practices such as "staking out" premises, "shadowing" a person, and observing areas left open to public view are not considered searches.

The definition of "seizure" is also without statutory precedent. In most cases, a seizure will occur as a result of a search. The inclusion of the phrase "under other color of authority" is intended to cover nonsearch situations where an officer is justified in making a seizure — for example, when he discovers abandoned contraband or observes contraband openly possessed by an individual.

The term "reasonable cause" has been used throughout this Article and Article III in preference to "probable cause." Although most courts agree that there is no substantive distinction between the two terms, it was felt that the use of "probable cause" might imply a requirement that the existence of facts must be "more-probable-than-not." *See A.L.I. commentary at 163; commentary to Arrest, Citation, Summons, and Pre-trial Release, supra at 9.* "Reasonable cause" also corresponds to the standard in the present Arkansas statutes on search and arrest warrants, both of which use the phrase "reasonable grounds." Ark. Stat. Ann. §§ 43-201, 43-408 (Repl. 1964).

Rule 10.2 lists the permissible objects of a seizure. The first three categories are coextensive in scope with Ark. Stat. Ann. § 43-205 (Supp. 1973). Paragraph (iv), which recognizes searches for the purpose of arresting or rescuing a person, has no analogue in the present statute. The paragraph does not supplement or otherwise affect relief by writ of habeas corpus.

Rule 11.1 authorizes searches based on consent. Rule 11.4 adds the logical restriction that such searches shall not exceed the limits of the consent given.

Rule 11.2 attempts to identify those individuals who can give effective consent to a search. In the case of searching an individual's person, it seems rather obvious that the person searched must give consent. When the searchee is under the age of 14, his consent is not effective unless coupled with that of a parent or a person *in loco parentis*.

Under subpart (b) the owner of a vehicle or a person in apparent control of the vehicle can effectively consent to its search. Subpart (c) adopts a flexible rule with respect to searches of premises. Consent to such searches can be given by any person who, based on the circumstances as they appear to the officer conducting the search, is entitled to give such consent.

Rule 11.2 merely relieves the searching and seizing officer of any criminal or civil liability for his conduct. The admissibility in evidence of any things seized during a consent search is governed by existing authority read in conjunction with the *Comments* to Rule 16.2.

Rule 11.4 requires that the seizing officer provide the person consenting to the search with a receipt listing all things seized. Rule 13.3(f) imposes a similar requirement in the case of warrant searches. Such a receipt informs the person that the seizure is under color of law and may be of evidentiary value in a subsequent proceeding under Rule 15 for the return of seized things.

Rule 11.5 introduces a sensible principle into the law of consent searches — consent may be withdrawn or modified at any time. Admittedly, this rule permits a guilty suspect to halt a search when the searchers come too close to his hiding place, but the rationale of such a rule seems no less compelling in the search context than in an interrogation context. Furthermore, if initial consent were to be considered irrevocable, the warning required by Rule 11.3 would have to include a statement to this effect. This would presumably make it more difficult to obtain consent, thus defeating the object of a rule of irrevocability. See A.L.I. commentary at 196, 197.

Rule 12 is addressed to searches and seizures incidental to an arrest.

Rule 12.1 provides the basic authorization for such searches and lists the purposes for which a search incidental to an arrest may lawfully be made. These purposes, as well as the *Comment* to Rule 12.1, and the subsequent rules serve to clearly define the permissible scope of a search incidental to an arrest.

Rule 12.2 authorizes searches of an arrestee's person and the area within his immediate control. Such searches were expressly approved in *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

Because searches of body cavities or the blood stream are especially offensive and intrusive, Rule 12.2 establishes special criteria which must be met before a warrantless search is authorized. In addition to a general requirement that the search be reasonable under the circumstances of the case, the rule requires that there be a "strong probability" that seizable objects will be disclosed and that any delay will probably result in the disap-

pearance of evidence. These standards are substantially in agreement with the Supreme Court holding in *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). *Cf.*, *Cupp v. Murphy*, 412 U.S. 291, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973).

Rule 12.4 permits searches of a vehicle within the control of an arrested person when the arresting officer reasonably believes that the vehicle contains seizable items connected with offense for which the arrest is made. The court in *Chimel*, *supra*, expressly disclaimed any intent to change the law regarding searches of vehicles incidental to an arrest, 395 U.S. at 764, n. 9, 23 L. Ed. 2d at 694.

Searches pursuant to Rule 12.4 should be distinguished for analytical purposes from vehicular searches without a warrant and independent of an arrest. Searches of the latter type are the subject of Rule 14.1. However, both types of searches find support in the same constitutional principles. See commentary to Rule 14.1, *infra*. A vehicular search under Rule 12.4 must meet the same standards as a vehicular search under Rule 14.1. The fact that an arrest is made in no way extends the permissible scope of the search except in so far as the arrest or the circumstances on which the arrest is based also justify a reasonable belief that the vehicle contains seizable things. If the circumstances do not justify such a belief, then the arresting officer is limited to a search of the arrestee's person within the scope permitted by Rule 12.2. *Compare*, *Steel v. State*, 248 Ark. 159, 450 S.W.2d 545 (1970).

The contemporaneous time limitation of Rule 12.4(2) is required by United States and Arkansas Supreme Court decisions. *Preston v. United States*, 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964); *Jenkins v. State*, 253 Ark. 249, 485 S.W.2d 541 (1972).

Rule 12.5 embodies a limited authorization for searches of premises incident to an arrest on the premises. Although the Supreme Court in *Chimel*, *supra*, restricted the scope of a premises search incident to an arrest to the area actually within the control of the arrestee, it is believed that searches under the circumstances stated in Rule 12.5(b) fall within the "well-recognized exceptions" referred to by the court in *Chimel*. 395 U.S. at 763, 23 L. Ed. 2d at 694. The language of the rule reflects the following conclusion of the A.L.I. Reporters:

It appears, therefore, that the *Chimel* case is intended to rule out "routine" searches of premises incidental to an arrest, especially if the situation is such that a search warrant could have been obtained without danger to the success of the search. It does not, however, undertake to rule out searches where there is reasonable cause to believe that vehicles or premises, in which



an arrest has been made, contain seizable things which are likely to be removed or destroyed before a warrant can be secured and served. *A.L.I. commentary at 188.*

As in the case of vehicular searches incident to an arrest, the premises search must be contemporaneous in time with the arrest. *Stoner v. California*, 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964); *Jones v. State*, 246 Ark. 1057, 441 S.W.2d 458 (1969).

Things not subject to seizure under Rule 10.2 may nevertheless be taken from the possession of a jailed arrestee under Rule 12.6(a), if reasonably necessary for custodial purposes. Such purposes may include the safeguarding of the arrestee's property, the protection of the police against charges of theft, the prevention of escape, and the maintenance of prison discipline. Only in the limited circumstances cited in paragraph (a) will these purposes justify reading the arrestee's personal papers.

Rule 12.6(b) relaxes the contemporaneous time limitation for vehicular searches when custody of a vehicle is lawfully retained by the police. The constitutionality of such searches was recognized in *Cooper v. California*, 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967).

Rule 13 deals with searches and seizures pursuant to a warrant.

Rule 13.1 establishes issuance procedures designed to prevent abuse of the search warrant process unduly discouraging warrant searches.

Under Rule 13.1(a) a search warrant may be issued only by a "judicial officer." The same term is used in the present statute. Ark. Stat. Ann. § 43-205 (Supp. 1973). Since Rule 1.6 restricts the definition of judicial officers to those persons authorized to hear criminal cases, chancellors would no longer be able to issue search warrants, except in circumstances indicated *supra* at 1, 2 (*Commentary to General Provisions*).

Rule 13.1(b) requires that an application for a search warrant contain a description of the persons or places to be searched and the persons or things to be seized. This is probably the present Arkansas practice although there are no Supreme Court cases in point. See Ark. Stat. Ann. § 43-201. The application must set forth "facts and circumstances." This provision is intended to discourage conclusory statements in affidavits for search warrants — a practice soundly condemned by both the United States and Arkansas Supreme Courts. *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Cockrell v. State*, 256 Ark. 19, 505 S.W.2d 204 (1974); *Montgomery v. State*, 251 Ark. 645, 473 S.W.2d 885 (1971); *Ferguson v. State*, 249 Ark. 138, 458 S.W.2d 383 (1970). The last sentence of Rule 13 (b) incorporates federal

and state case law regarding use of hearsay information to support the issuance of search warrants. *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar, supra*; *Glover v. State*, 248 Ark. 1260, 455 S.W.2d 670 (1970); *Walton v. State*, 245 Ark. 84, 431 S.W.2d 462 (1968), *appeal after remand*, *Fuller v. State*, 246 Ark. 704, 439 S.W.2d 801 (1969), *cert. denied*, 396 U.S. 930, 90 S. Ct. 260, 24 L. Ed. 2d 228 (1969).

Subpart (c) of Rule 13.1 allows the judicial officer to take additional testimony under oath in support of affidavits. A written summary must be made of such testimony.

The Rule 13.1(e) requirement that search warrant proceedings be conducted in secret does not appear in the current statutes although this is probably a common practice.

Rule 13.2 details the contents of a search warrant. Under present law a warrant is directed to the sheriff of the county or any constable, but may be executed by any public officer. Ark. Stat. Ann. §§ 43-202, 43-204 (Repl. 1964). Rules 13.2(a) and 13.3(a) permit the warrant to be issued to and executed by any "officer." An "officer," as defined in Rule 10.1, is comparable to "public officer" under present law.

Paragraphs (i) and (ii) of Rule 13.2(b) provide information which may be needed by a person served who desires to contest the validity of the warrant. Paragraphs (iii) and (iv) reflect the requirements of the Fourth Amendment to the United States Constitution and Article 2, § 15 of the Arkansas Constitution.

Subpart (c) of Rule 13.2 recognizes that nighttime searches are more likely to be resisted and, accordingly, establishes guidelines for determining when such searches are justified. Present law allows nighttime searches only "[i]f there is proof positive that any property stolen or embezzled is concealed in any particular house or place." Ark. Stat. Ann. §§ 43-202, 43-203 (Repl. 1964).

Under Rule 13.2(c), the warrant must provide that it be executed within a reasonable time, not to exceed sixty days. Under Rule 13.2(b)(v) the warrant must state the period of time, not to exceed five days after execution, when it is returnable to the issuing officer. Heretofore, the only chronological restriction on execution or return has been the reasonable time limitation imposed by the Constitution.

Subpart (d) of Rule 13.2 is intended to effectuate the provisions of Rule 13.5 by providing that a warrant shall state any limitations on the scope of search or seizure imposed by Rule 13.5.

Rule 13.3 deals with execution of the search warrant.

Subpart (b) of Rule 13.3 changes present law by requiring the searching officer to fur-

nish a copy of the warrant to the individual whose person or premises are searched before the search is begun. *Easley, supra*. This procedure informs the searchee that the intrusion is authorized by law and provides a basis for future challenges to the validity of the warrant.

Rule 13.3(c) compels the officer to discontinue the search when the persons or things specified in the warrant are found. *Cf., Marron v. United States*, 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927). This rule does not preclude continuation of the search if what transpires during the search gives reasonable cause for further search outside the warrant's authority.

Rule 13.3(d) requires the searching officer to furnish a receipt for things seized. Like the requirement that a copy of the search warrant be furnished, this procedure apprises the affected party of the lawful nature of the seizure. It also serves an evidentiary function in future proceedings under Rule 15.5 for the return or restoration of seized property.

Rule 13.3(e) permits the use of deadly force in the execution of a search warrant only in certain specified situations:

[D]eadly force is not permissible unless there is no unnecessary risk to innocent bystanders, and there is substantial risk that failure to effect a prompt seizure of the things sought will result in death or serious bodily harm. The phrase "other than in self-defense" is inserted in order to make it clear that ... an officer may use such degree of force, as is reasonably necessary to defend himself, even in circumstances where deadly force would not be authorized merely to ensure successful execution of the warrant. *A.L.I. commentary at 44*.

Rule 13.4 sets out procedures to be followed upon the return of a warrant, whether executed or not. A return of the warrant to the issuing officer is not required in either case by present statutes. The return of an executed warrant facilitates and encourages judicial supervision of compliance with the provisions of Rule 13. A return is also desirable when the warrant is not executed because the reasons for nonexecution may be relevant in subsequent criminal or civil litigation arising out of the search. Subpart (b) adds the requirement of a "verified report of the facts and circumstances of the execution, including a list of the things seized." This additional information may be useful in future proceedings challenging the search or seeking the return or restoration of things seized. To facilitate that end, subparts (c) and (d) ensure that the return and accompanying report are perpetuated.

Rule 13.5 establishes a new procedure to be followed when the search for documents covered by a warrant necessarily entails the examination of other documents outside the

scope of the warrant. When such "intermingling" is present, the executing officer must impound the documents *in situ* or remove them under the seal of another place for safeguarding. At a subsequent hearing presided over by an appropriate judicial officer, any interested person may move for return of the documents or for specification of conditions or limitations on future examination of them. The A.L.I. note to Section 220.5 states:

In support of such limitations, the moving party might request that the search be conducted in the presence of counsel; might show that certain files or other discrete portions of the intermingled documents could not possibly contain the particular documents or entries sought under the warrant; might request that the search be carried out by a special master or other qualified and judicially-designated examiner rather than by the police; or might suggest other safeguards against unnecessary scrutiny or disclosure of the contents of the documents. *Id.* at 48.

The entire procedure is designed to balance the state's interest in securing information relevant to a criminal prosecution against the individual's right to privacy.

Despite some reservations to the contrary, the Commission has taken the position that diaries and other private records of a testimonial nature are not protected from seizure by either the Fourth or Fifth Amendments to the United States Constitution. Therefore, such documents are seizable when relevant to a criminal prosecution. However, in a case covered by Rule 13.5, the determination of relevancy must be made by a judicial officer.

Since testimony in support of a motion under subpart (c) of Rule 13.5 may in some cases be self-incriminating, subpart (d) prohibits the admission of such testimony in a subsequent proceeding, except for impeachment purposes or in a perjury or contempt prosecution.

Seizure of obscene materials is the subject of Rule 13.6, which codifies the recent Supreme Court decision in *Heller v. New York*, 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973). That opinion permits the seizure of a single copy of an instrument without an adversary hearing for the bona fide purpose of preserving it as evidence in a criminal trial provided "such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party." 413 U.S. at 492, 37 L. Ed. 2d at 754. *See, also, Gibbs v. State*, 255 Ark. 997, 504 S.W.2d 719 (1974). Since seizing even a single copy may block the exhibition or distribution of an instrument, especially in the case



of a film, the trial court must in appropriate cases either allow copies to be made or return the instrument pending a final determination on the obscenity issue.

Rule 14 outlines several situations where warrantless searches independent of an arrest or absent consent are nevertheless valid.

Rule 14.1 incorporates the widely recognized exception for vehicular searches where the officer has reasonable cause to believe that the vehicle contains seizable things. *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925); *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970); *Jackson v. State*, 253 Ark. 1116, 491 S.W.2d 581 (1973); *Burke v. State*, 235 Ark. 882, 362 S.W.2d 695 (1962), *cert. denied*, 373 U.S. 922, 83 S. Ct. 1523, 10 L. Ed. 2d 421 (1963). The authority granted by the rule extends to searches of vehicles on property open to the public or, under specified conditions, to vehicles on private property. A vehicle lawfully on private premises may be searched or seized only under exigent circumstances. Absent such circumstances the propriety of a search is governed by the rules applicable to searches of premises. The rule does not expressly require that it be impracticable to obtain a search warrant prior to the search. The commentary to the corresponding A.L.I. section takes the position that: "(a)s-suming ... there is probable cause to search the vehicle, and that the vehicle is mobile, it would be artificial that the courts should disallow the search on the ground that the officer should have known that he would be able to secure a warrant without losing his target." *Id.* at 208. *But, see, Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564, 2022 (1971); *see, also, Tygart v. State*, 248 Ark. 125, 451 S.W.2d 225 (1970); *Mann, supra*.

Rule 14.1(b), which permits search of the persons in a vehicle when the officer does not find the things subject to seizure in his search of the vehicle, may raise constitutional questions. The Supreme Court disapproved such searches in *United States v. Di Re*, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (1948), basing its holding on the analogous rule that a warrant to search premises does not justify a search of persons on such premises. However, this analogy may be inappropriate, and the continued validity of *Di Re* is questionable. Following *Chimel, supra*, an officer must in most instances secure a warrant prior to a premises search. If the officer desires to search persons on the premises, he can always ensure that the warrant so states. On the other hand, a vehicular search under Rule 14.1 is, by definition, without a warrant. It would be unduly burdensome to require that the officer secure a warrant before he

searches the occupants of the vehicle. Furthermore, as stated in the A.L.I. commentary, "it seems absurd to say that the occupants can take [seizable things] out of the glove compartment and stuff them in their pockets, and drive happily away after the vehicle has been fruitlessly searched." *Id.* at 209.

Rule 14.2 codifies the so-called "open field" doctrine established in *Hester v. United States*, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898, 445 (1924) and approved in *Jones, supra*. The rationale of *Hester* is that the Fourth Amendment speaks only of "persons, houses, papers, and effects," and hence offers no protection against searches of "open fields." It is unclear to what extent this reasoning has been eroded by *Katz, supra*, which rejected the notion of "constitutionally protected areas" and held instead that "the Fourth Amendment protects people not places." Since the *Katz* court did not expressly overrule or limit the scope of *Hester*, the Commission has adopted a rule which encompasses the full sweep of the latter opinion.

Rule 14.3 allows warrantless searches of premises or vehicles in emergency situations. Such a search is justified under essentially the same circumstances that support the use of deadly force to execute a search warrant. See Rule 13.3.

The "plain view" doctrine, which forms the basis for Rule 14.4, was extensively discussed in *Coolidge, supra*. *See, also, Cox v. State*, 254 Ark. 1, 491 S.W.2d 802, *cert. denied*, 414 U.S. 923, 94 S. Ct. 230, 38 L. Ed. 2d 157 (1973). The doctrine permits the seizure of things which fall within the plain view of an officer who has a right to be in a position to have that view. Such a right may be based on "a warrant for another object, hot pursuit, search incident to an arrest, or some other legitimate reason for being present unconnected with a search directed against the accused." 403 U.S. at 466, 29 L. Ed. 2d at 583. The *Coolidge* opinion lists two limitations to the doctrine which are not expressed by the rule. First, a warrantless seizure is not justified absent "exigent circumstances" excusing the failure to procure a warrant. Second, the discovery of evidence must be inadvertent. Where the police know in advance the location of the evidence and intend to seize it, they cannot rely on the plain view doctrine to validate the search.

Rule 15 is without Arkansas statutory precedent. It is believed that most courts and law enforcement officers will welcome clear, reasonable procedures for the disposition of seized property.

The corresponding A.L.I. provisions require that a custody order be obtained from an appropriate court in all cases where property is seized. It was the consensus of the Commis-

sion that such a requirement imposed a needless administrative burden on courts and law enforcement officers. Accordingly, the proposed rules require a custody order to be entered only when a person makes a motion for return or restoration of seized things pursuant to Rule 15.2. Absent such a motion, the seizing officer need only provide for the appropriate safekeeping of the property.

In the case of warrantless seizure, he must also furnish a report of the facts and circumstances of the seizure to the court before which the defendant will be brought for first appearance. If no arrest is made, the seizure is reported to a court having jurisdiction to entertain proceedings respecting the offense disclosed by the seizure. *See*, Rule 15.4. Warrant seizures are not covered since a similar requirement is imposed with respect to them by Rule 13.4(b).

Rule 15.2 establishes procedures for the return or restoration of seized things to appropriate parties. Subpart (a)(i) permits the person from whose possession the things were seized to move for their return. Paragraph (ii) allows some other person asserting a claim to the seized things to move for restoration, generally on the grounds that the things were stolen and the moving party is the owner or rightful possessor.

The appropriate tribunal to hear motions for return or restoration of seized things will vary depending on the stage of the criminal proceedings. In the case of a warrant search, the motion should be made to the court to which the warrant was returned or to which the proceedings have been transferred pursuant to Rule 13.4(d). If a person has been charged in connection with the seizure, then the motion should be made to the court which will try the offense. If no prosecution is pending, then any court having jurisdiction to entertain proceedings respecting the offense disclosed by the seizure is competent to hear the motion. The overriding intent of the rule is that the court with the greatest evidentiary interest in the seized things should control their custody and disposition.

The motion for return or restoration must be made within 30 days after actual or constructive notice of the seizure, subject to the court's discretion to allow motions to be made at a later date.

The reasons that justify exclusion of seized things at trial do not necessarily justify returning the things to the person from whom they were seized. *See, Bostic v. City of Little Rock*, 243 Ark. 50, 418 S.W.2d 619 (1967). Therefore, the grounds upon which a motion for return or restoration may be based are more limited in scope than the grounds that may support a motion to suppress evidence. *Cf.*, Rule 15.2(b) with *Comment* to Rule 16.1.

Rule 15.2(d) permits the court to postpone

the return or restoration of seized things until they are no longer needed for evidentiary use.

Rule 15.2(e) makes it clear that the hearing on a motion for return or restoration of property is a special proceeding, independent of the underlying criminal prosecution. An order granting the motion is a final order for purposes of appeal within the meaning of the third subsection of Ark. Stat. Ann. § 27-2101 (Supp. 1973). The same is true of an order denying the motion, but the court may postpone the appeal until the seized things are no longer needed for evidentiary purposes. Since the remedy provided by Rule 15.2 supplements the civil remedies otherwise available to a person whose property has been seized or is being withheld by the state, an order granting or denying relief under Rule 15.2 is appealable in accordance with the general statutory provisions governing civil appeals.

Since a criminal court is not the most appropriate forum for sorting out the interests of competing claimants, Rule 15.2(f) gives two alternatives to the court confronted with disputed possession rights in seized things. The court may return the things to the person from whose possession they were seized, or it may impound the things, pending resolution of the dispute by compromise or civil litigation.

If no motion is made for return or restoration of seized things, then whenever their custody is no longer necessary, the court must order their disposition in accordance with the provisions of the Arkansas Criminal Code which govern disposition of contraband and unclaimed property.

Finally, Rule 15.3 permits an informal restoration of freshly seized items to the rightful possessor when his claim is established beyond a reasonable doubt. The officer may also dispose of perishable things in appropriate circumstances.

Rule 16 sets out procedures for suppressing evidence seized in violation of the preceding rules of Article III. There is presently no statutory law respecting motions to suppress evidence, and current practice allows such motions to be made for the first time when the evidence is offered at trial. This often causes delay and creates confusion and frustration on the part of jurors. Unless the omnibus hearing procedure of Rule 20 is employed, motions to suppress evidence pursuant to Rule 16.2 must be made not later than ten days before trial. Rule 16.2(c) and the exception to Rule 16.2(b) should provide sufficient flexibility in cases where a motion ten days before trial is not feasible.

Rule 16.2(d) permits the state to appeal an order granting a motion to suppress evidence in cases where the exclusion would substantially prejudice the prosecution of the case.



The rule supersedes the holding of *State v. Gibbons*, 255 Ark. 352, 500 S.W.2d 341 (1973), construing Act 333 of 1971 to abrogate the state's right to appeal interlocutory orders in felony cases. The right to appeal under Rule 16.2(d) is even broader than that existing prior to Act 333 since an appeal of interlocutory orders is now permitted even in misdemeanor cases.

Under Rule 16.2(e) an order denying a defendant's motion to suppress evidence is reviewable only when the conviction is subsequently appealed. However, the rule does allow the defendant to appeal such a denial notwithstanding the fact that he pleaded guilty. Under present Arkansas practice, a plea of guilty waives any defenses that might have been interposed at trial. *Cox v. State*, 255 Ark. 204, 499 S.W.2d 630 (1973), and cases cited therein. This forces the defendant

whose defense is based solely on the invalidity of a search or seizure to stand trial, unnecessarily, in order to preserve his point on appeal.

Comment I to Rule 16.2 is a nonexclusive list of the possible grounds for suppression of evidence. These grounds have been placed in a comment rather than a separate rule in order to emphasize the Commission's view that the provisions of Article III are general guidelines for searches and seizures rather than absolute rules. A further indication of the flexibility with which the rules are to be applied is found in subpart (i) of the comment, which provides that, subject to constitutional limitations, "[a] motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial."

### Rule 10.1. Definitions.

For the purposes of this Article, unless a different meaning is plainly required:

(a) "Search" means any intrusion other than an arrest, by an officer under color of authority, upon an individual's person, property, or privacy, for the purpose of seizing individuals or things or obtaining information by inspection or surveillance, if such intrusion, in the absence of legal authority or sufficient consent, would be a civil wrong, criminal offense, or violation of the individual's rights under the Constitution of the United States or this state.

(b) "Seizure" means the taking of any person or thing or the obtaining of information by an officer pursuant to a search or under other color of authority.

(c) "Search warrant" means an order issued by a judicial officer authorizing a search or seizure or both.

(d) "Officer" means a law enforcement officer or other person acting under color of authority to search and seize.

(e) "Individual" includes a corporation.

(f) "Vehicle" includes any craft or device for the transportation of persons or things by land, sea or air.

(g) "Property" means real or personal property, including vehicles.

(h) "Reasonable cause to believe" means a basis for belief in the existence of facts which, in view of the circumstances under and purposes for which the standard is applied, is substantial, objective, and sufficient to satisfy applicable constitutional requirements.

(i) "Reasonable belief" means a belief based on reasonable cause to believe.

#### 1987 Unofficial Supplementary Commentary to Rule 10.1

The Rule 10.1 definition of "search" was relied upon by a sharply divided Court in *Haynes v. State*, 269 Ark. 506, 602 S.W.2d 599, cert. denied, 449 U.S. 1066 (1980). The Court decided that securing a hotel room after a warrantless arrest while a search warrant

was being obtained was an "intrusion" constituting a "search" under Rule 10.1. Officers had witnessed appellant and an undercover agent going into a hotel room under surveillance. The agent then left the room and told officers that he had purchased drugs from

appellant. Thereupon some officers left to obtain a search warrant for the room in which the sale had taken place as well as two nearby rooms. Appellant then left the room in which the sale had taken place and went to another room in the hotel where he lived with his father. The police raided that room, arrested appellant, and "seized" the room without searching it while awaiting the search warrant. Appellant volunteered that he had marijuana in the room. After he produced it and showed it to the officers, they told him to replace it in the drawer from which he had taken it. After the search warrant arrived, a more thorough search disclosed not only the marijuana, but also LSD. Appellant was convicted of delivery of LSD and possession of LSD with intent to deliver and received a 20 year sentence on each charge.

A four judge majority held that no exigent circumstances existed to support a search under Rule 14.3 governing warrantless emergency searches. Three dissenters vigorously protested that the police were justified in arresting appellant and in securing the room to prevent the sale or destruction of drugs.

As frequently happens in search and seizure cases, the facts become the focal point of

dispute between members of the majority and dissenters. Though the majority presumably would not gainsay that LSD can cause "serious bodily harm" and that further drug sales might have taken place had appellant not been arrested, it concluded without much explanation that the circumstances did not disclose grounds for an emergency search. The dissent, without adverting to Rule 14.3, concluded that manifest exigent circumstances justified the officers in remaining on the premises for three hours until a search warrant could be procured. The dissenting opinion argued that the search was "reasonable," but this argument does not meet the thrust of the majority's opinion, the question being whether a three-hour "seizure" of an entire room prior to a search under warrant was constitutionally permissible. Though the United States Supreme Court has approved the "seizure" of an automobile pending the issuance of a search warrant to search its interior, *Chambers v. Maroney*, 399 U.S. 42 (1970), the Arkansas Supreme Court has apparently decided that a dwelling place, not being mobile, cannot be quarantined, so to speak.

## RESEARCH REFERENCES

**Ark. L. Rev.** Notes, *Richardson v. State*: Ark. R. Crim. P. 8.1 — A Rule in Need of a Standard, 38 Ark. L. Rev. 842.

**U. Ark. Little Rock L.J.** Notes, Criminal Procedure — Exclusionary Rule — No Good Faith Exception to the Arkansas Rules of Criminal Procedure — Yet, 8 U. Ark. Little Rock L.J. 513.

**U. Ark. Little Rock L. Rev.** Sachar, *Overview of Arkansas Warrantless Search and Seizure Law*, 23 U. Ark. Little Rock L. Rev. 423.

## CASE NOTES

### ANALYSIS

Constitutional protection.

Invasion of privacy.

Official intrusion.

Probable cause.

Search.

Seizure.

### Constitutional Protection.

Absent exigent circumstances, an intrusion into an individual's place of abode without a warrant is a violation of that individual's rights under the Constitutions of the United States and the State of Arkansas. *Haynes v. State*, 269 Ark. 506, 602 S.W.2d 599, cert. denied 449 U.S. 1066, 101 S. Ct. 795, 66 L. Ed. 2d 611 (1980).

No provision of the constitution permits police officers without a warrant to break down doors, to enter the premises of an indi-

vidual, and to detain him for several hours while waiting for a search warrant. *Haynes v. State*, 269 Ark. 506, 602 S.W.2d 599, cert. denied 449 U.S. 1066, 101 S. Ct. 795, 66 L. Ed. 2d 611 (1980).

### Invasion of Privacy.

Where the police arrested the defendant for the sale of a controlled substance and seized his motel room until a search warrant could be obtained, the seizure of the room was an invasion of privacy; therefore, the search of the motel room and the seizure of evidence prior to the receipt of the warrant, three hours later, were not authorized and the evidence so obtained was inadmissible in the prosecution of the defendant. *Haynes v. State*, 269 Ark. 506, 602 S.W.2d 599, cert. denied 449 U.S. 1066, 101 S. Ct. 795, 66 L. Ed. 2d 611 (1980).



**Official Intrusion.**

Where search is not under government direction, the search is not an "official intrusion" and is not subject to the exclusionary rule under U.S. Const., Amend. 4 or implicated under Arkansas Rules of Criminal Procedure. *Winters v. State*, 301 Ark. 127, 782 S.W.2d 566 (1990).

**Probable Cause.**

Unverified anonymous telephone tips do not support or contribute to a probable cause determination. *Burks v. State*, 293 Ark. 374, 738 S.W.2d 399 (1987), overruled *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

Although the search was lengthy, it was not unreasonable, based upon the totality of the circumstances, where the evidence revealed that the item listed on the warrant was never found, and what transpired during the search gave the officers reasonable cause to believe that other items were subject to seizure. *Campbell v. State*, 27 Ark. App. 82, 766 S.W.2d 940 (1989).

The degree of proof sufficient to sustain a finding of probable cause is less than that required to sustain a criminal conviction. *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997).

**Search.**

Officer's entry into defendant's home in connection with his investigation of a suspect who had just left the home in defendant's company was a "search" as defined by this rule. *Holmes v. State*, 75 Ark. App. 46, 54

S.W.3d 121 (2001), aff'd 347 Ark. 530, 65 S.W.3d 860 (2002).

Defendant's suppression motion was properly denied where her co-tenant gave police officers consent to search the common areas of her residence and the officers saw drug paraphernalia, from the living room through an open door, in plain view on defendant's bed. *Love v. State*, 355 Ark. 334, 138 S.W.3d 676 (2003), overruled, *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006).

Drug manufacturing evidence should have been suppressed where officers entered defendant's residence seeking persons named in arrest warrants, which was a search under this rule; because the person allowing consent was not advised that she could refuse consent, the search violated Ark. R. Crim. P. 11.1(c), the Fourth Amendment, and Ark. Const., Art. 2, § 15. *Burroughs v. State*, 96 Ark. App. 289, 241 S.W.3d 280 (2006).

**Seizure.**

The chasing of a suspect by a police officer did not constitute a seizure. *Stewart v. State*, 42 Ark. App. 28, 853 S.W.2d 286 (1993).

**Cited:** *Logan v. State*, 264 Ark. 920, 576 S.W.2d 203 (1979); *Brannon v. State*, 26 Ark. App. 149, 761 S.W.2d 947 (1988); *State v. Torres*, 309 Ark. 422, 831 S.W.2d 903 (1992); *McCormick v. State*, 74 Ark. App. 349, 48 S.W.3d 549 (2001); *Dickinson v. State*, 367 Ark. 102, 238 S.W.3d 125 (2006); *Moss v. State*, 2011 Ark. App. 14, — S.W.3d —, 2011 Ark. App. LEXIS 27 (Jan. 12, 2011).

**Rule 10.2. Permissible objects of seizure.**

(a) Unless prohibited by other express provision, the following are subject to seizure:

(i) evidence of or other information except privileged information concerning the commission of a criminal offense or other violation of law;

(ii) contraband, the fruits of crime, or things possessed in violation of the laws of this state;

(iii) weapons or other things used or likely to be used as means of committing a criminal offense; and

(iv) an individual for whose arrest there is reasonable cause, or who is unlawfully held in confinement or other restraint.

**CASE NOTES****ANALYSIS**

Evidence from victim.

Evidence of criminal offense.

**Evidence from Victim.**

Seizure of evidence from clothing of crime victim is constitutional. *Mitchell v. State*, 321

Ark. 570, 906 S.W.2d 307 (1995).

**Evidence of Criminal Offense.**

Where, in prosecution for witnessing a dog fight presented as a public spectacle, a copy of the rules for dog fighting was lawfully seized by the officers as being incidental to the

arrests, as being within the immediate control at least of one witness, and as being evidence of the offense, and the rules were relevant to the action, explaining the purpose of the pit and details shown by the video-tape, the copy of the rules was admissible even though the state did not show that the defendants were aware of its existence. *Ash v. State*, 290 Ark. 278, 718 S.W.2d 930 (1986).

Where officers lawfully seized defendant's vehicle as a permissible object of seizure after

viewing it with his consent, and upon inspection of the vehicle, the police had a reasonable belief that it was evidence of the commission of a crime, then, since the initial seizure was legal and since the reason for and nature of the custody of the vehicle was to use it as evidence, the subsequent warrantless searches were not unconstitutional. *Booth v. State*, 26 Ark. App. 115, 761 S.W.2d 607 (1988), cert. denied 490 U.S. 1047, 109 S. Ct. 1956, 104 L. Ed. 2d 425 (1989).

## RULE 11. SEARCH AND SEIZURE BY CONSENT

### Rule 11.1. Authority to search and seize pursuant to consent.

(a) An officer may conduct searches and make seizures without a search warrant or other color of authority if consent is given to the search.

(b) The state has the burden of proving by clear and positive evidence that consent to a search was freely and voluntarily given and that there was no actual or implied duress or coercion.

(c) A search of a dwelling based on consent shall not be valid under this rule unless the person giving the consent was advised of the right to refuse consent. For purposes of this subsection, a "dwelling" means a building or other structure where any person lives or which is customarily used for overnight accommodation of persons. Each unit of a structure divided into separately occupied units is itself a dwelling. (Amended November 18, 2004, effective January 1, 2005.)

#### Reporter's Notes to 2004 Amendments:

The 2004 amendments added subsections (b) and (c). Subsection (b) codifies the burden of proof imposed on the state beginning with such cases as *Scroggins v. State*, 268 Ark. 261, 595 S.W.2d 219 (1980) and *Rodriguez v. State*, 262 Ark. 659, 559 S.W.2d 925 (1978). Arkansas Supreme Court jurisprudence on consen-

sual searches requires the state to prove the voluntary character of consent by "clear and positive evidence" or "clear and positive testimony." Subsection (c) incorporates the holding of *State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (2004), which requires that a home dweller be advised of his or her right to refuse consent to a search of the dwelling.

### 1987 Unofficial Supplementary Commentary to Rule 11.1

It is now clear that Arkansas law enforcement officers seeking consent to search from suspects do not have to advise them that they may refuse to consent. *Miranda* has no counterpart in the search and seizure context. *Scroggins v. State*, 268 Ark. 261, 595 S.W.2d 219 (1980); *Dickson v. State*, 260 Ark. 857, 545 S.W.2d 606 (1977).

The state's burden of proof on the consent issue is to produce "clear and positive testimony that consent to a search was freely and voluntarily given and that there was no actual or implied duress or coercion." *Scroggins v. State*, relying upon *Rodriguez v. State*, 262 Ark. 659, 559 S.W.2d 925 (1978). "Clear and positive testimony" is apparently testimony that clears the preponderance of the evidence hurdle but falls short of proof beyond a reasonable doubt. In *Rodriguez*, a number of

police units converged on the vehicle driven by appellant and stopped it. An officer patted appellant down, examined his driver's license and opened the trunk of the vehicle with a key provided by appellant. According to the officer, the key was provided in response to a request accompanied by an explanation that the officer was looking for marijuana. Appellant disputed this testimony, stating that when he asked the officer if he had a search warrant, the officer patted his gun, saying that was all the search warrant he needed. Pointing out that appellant was surrounded by armed police officers at the time of the search, the Court overturned the trial court's finding of voluntary consent, saying that the state's burden of proof "cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Rodriguez* at 661,



559 S.W.2d at 926, quoting from *White v. State*, 261 Ark. 23, 545 S.W.2d 641 (1977).

### Standard of Review.

It is important to distinguish between the state's burden of proof at trial and the standard of review on appeal. Though the state has the burden of proving by clear and positive testimony that consent to a search was freely and voluntarily given without actual or implied duress or coercion, on appeal the Supreme Court make[s] an independent determination based upon the totality of the circumstances when it reviews a trial judge's ruling on a motion to suppress evidence, and it will not set aside a trial judge's finding

unless it is clearly against the preponderance of the evidence. *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979).

In regard to warrantless searches, the Court has stated:

"On appeal [the appellate court] make[s] an independent determination, based on the totality of the circumstances, as to whether evidence obtained by means of a warrantless search ... should be suppressed, and the trial court's finding will not be set aside unless it is clearly against the preponderance of the evidence or clearly erroneous."

*State v. Tucker*, 268 Ark. 427, 428-29, 597 S.W.2d 584, 585 (1980).

## CASE NOTES

### ANALYSIS

Burden on state.  
Challenge to legality.  
Consent to search.  
Proof of voluntariness.  
Right to refuse.

### Burden on State.

The state has the burden of proving by clear and positive testimony that consent to a search was freely and voluntarily given and that there was no actual or implied duress or coercion. *Scroggins v. State*, 268 Ark. 261, 595 S.W.2d 219 (1980).

### Challenge to Legality.

The proper manner of asserting a challenge to the legality of a search is at a hearing on a timely motion to suppress the evidence where the claims can be made without danger of self-incrimination, and one that fails to do so has no standing to make that challenge at a later point. *Mock v. State*, 20 Ark. App. 117, 725 S.W.2d 1 (1987).

### Consent to Search.

Where officers lawfully seized defendant's vehicle as a permissible object of seizure after viewing it with his consent, and upon inspection of the vehicle, the police had a reasonable belief that it was evidence of the commission of a crime, then, since the initial seizure was legal and since the reason for and nature of the custody of the vehicle was to use it as evidence, the subsequent warrantless searches were not unconstitutional. *Booth v. State*, 26 Ark. App. 115, 761 S.W.2d 607 (1988), cert. denied 490 U.S. 1047, 109 S. Ct. 1566, 104 L. Ed. 2d 425 (1989).

A search of the defendant's sister's home, at which the defendant resided, was proper where (1) the defendant's signed parole release form stated that, "You must submit your person, place of residence, and motor vehicles to search and seizure at any time, day or night, with or without a search warrant,

whenever requested to do so by any Department of Community Punishment officer," and (2) the defendant's parole officer had informed the defendant's sister that if she permitted the defendant to live in her home, it would be subject to search "24 hours a day, seven days a week without a warrant," and the sister agreed to that condition. *McFerrin v. State*, 344 Ark. 671, 42 S.W.3d 529 (2001).

A "knock and talk" search, which involves officers proceeding to a house, knocking on the door, asking to be admitted inside, and then seeking consent to search the house, is not inherently coercive and does not violate the rule. *Hadl v. State*, 74 Ark. App. 113, 47 S.W.3d 897 (2001).

Where officer asked defendant for consent to search home and defendant stated he wanted to call his attorney and went back into the house, and officer simply followed defendant into the house, officer's entry into the home was illegal and not supported by unequivocal proof of consent required by state caselaw, therefore, evidence of manufacture of methamphetamine was suppressed. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002).

Defendant's consent to search following the telephone conversation with his attorney was not sufficiently attenuated from officer's illegal entry into defendant's house without unequivocal consent; thus, the methamphetamine and methamphetamine-manufacturing products seized as a result of the illegal entry and search were the fruit of the poisonous tree and had to be suppressed. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002).

Officers' warrantless entry into defendant's home constituted a Fourth Amendment violation because the state failed to present any clear and positive testimony that any type of consent, verbal or otherwise, was obtained by officers before they entered defendant's house. *Latta v. State*, 350 Ark. 488, 88 S.W.3d 833 (2002).

There was no evidence to support defendant's assertion that he was coerced into consenting to the search of his vehicle where defendant gave his consent to a police officer over the phone and another officer present with defendant at the police station overheard the conversation in which defendant gave his consent. *Medlock v. State*, 79 Ark. App. 447, 89 S.W.3d 357 (2002).

Defendant's suppression motion was properly denied where her co-tenant gave police officers consent to search the common areas of her residence and the officers saw drug paraphernalia, from the living room through an open door, in plain view on defendant's bed. *Love v. State*, 355 Ark. 334, 138 S.W.3d 676 (2003), overruled, *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006).

When an officer does not inform a suspect of his or her right to refuse consent, any subsequent search, even one based on the suspect's apparent consent, is invalid; subsection (c) of this rule was amended such that this rule now explicitly provides that a search of a dwelling based on consent shall not be valid unless the person giving consent was advised of the right to refuse consent. *Carson v. State*, 363 Ark. 158, 211 S.W.3d 527 (2005).

Trial court properly denied defendant's motion to suppress evidence of methamphetamine that was found during a search of his vehicle where defendant gave an officer permission to look inside the vehicle. *Welch v. State*, 364 Ark. 324, 219 S.W.3d 156 (2005).

In a murder case, the circuit court properly denied defendant's motion to suppress a .40 caliber Glock pistol where the record showed defendant waived his Miranda rights and consented to police officers' obtaining his gun so that they could conduct ballistics testing. *Dickinson v. State*, 367 Ark. 102, 238 S.W.3d 125 (2006).

Although defendant argued that he gave consent to search his house only after the officer made threats of incarceration and of taking his children from the home, the officer denied ever threatening defendant or his family in order to get consent to search the house and confirmed that no one was taken to jail that night; thus, the appellate court could not say that the trial court's denial of the motion to suppress was clearly erroneous. *Gonder v. State*, 95 Ark. App. 144, 234 S.W.3d 887 (2006).

Drug manufacturing evidence should have been suppressed where officers entered defendant's residence seeking persons named in arrest warrants, which was a search under Ark. R. Crim. P. 10.1; because the person allowing consent was not advised that she could refuse consent, the search violated subsection (c) of this rule, the Fourth Amend-

ment, and Ark. Const., Art. 2, § 15. *Burroughs v. State*, 96 Ark. App. 289, 241 S.W.3d 280 (2006).

Where officers saw evidence that defendant was manufacturing methamphetamine during a warrantless search of his home, he was not entitled to suppress the evidence. The consent form signed by defendant as a condition of his release on parole was sufficient to support the officers' search under this rule. *Hatcher v. State*, 2009 Ark. App. 481, 324 S.W.3d 366 (2009).

Trial court did not err in denying defendant's motion to suppress evidence obtained in a body cavity search where defendant was asked for, and gave, his consent to the search, the request for consent was specific, the search was conducted in just the manner and extent requested, the search did not exceed the scope of the consent given, and the search was reasonable. *Jackson v. State*, 2010 Ark. App. 359, — S.W.3d —, 2010 Ark. App. LEXIS 368 (Apr. 28, 2010).

Trial court's finding that a deputy sheriff had defendant's consent to a pat-down search after a traffic stop was not clearly erroneous. Though defendant testified that he never consented to the search, the trial court was entitled to find the contrary testimony of the deputy to be more credible, and there was no evidence that defendant was coerced into consenting. *Webb v. State*, 2011 Ark. 430, — S.W.3d —, 2011 Ark. LEXIS 517 (Oct. 13, 2011).

Denial of the motion to suppress evidence was affirmed because consent was obtained prior to the completion of the traffic stop; the video indicated that the written warning was handed to appellant approximately nine minutes into the traffic stop. *Freeman v. State*, 2012 Ark. App. 144, — S.W.3d —, 2012 Ark. App. LEXIS 246 (Feb. 15, 2012).

### **Proof of Voluntariness.**

State failed to meet its burden of proving that consent was freely and voluntarily given where defendant, whose automobile was stopped by armed police officers, handed over the keys to his trunk. *Rodriguez v. State*, 262 Ark. 659, 559 S.W.2d 925 (1978).

Consent to search was voluntarily given by the defendant's father where (1) the search form stated that he had been informed of his constitutional right not to permit a search without a search warrant and that he willingly gave his permission to conduct a complete search of his premises and property, and (2) a deputy testified that the father told him he didn't have anything to hide, that his boy shouldn't have anything to hide either, and that the officers could take a look around. *Burdyshaw v. State*, 69 Ark. App. 243, 10 S.W.3d 918 (2000).



**Right to Refuse.**

Knowledge of the right to refuse consent to search is not a requirement to prove the voluntariness of consent; specifically, a Miranda warning is not required before a warrantless search is conducted. *Scroggins v. State*, 268 Ark. 261, 595 S.W.2d 219 (1980).

Search of defendant's vehicle was not in violation of the Arkansas Constitution because the knock-and-talk procedure, during which officers were required to inform a home dweller that he or she had the right to refuse

consent to a search, did not apply to the search of a vehicle; hence, defendant's motion to suppress evidence was properly denied because defendant consented to the search. *Welch v. State*, 364 Ark. 324, 219 S.W.3d 156 (2005).

**Cited:** *Hamm v. State*, 296 Ark. 385, 757 S.W.2d 932 (1988); *Williams v. State*, 303 Ark. 193, 794 S.W.2d 618 (1990); *Moore v. State*, 304 Ark. 257, 801 S.W.2d 638 (1990); *Bruce v. State*, 367 Ark. 497, 241 S.W.3d 728 (2006).

**Rule 11.2. Persons from whom effective consent may be obtained.**

The consent justifying a search and seizure can only be given, in the case of:

(a) search of an individual's person, by the individual in question or, if the person is under fourteen (14) years of age, by both the individual and his parent, guardian, or a person *in loco parentis*;

(b) search of a vehicle, by the person registered as its owner or in apparent control of its operation or contents at the time consent is given; and

(c) search of premises, by a person who, by ownership or otherwise, is apparently entitled to give or withhold consent.

**1987 Unofficial Supplementary Commentary to Rule 11.2****Consent by Person Without Authority.**

The Arkansas Supreme Court has suggested that so long as a searching police officer reasonably believes that a person giving consent had authority to do so, the consent is valid, notwithstanding a later determination that the consensor had no such authority. *Grant v. State*, 267 Ark. 50, 54-55, 589 S.W.2d 11, 13 (1979). Evidence seized pursuant to consent by one lacking authority to give it might survive a motion to suppress on the theory that the exclusionary rule is designed to deter future unlawful police conduct, not vindicate personal constitutional rights, and the deterrent function is not well served by excluding evidence seized by police officers acting in good faith and on reasonable grounds. See *United States v. Peterson*, 524 F.2d 167 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976). See, also, *United States v. Leon*, 468 U.S. 897, 82 L. Ed. 2d 677 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981, 82 L. Ed. 2d 737 (1984).

The Court's lines of inquiry in consent search cases generally track the grounds set out in Comment I(a)(iv) to Rule 16.2. The appearance of authority to give consent is an important factor in determining the validity of the search for the purposes of Rule 11, which relieves the searching officer of criminal or civil liability. Apparent authority has not, however, been found by the Arkansas Supreme Court to foreclose attack on the

admissibility of evidence where there was no authority in fact. See, for instance, *Spears v. State*, 270 Ark. 331, 334, 605 S.W.2d 9, 11 (1980). But, given the United States Supreme Court's explicit recognition that the exclusionary rule is founded upon deterrence of future unlawful police conduct so that good faith searches are immunized, *United States v. Leon* and *Massachusetts v. Sheppard*, it is conceivable that a "good faith" doctrine may arise to immunize a seizure made pursuant to a search by an officer acting in good faith pursuant to consent given by one having apparent but not actual authority to consent.

It should be noted that an Arkansas Federal District Court has ruled that a third party cannot give consent validating a warrantless search of areas in which an absent party retains an expectation of privacy, regardless of actual or apparent authority on the part of the third person consensor. *United States v. Butler*, 495 F. Supp. 679 (E.D. Ark. 1980). In *Butler*, appellant's father consented to a search of the room in the father's home where appellant lived. FBI agents entered the room and opened a suitcase and a bureau drawer. The court suppressed the evidence on two grounds. First, appellant had a reasonable expectation of privacy in the suitcase and bureau drawer. Second, the prosecution failed to show exigent circumstances justifying a warrantless search.

The court relied upon *Arkansas v. Sanders*,

442 U.S. 753, 61 L. Ed. 2d 235 (1979) in making its privacy finding. In *Sanders*, the United States Supreme Court found that a warrantless search of luggage taken from the trunk of an automobile lawfully stopped was violative of the Fourth Amendment to the Constitution of the United States, notwithstanding the validity of the stop and the valid warrantless arrest of the automobile's occupants. The Court found that exigent circumstances did not exist, the suitcase and its owners being in custody. "The exigency of mobility must be assessed at the point immediately before the search — after the police have seized the object to be searched and have it securely within their control." *Id.* at 763, 61 L. Ed. 2d at 244-45. Also, see *United States v. Block*, 590 F.2d 535 (4th Cir. 1978), where the court found that a mother had authority to permit inspection of the room that her son, the defendant, occupied as a guest in her home, but that this authority did not extend to the interior of her son's footlocker in this room, the expectation of privacy rationale preventing such a search.

The Arkansas Supreme Court's recitation of the facts in *Grant v. State* does not disclose the location of the items seized, so it is difficult to speculate how the *Butler* Court would have ruled on those facts.

It should be noted, however, that in *Alford v. State*, 291 Ark. 243, 724 S.W.2d 151 (1987) the Arkansas Supreme Court upheld the seizure of a gun that was concealed under books on a shelf in appellant's closed closet on the theory that his father, who shared the apartment, had impliedly consented to the search by inviting police officers into the apartment immediately after decedent had been shot by appellant. It later came out that appellant had shot decedent during an argument. Appellant's father was present and asked a neighbor to call an ambulance and the police. When police officers arrived, appellant and his father advised them that decedent had committed suicide. At some point the investigating officers became skeptical about the suicide claim and conducted the warrantless search of the apartment in which the murder weapon was discovered. Without citing *Butler* and though no explicit consent to search was given by either appellant or his father, the Court upheld the conviction, concluding:

Here, the officers were permissibly in the Alford's apartment investigating a reported suicide, and no probable cause existed initially to obtain a warrant or to make an arrest. Yet, as a result of Dennis Alford's invitation into the apartment and his total cooperation in the search, the officers' search did ultimately yield substantial evidence that served as a basis for appellant's prosecution. On the facts presented in this

situation, we hold the trial judge correctly upheld the search as constitutionally permissible.

291 Ark. at 249, 724 S.W.2d at 154. See, also, *Spears v. State*, 270 Ark. 331, 605 S.W.2d 9 (1980).

### **Warrantless Search of Closed Container Inside Passenger Compartment of Vehicle.**

In *Honea v. State*, 15 Ark. App. 382, 695 S.W.2d 391 (1985), an officer posing as a truckdriver wishing to buy amphetamines had a conversation with appellant on a CB radio band and arranged to meet him. Police arrested appellant as he sat in the cab of his employer's truck on his employer's property. After arresting appellant, the officer searched the truck and found counterfeit drugs in an unlocked briefcase in the cab. Before the search was conducted, permission was obtained from a high level managerial official of the company. The Court found that the company official had authority to consent to the truck search. The Court went on to state as an alternative justification for the search that the officer was entitled to search the cab of the truck incidental to appellant's valid arrest under *New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768 (1981).

In *Belton*, the United States Supreme Court held that a policeman who has made a lawful custodial arrest of an automobile's occupant may contemporaneously search the automobile's passenger compartment and examine and seize the contents of containers found there. The Court upheld the admission into evidence of drugs seized from a closed pocket of a jacket on the back seat of an automobile. In *Arkansas v. Sanders*, 442 U.S. 753, 61 L. Ed. 2d 235 (1979), the Court had previously observed that the "automobile exception" is recognized because of the inherent mobility of automobiles and the diluted reasonable expectation of privacy that may exist with respect to property in an automobile, depending upon the circumstances of each case.

In *Honea v. State*, the evidence was seized from a vehicle owned by a party other than appellant, indicating that his expectation of privacy was minimal. On the other hand, because ownership was in the company and the truck was immobilized on company property and in the custody of responsible officials, exigent circumstances justifying a warrantless search were completely absent. Accordingly, dicta by the Court in *Honea* to the effect that *New York v. Belton* is dispositive may be less reliable than would appear at first blush.

### **Consent by Minor.**

In *Harmon v. State*, 277 Ark. 265, 641 S.W.2d 21 (1982), the Arkansas Supreme Court upheld the fruits of a "search" con-



sented to by a sixteen-year-old. The viability of the *Harmon* decision as authority for the general proposition that sixteen-year-olds may consent to premises searches is uncertain. The target of the search had a turbulent relationship with the mother of the sixteen-year-old consentor and lived on uncertain terms with her in her home, the site of the "search." And, as the Court takes pains to point out, the sixteen-year-old consentor actually retrieved the murder weapon herself from an undisclosed place at the house. In

fact, after police officers entered the house, they made no search, but stood by and took possession of items delivered by the child. Appellant was not the parent of the child. Whether under other circumstances the parent of a sixteen-year-old would be found to have a reasonable expectation of privacy in regard to items in a dresser drawer in his room in a house occupied by the family is a question that cannot be answered by reference to the *Harmon* decision. Compare *United States v. Butler*; *Alford v. State*.

## RESEARCH REFERENCES

**Ark. L. Rev. Comment**, The Arkansas Wrongful Death Statute, 35 Ark. L. Rev. 294.

## CASE NOTES

### ANALYSIS

Apparent authority.

Effect of rule.

Evidence.

Expectation of privacy.

Foster father.

In loco parentis.

Lack of authority.

Registered owner.

### Apparent Authority.

Although a motion to suppress may be based upon the fact that consent was not given by any person authorized to give consent, this limitation on this rule does not mean that the appearance of authority to give consent is not an important factor in determining validity of consent to search, if the searching officers could reasonably believe in good faith that the one giving consent had authority to do so. *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979).

Consent to search effective to validate a warrantless search and seizure may, in appropriate circumstances, be given by a person other than the victim of the search, this third person authority may be based upon the fact that the third person shares with the absent target of the search a common authority over, general access to, or mutual use of the place or object sought to be inspected under circumstances that make it reasonable to believe that the third person has the right to permit the inspection in his own right and that the absent target has assumed the risk that the third person may grant this permission to others; however, third party consent, no matter how voluntarily given, cannot validate a warrantless search when the circumstances manifest to the contrary that the absent target of the search retains an expectation of privacy in the place or object, notwithstanding some appearance of claim of authority by

the third person. *United States v. Butler*, 495 F. Supp. 679 (E.D. Ark. 1980).

Although this rule does not, standing alone, govern admissibility of things seized during the search, the appearance of authority to give consent and the good faith of the officers are significant factors in determining the validity of the consent to search. *Spears v. State*, 270 Ark. 331, 605 S.W.2d 9 (1980).

Where woman consenting to search told officers the house belonged to her son, who had moved away, and that "she was taking care of it and was the overseer" and when asked if she would consent to a search, replied, "Yes you can. No one lives in there," and told them "if anything stolen is in the house, I want it out," and where officer who went into house at defendant's request saw that living room was unfurnished and electricity was off, it was not unreasonable for the officers to believe that the woman was vested with sufficient control over the premises, and in fact she did possess sufficient authority over the premises, to give a valid consent to a search without the issuance of a search warrant. *Spears v. State*, 270 Ark. 331, 605 S.W.2d 9 (1980).

Person sitting in driver's seat of parked car was in apparent control for purposes of consent to search where owner was sitting in passenger seat but ran away and did not return until after search was complete. *Ferrell v. State*, 7 Ark. App. 36, 644 S.W.2d 302 (1982).

An assistant manager of an industrial plant, who was the highest-ranking person on the scene when the driver of a truck owned by the plant owner was arrested, was the truck owner's agent and as such, was clearly acting within the bounds of his delegated authority in consenting to a search of the truck, even though the manager's responsibilities did not

specifically include trucks. *Honea v. State*, 15 Ark. App. 382, 695 S.W.2d 391 (1985).

Where defendant made representations to police that he lived in the apartment, defendant had apparent authority to consent to search of premises, and police officer's search that led to defendant being charged with marijuana possession was valid. *Strickland v. State*, 80 Ark. App. 268, 94 S.W.3d 376 (2002).

It was apparent that wife had common authority over items she discovered in a part of the home jointly accessed and controlled by defendant and his wife as they cohabitated in the home and defendant took no steps to prevent his wife from obtaining the materials, other than hiding some of them on a shelf in a doorless closet; thus, the trial court did not err in denying defendant's motion to suppress the materials. *Bruce v. State*, 367 Ark. 497, 241 S.W.3d 728 (2006).

Deputy's initial intrusion into defendant's residence was not based on facts and circumstances that overcame the presumption that his warrantless intrusion was unreasonable; it was unreasonable for the deputy to rely on the owner's consent to enter defendant's residence without further inquiry and further evidence that defendant had been lawfully evicted. *Breshears v. State*, 94 Ark. App. 192, 228 S.W.3d 508 (2006).

Where the owner of a vehicle was riding as a passenger during a traffic stop, the driver of the car had the authority to consent to a police search of the vehicle under subsection (b) of this rule. When the owner was charged with theft of property found in the trunk, the trial court properly denied his motion to suppress evidence because the officer had valid consent to conduct the search of the vehicle. *Cole v. State*, 2009 Ark. App. 514, 324 S.W.3d 695 (2009).

Police officer may rely on the consent to search given by the driver of a vehicle, even in the presence of the owner of the vehicle, unless the owner asserts his or her right to refuse consent. When the owner of a car allows another person to drive his or her car, he or she gives that person temporary authority to consent to a search of that car; the consent given to a police officer by the driver is valid, absent an objection from the owner. *Cole v. State*, 2009 Ark. App. 514, 324 S.W.3d 695 (2009).

#### **Effect of Rule.**

Although this rule relieves the searching officer of any criminal or civil liability, it does not, standing alone, govern admissibility of things seized during the search. *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979).

#### **Evidence.**

Evidence held sufficient to support finding of consent. *Hamm v. State*, 296 Ark. 385, 757 S.W.2d 932 (1988).

#### **Expectation of Privacy.**

Where there were no exigent circumstances which would have justified a warrantless search, and where there was evidence that the defendant had a reasonable expectation of privacy in his bureau drawer and suitcase, the defendant's father had no lawful authority to consent to the search thereof, and the items obtained through the search would be suppressed. *United States v. Butler*, 495 F. Supp. 679 (E.D. Ark. 1980).

Where the owner of a self-storage garage asked the police to investigate a chemical odor coming from one of the rented compartments in his garage, the contents of a van found in the compartment were admissible as evidence since by the terms of the rental contract the van was abandoned property, the van owners no longer had any expectation of privacy in it, and the owner of the premises had requested the search. *Harris v. State*, 12 Ark. App. 181, 672 S.W.2d 905, rev'd on other grounds, 284 Ark. 247, 681 S.W.2d 334 (1984).

#### **Foster Father.**

Despite the facts that there was no limitation as to time, area, or items to be seized in a "consent to search" form signed by defendant's foster father, that the form failed to warn him that his consent could be withdrawn or limited at any time, that several police officers bearing weapons were present, that the request for consent was made at 3:30 a.m., shortly after the defendant had been arrested without warrant, that the foster father was scared when he signed the form, and that it would have been easy to have obtained a search warrant, where the search was limited to the kitchen and defendant's room, where the foster father who admitted he had, in fact, signed the form had been told that the only search was to be for a gun and the search was so limited, where no warning was required that consent could be withdrawn, and where there were practical difficulties in obtaining a search warrant at 3:30 a.m., the finding by the trial court that the consent was voluntary was not clearly against the preponderance of the evidence. *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979).

Since it is clear that foster father, in addition to being the owner of the premises which constituted and were maintained as a single family dwelling, was the head of the single family household and had not surrendered or relinquished exclusive control of the defendant's bedroom or the ability to designate what use could be made of it, by lease or otherwise, he maintained the right to access and control over the entire premises, and had authority to consent to a search of the bedroom. *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979).

Where defendant, who was the foster son of his natural father, lived with his foster par-



ents in a house owned by his foster father which was a one family dwelling and where his foster mother washed his clothes and put them in his dresser in his room, the fact that the defendant paid board and owned everything in the room did not prevent his foster father from being able to consent to a search in his absence under subsection (c) of this rule. *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979).

#### **In Loco Parentis.**

For the purposes of consenting to a search, the status of one in loco parentis and a natural parent should be the same; therefore, the fact defendant was a foster child made no difference. *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979); *Winters v. State*, 301 Ark. 127, 782 S.W.2d 566 (1990).

#### **Lack of Authority.**

Consent to search held invalid where the consent to search the vehicle was not obtained

from the owner, who was sitting inside the car at the time the officer arrived. *State v. Pruitt*, 347 Ark. 355, 64 S.W.3d 255 (2002).

#### **Registered Owner.**

Motion to suppress evidence was properly denied in a drug case where the evidence showed that a search based on a pretextual stop was valid; the officer had probable cause for the stop since the vehicle was speeding, consent to search was given by the registered owner, and the consent was not limited to exclude containers found inside the vehicle. *Flores v. State*, 87 Ark. App. 327, 194 S.W.3d 207 (2004).

**Cited:** *Love v. State*, 355 Ark. 334, 138 S.W.3d 676 (2003), overruled, *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006).

### **Rule 11.3. Search limited by scope of consent.**

A search based on consent shall not exceed, in duration or physical scope, the limits of the consent given.

#### **CASE NOTES**

##### **ANALYSIS**

Implied consent.

Search exceeding consent.

Search not exceeding consent.

#### **Implied Consent.**

The defendant's mother-in-law did not give implied consent to a police officer to follow her down a hall into the defendant's bedroom where: (1) the mother-in-law testified that she asked the officer to step inside the house because the family dog was making a disturbance, and for no other reason, (2) the officer asked for the defendant, (3) the mother-in-law went to the defendant's bedroom to retrieve him, and (4) the officer followed the mother-in-law to the defendant's bedroom. *Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999), modified 338 Ark. 397, 999 S.W.2d 183 (1999).

The defendant's wife did not give implied consent to a police officer to follow her mother down a hall into the defendant's bedroom where: (1) the mother-in-law testified that she asked the officer to step inside the house because the family dog was making a disturbance, and for no other reason, (2) the officer asked for the defendant, (3) the mother-in-law went to the defendant's bedroom to retrieve him, and (4) the officer followed the mother-in-law to the defendant's bedroom; no consent could be implied by the wife's presence in the living room and her failure to object when the officer followed her mother to the defendant's

bedroom. *Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999), modified 338 Ark. 397, 999 S.W.2d 183 (1999).

#### **Search Exceeding Consent.**

The entry by a police officer into the defendant's bedroom exceeded any consent given by the defendant's visiting mother-in-law where: (1) the mother-in-law testified that she asked the officer to step inside the house because the family dog was making a disturbance, and for no other reason, and that she never asked or verbally consented to the officer coming any further into the house, and specifically, not down the hall and into the defendant's bedroom; and (2) the officer never asserted that he perceived the initial invitation as anything more than entry inside the front door or that he relied on that invitation in any way as a basis for going into the interior of the defendant's home. *Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999), modified 338 Ark. 397, 999 S.W.2d 183 (1999).

#### **Search Not Exceeding Consent.**

Search of defendant's vehicle did not exceed the scope of his consent because defendant did not claim that he placed a limit on what parts of the vehicle an officer could search; hence, the court properly denied defendant's motion to suppress evidence of methamphetamine that was found behind a dashboard panel in the vehicle. *Welch v. State*, 364 Ark. 324, 219 S.W.3d 156 (2005).

Denial of the motion to suppress evidence was affirmed because consent was obtained prior to the completion of the traffic stop; the video indicated that the written warning was handed to appellant approximately nine minutes into the traffic stop. *Freeman v. State*, 2012 Ark. App. 144, — S.W.3d —, 2012 Ark. App. LEXIS 246 (Feb. 15, 2012).

**Cited:** *Love v. State*, 355 Ark. 334, 138 S.W.3d 676 (2003), overruled, *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006); *Jackson v. State*, 2010 Ark. App. 359, — S.W.3d —, 2010 Ark. App. LEXIS 368 (Apr. 28, 2010).

### Rule 11.4. Items seized: receipt.

After making a seizure, the officer shall make a list of the things seized, and shall deliver a receipt fairly describing the things seized to the person consenting to the search.

#### 1987 Unofficial Supplementary Commentary to Rule 11.4

Failure to provide a list of things seized to the person consenting to a search will not invalidate a consensual search absent a showing of prejudice. *King v. State*, 262 Ark. 342, 557 S.W.2d 386 (1977). Rule 16.2(e) states that “a motion to suppress evidence shall be

granted only that if Court finds that the violation upon which it is based was substantial...” Comment I(a)(iv) to Rule 16.2 does not make failure to provide an inventory list a ground for invalidating a consent search.

#### CASE NOTES

##### ANALYSIS

Delivery of receipt.  
Failure to list.

##### Delivery of Receipt.

In a prosecution for theft by receiving, defendant was not prejudiced by the delivery of a copy of the consent form with a list of the items seized to defendant’s wife rather than to his mother-in-law who had given her consent to the warrantless search of the premises. *King v. State*, 262 Ark. 342, 557 S.W.2d

386 (1977), overruled in part *State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (2004).

##### Failure to List.

The failure of the officers to make a list of the items seized, in the absence of prejudice, can amount to nothing more than harmless error. *Wiman v. State*, 266 Ark. 380, 583 S.W.2d 67 (1979).

**Cited:** *Moore v. State*, 261 Ark. 274, 551 S.W.2d 185 (1977); *Logan v. State*, 264 Ark. 920, 576 S.W.2d 203 (1979).

### Rule 11.5. Withdrawal or limitation of consent.

A consent given may be withdrawn or limited at any time prior to the completion of the search, and if so withdrawn or limited, the search under authority of the consent shall cease, or be restricted to the new limits, as the case may be. Things discovered and subject to seizure prior to such withdrawal or limitation of consent shall remain subject to seizure despite such change or termination of the consent.

#### CASE NOTES

##### Warning Unnecessary.

This rule does give one the right to withdraw or limit a consent previously given, but there is nothing in the rule requiring that the person giving the consent be advised of a right

to revoke it. *Pace v. State*, 265 Ark. 712, 580 S.W.2d 689 (1979).

**Cited:** *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979); *Carter v. State*, 9 Ark. App. 206, 657 S.W.2d 213 (1983).



## RULE 12. SEARCH AND SEIZURE INCIDENTAL TO ARREST

### 1987 Unofficial Supplementary Commentary to Rule 12

#### Standard of Review.

In regard to warrantless searches, the Court has stated:

"On appeal [the appellate court] make[s] an independent determination, based on the totality of the circumstances, as to whether evidence obtained by means of a warrantless search ... should be sup-

pressed, and the trial court's finding will not be set aside unless it is clearly against the preponderance of the evidence or clearly erroneous."

*State v. Tucker*, 268 Ark. 427, 428-29, 597 S.W.2d 584, 585 (1980). See, also, *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979).

#### Rule 12.1. Permissible purposes.

An officer who is making a lawful arrest may, without a search warrant, conduct a search of the person or property of the accused for the following purposes only:

- (a) to protect the officer, the accused, or others;
- (b) to prevent the escape of the accused;
- (c) to furnish appropriate custodial care if the accused is jailed; or
- (d) to obtain evidence of the commission of the offense for which the accused has been arrested or to seize contraband, the fruits of crime, or other things criminally possessed or used in conjunction with the offense.

#### Comment to Rule 12.1

Searches of the person shall be carried out with all reasonable regard for privacy, and unless exceptional circumstances otherwise require, the search of an accused prior to his

arrival at a police station shall be only as extensive as is reasonably necessary to effect the arrest with all practicable safety, or to prevent escape or the destruction of evidence.

### 1987 Unofficial Supplementary Commentary to Rule 12.1

As indicated in the original commentary to this rule, in cases involving searches — especially, of premises — incident to arrest, *Chimel v. California*, 395 U.S. 752, 23 L. Ed. 2d 685 (1969) is the fountainhead. *Chimel* held that a contemporaneous warrantless search incident to a lawful arrest may extend to the area from within which the person arrested might obtain either a weapon or something that could be used as evidence against him. Over ten years later, in *New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768 (1981), the Court held that the *Chimel* decision permits the conclusion that a law enforcement officer making an arrest of an automobile occupant may contemporaneously search the passenger compartment of the automobile, examining containers and seizing their contents as an incident of the arrest.

#### Pat-down Searches vs. Inventory Searches.

When the standard applied by the Arkansas Supreme Court in *Webb v. State*, 269 Ark. 415, 601 S.W.2d 848 (1980) is measured against tests previously adopted by both the

Arkansas Supreme Court and the United States Supreme Court, the results reached in *Webb* are perplexing.

Police officers reported to a motel after being advised that a mattress was on fire in a room. The officers did not charge any of the five people in the room with an offense based upon that incident, but did obtain their names and communicate them to headquarters for an arrest warrant check. The officers were advised by headquarters that there was an outstanding arrest warrant for appellant. They thereupon advised him that he would have to come to the police station. Appellant was searched twice, first in a pat-down search immediately after his arrest under a warrant later declared invalid by the Court and, second, in an inventory search conducted prior to incarceration at the police station. Evidently, neither the parties nor the Court questioned that appellant had been arrested prior to the pat-down.

The Court then determined that the arrest warrant was invalid and that therefore the arrest preceding the pat-down was invalid.

Yet the Court refused to follow *Whiteley v. Warden*, 401 U.S. 560, 28 L. Ed. 2d 306 (1971) and *Rodrigues v. State*, 262 Ark. 659, 559 S.W.2d 925 (1978), holding inadmissible items seized in searches pursuant to arrests under invalid warrants. Instead, the Court observed that "in both of these cases the search was made of an automobile, and we are not willing to extend the holding of those cases to apply to the facts here of a 'pat-down' search of an individual made incident to arrest." 269 Ark. at 421, 601 S.W.2d at 852.

The Court went on to discuss limited searches for weapons under Rule 3.4, perhaps because the Rule 3.4 standard turns on "reasonable suspicion," a lower hurdle to clear, so to speak, than the "reasonable cause" required for a valid arrest permitting a warrantless search. Ignoring that appellant was in fact arrested before the pat-down search, the Court appears to intimate that, had the officers made a pat-down search under Rule 3.4 as a result of a valid Rule 3.1 stop pursuant to a reasonable suspicion, the evidence disclosed by the pat-down would have been admissible. This hypothetical set of circumstances is then measured against Rule 3 standards.

The Court's ruling is also confounding in that it suppresses evidence seized during an inventory search under Rule 12.2 taking place a short time after the pat-down search, stating that Rule 12.2 "does not authorize such a search for [sic] incarceration under an invalid arrest warrant." *Id.* at 422, 601 S.W.2d at 853. It should be noted that Rule 12.1, governing the pat-down search immediately after the initial arrest under the invalid warrant, begins: "An officer who is making a lawful arrest . . ." Justices Mays and Purtle filed a dissent protesting that no rule of criminal procedure authorizes even a pat-down search pursuant to an illegal arrest.

*Webb* can certainly be read as saying that evidence will be suppressed if it is discovered pursuant to an inventory search at a police station after an invalid arrest, though the same evidence is admissible if seized an hour before after being found while defendant is being patted down immediately after the illegal arrest.

#### **Vehicle Searches Incident to Arrest.**

In *Jackson v. State*, 266 Ark. 754, 585 S.W.2d 367 (Ark. App. 1979), *cert. denied*, 444 U.S. 1017, 62 L. Ed. 2d 647 (1980), a law enforcement officer received a call that a theft was in progress nearby. While driving to the scene, he saw appellant's car approaching from the opposite direction. The officer had been told that persons had been seen rolling a large tire across a parking lot away from the scene of the crime. Appellant's car was "sitting low in the rear." *Jackson* at 759, 585 S.W.2d at 370.

The officer stopped the car, searched the trunk, and found the stolen tire, which was introduced into evidence over appellant's objections. The Arkansas Court of Appeals' conclusion that the search was lawful is unexceptionable under standards provided by *Chambers v. Maroney*, 399 U.S. 42, 26 L. Ed. 2d 419 (1970) and *Carroll v. United States*, 267 U.S. 132, 69 L. Ed. 543 (1925). As pointed out by the Court of Appeals, "the Arkansas Supreme Court has previously held that whenever a police officer has reasonable cause to believe that contraband is being unlawfully transported in a vehicle, then the vehicle may be the object of a warrantless search." *Jackson* at 759, 585 S.W.2d at 370. It must be remembered, however, that the scope of a permissible *Carroll* search will in many cases be broader than the scope of a search incident to the arrest of a vehicle occupant. In *Arkansas v. Sanders*, 442 U.S. 753, 61 L. Ed. 2d 235 (1979), the United States Supreme Court found invalid a search of a locked briefcase in the trunk of a vehicle being searched after the lawful arrest of an occupant of the vehicle. The Court emphasized that warrantless searches of vehicles incident to arrest are grounded on considerations of mobility of the vehicle and the lesser expectation of privacy in a vehicle. In fact, in *Sanders v. State*, 262 Ark. 595, 559 S.W.2d 704 (1978) (*Arkansas v. Sanders* below), the Arkansas Supreme Court placed emphasis on the fact that the suitcase was locked in the trunk of a taxicab and that the automobile's mobility was not a factor.

*Arkansas v. Sanders* must, in turn, be read in conjunction with *New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768 (1981), where the Court held that a policeman who has made a lawful custodial arrest of an automobile's occupant may contemporaneously search the automobile's passenger compartment and examine and seize the contents of containers in the passenger compartment. The Court upheld the admission into evidence of drugs seized from a closed pocket of a jacket on the back seat of the automobile. So, though it is difficult to reconcile the United States Supreme Court's holding in *Arkansas v. Sanders* and *New York v. Belton*, it is not safe to conclude that containers located in the trunk of a stopped vehicle may be searched without a warrant as an incident to a lawful arrest, though a trunk search in circumstances contemplated by Rule 14.1 will presumably be upheld.

#### **Scope of Search vs. Right to Seize.**

In *Van Daley v. State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987), the Court of Appeals noted that "while Rules 12.1(d) and 12.4(a) limit the scope of a search to that for evidence connected with the offense for which one has been arrested, they do not so limit the items



that can properly be *seized*. ... Once [things criminally possessed] are discovered, they may be seized and used as evidence without regard to whether they are connected with the offense for which the accused was initially arrested." *Id.* at 131, 725 S.W.2d at 576 (Court's emphasis).

In *Moore v. State*, 261 Ark. 274, 551 S.W.2d 185 (1977) (Supplemental Opinion on Rehearing), evidence seized in a warrantless search of appellant's bedroom after he had been awakened, arrested, and while he was being taken to a police station was excluded, the Court finding that the police should have obtained a search warrant. The Court did not discuss Rule 12.5. In its original opinion, in response to an argument that the search was necessary to prevent destruction of evidence by appellant's family, the Court said, "There is no reason one of the officers could not have obtained a search warrant while the other officers remained at the scene." *Id.* at 277, 551 S.W.2d at 187. It should be noted, however, that in a previous decision, *Haynes v. State*, 269 Ark. 506, 602 S.W.2d 599, *cert. denied*, 449 U.S. 1066 (1980), the Court invalidated a search on grounds that securing a residence after a warrantless arrest pending arrival of a warrant was an impermissible "intrusion" constituting a "search" under Rule 10.1(a).

Once one grants that exigent circumstances justify the warrantless arrest of a person at his residence, it appears anomalous to maintain that the same exigent circumstances do not justify securing the residence or a portion of it pending issuance of a search warrant that, *ex hypothesi*, could not have been se-

cured previously. As Justice Hickman convincingly observed in dissent in *Moore*:

I could accept the law that a person cannot be arrested in his home without an arrest warrant, and that his home at the same time could not be searched without a search warrant; or I could accept the law that a person can be arrested without an arrest warrant on probable cause, and at the same time his premises reasonably searched for any evidence *connected* with the alleged crime.

These are propositions that are both reasonable and can be scrutinized by the courts to guarantee the reasonable use of police power. But to say that a person can be taken from his home in the early morning hours without an arrest warrant and at the same time that the police cannot lawfully use evidence taken from under his bed, obviously connected with the crime, cannot be defended logically. Which is the greater threat, or potential threat, to individual rights?

261 Ark. at 278-E, 551 S.W.2d at 190. (Court's emphasis.)

#### **Reasonable Cause Test: Warrantless Searches.**

Though *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527 (1983), dealt with standards to be applied to ascertain whether reasonable cause exists to support the issuance of a search warrant, the Arkansas Court of Appeals has also applied the *Gates* "totality of the circumstances" test in analyzing whether reasonable cause exists to support a warrantless search. See, for example, *Mock v. State*, 20 Ark. App. 72, 723 S.W.2d 844 (1987).

### **RESEARCH REFERENCES**

**Ark. L. Rev.** Arrest, Citation and Summons — The Supreme Court Takes a Giant Step Forward, 30 Ark. L. Rev. 137.

### **CASE NOTES**

#### **ANALYSIS**

Purpose.  
Applicability.  
Consent.  
Evidence of criminal offense.  
Fruits or instrumentalities of crime.  
Inventory search.  
Search for weapons.  
Search prior to arrest.  
Search reasonable.  
Seizure of controlled substances.

#### **Purpose.**

The purpose of this rule is to protect the arresting officer by allowing the search of the passenger compartment of a car incident to a

lawful custodial arrest. *Stout v. State*, 320 Ark. 552, 898 S.W.2d 457 (1995).

#### **Applicability.**

Game and Fish officers are empowered to make arrests for violation of the game and fish laws and in making such arrests, those officers may also conduct a search of the person or property of the accused including his vehicle, in accordance with this rule. *State v. Henry*, 304 Ark. 339, 802 S.W.2d 448 (1990).

#### **Consent.**

It is well established that validly-obtained consent justifies an officer in conducting a warrantless search, with or without probable

cause. *Stout v. State*, 320 Ark. 552, 898 S.W.2d 457 (1995).

Defendant's convictions for possession of drug paraphernalia with intent to manufacture methamphetamine and possession of pseudoephedrine were upheld as his argument that the search and seizure were not authorized by this rule and Ark. R. Crim. P. 12.4 was inappropriate because the trial court concluded that defendant had consented to the search, making arguments based on those rules irrelevant. *Nelson v. State*, 365 Ark. 314, 229 S.W.3d 35 (2006), appeal dismissed — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 494 (Sept. 27, 2007).

#### **Evidence of Criminal Offense.**

Where, in prosecution for witnessing a dog fight presented as a public spectacle, a copy of the rules for dog fighting was lawfully seized by the officers as being incidental to the arrests, as being within the immediate control at least of one witness, and as being evidence of the offense, and the rules were relevant to the action, explaining the purpose of the pit and details shown by the video-tape, the copy of the rules was admissible even though the state did not show that the defendants were aware of its existence. *Ash v. State*, 290 Ark. 278, 718 S.W.2d 930 (1986).

It was not error to refuse to suppress the shotgun in defendant's trial for being a felon in possession of a firearm, despite the fact that the shotgun was originally seized as being evidence of an armed robbery, for, while subdivision (d) of this rule and Ark. R. Crim. P. 12.4(a) limit the scope of a search to that for evidence connected with the offense for which one has been arrested, they do not so limit the items that can properly be seized. These rules specifically provide that the arresting officer can seize contraband, the fruits of crime, and any other things criminally possessed which are discovered in the course of a proper search incident to arrest; once such items are discovered, they may be seized and used as evidence without regard to whether they are connected with the offense for which the accused was initially arrested. *Van Daley v. State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987).

Where contraband articles are identified without a trespass on the part of the officer, there is no "search" that is prohibited by the constitution. *Van Daley v. State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987).

Where defendant was arrested while in possession of a package which the police knew to contain illegal drugs, then even though the package was addressed to the defendant's son, the defendant had shown an interest in the package sufficient to lead authorities to conclude that he was aware of its contents; therefore, reasonable cause to arrest the defendant existed and the warrantless search of

his person was justified. *Heritage v. State*, 326 Ark. 839, 936 S.W.2d 499 (1996).

Defendant's arrest for DWI and search incident to arrest were proper under the standards set forth in Ark. R. Crim. P. 4.1(a)(ii)(C) and subsection (d) of this rule because a restaurant manager had reported that defendant was intoxicated, the officer discovered defendant sitting in his vehicle, with the keys in the ignition, and defendant failed two field sobriety tests. *Stewart v. State*, 2010 Ark. App. 9, — S.W.3d —, 2010 Ark. App. LEXIS 15 (Jan. 6, 2010).

#### **Fruits or Instrumentalities of Crime.**

A police officer who makes a lawful warrantless arrest is authorized to search the person or property of the accused to look not only for weapons but also for the fruits and instrumentalities of crime, and even if the fruits and instrumentalities of any other crime are found, they are properly seized. *Stout v. State*, 304 Ark. 610, 804 S.W.2d 686 (1991).

#### **Inventory Search.**

Inventory searches are recognized as an appropriate and necessary exception to the warrant requirement of the Fourth Amendment. *Stout v. State*, 304 Ark. 610, 804 S.W.2d 686 (1991).

Where both the investigative stop and frisk, plus the warrantless arrest, were reasonable, it was entirely proper for police officers to inventory defendant's personal property. *Stout v. State*, 304 Ark. 610, 804 S.W.2d 686 (1991).

#### **Search for Weapons.**

A police officer executing an arrest warrant acted reasonably in looking at a pill bottle in defendant's pants' pocket felt during the "pat-down" search for weapons and in returning the pill bottle to appellant's pants' pocket after determining that it was not a weapon where the officer testified he found two knives concealed on appellant, since a glass pill bottle is certainly similar enough to the size and shape of a knife to warrant further examination when felt. *Webb v. State*, 269 Ark. 415, 601 S.W.2d 848 (1980).

Justification for a limited search for weapons turns upon the question of whether the facts available to the officer at the moment of search would warrant a man of reasonable caution to believe that the action taken was appropriate; and it is only required that the police officer be able to point to specific and articulable facts which, taken together with rational inferences to be drawn from those facts, reasonably warrant a belief that his safety or that of others is in danger. *Webb v. State*, 269 Ark. 415, 601 S.W.2d 848 (1980).

The circumstance of finding a round of buckshot in a shotgun laying in a pickup truck occupied by defendants and spotting



another round on the floorboard justified a reasonable belief on the part of arresting officers that the truck contained items connected with the offense of unlawful hunting of wildlife in closed season with a modern firearm. *Blair v. State*, 16 Ark. App. 1, 696 S.W.2d 755 (1985).

There was no error in seizure of defendant's purse as part of a search incident to her arrest although it was not in her possession at the time of her arrest, where the purse was brought to defendant by her daughter and the arresting officer had reason to suspect it contained a weapon. *Bonebrake v. State*, 51 Ark. App. 81, 911 S.W.2d 261 (1995).

Search of film canister found to contain a controlled substance held valid, where, during a weapons search incident to arrest for a separate offense, the police officer found the canister in defendant's pocket and defendant attempted to divest himself of its possession. *Pyles v. State*, 55 Ark. App. 201, 935 S.W.2d 570 (1996).

#### **Search Prior to Arrest.**

A search is valid as incident to a lawful arrest even if conducted before the actual arrest provided the arrest and search are substantially contemporaneous and there was probable cause to arrest prior to the search. *Johnson v. State*, 21 Ark. App. 211, 730 S.W.2d 517 (1987).

An officer was in compliance with subsection (d) of this rule where the officer smelled marijuana emanating from the defendant's vehicle, conducted a patdown search of the defendant, found marijuana, arrested the defendant, and then continued to search him following the arrest. *Brunson v. State*, 327 Ark. 567, 940 S.W.2d 440 (1997), cert. denied 522 U.S. 898, 118 S. Ct. 244, 139 L. Ed. 2d 173 (1997).

#### **Search Reasonable.**

Where the officer had information that a crime was in progress, that the criminals had been observed rolling a large tire from the scene of the crime to a parking lot, and the hour was late at night, and where upon observing that the vehicle appeared to contain a heavy load as it seemed to be "sitting low in the rear," and was occupied by two suspects meeting the description of the information furnished him by radio, the officer stopped the vehicle, for the officer to have gone in quest of a search warrant at that hour of the night under the circumstances would have been impractical; thus a warrantless search incident to the arrest was not only reasonable but it would have rendered the officer subject to criticism had he not searched the automobile. *Jackson v. State*, 266 Ark. 754, 585 S.W.2d 367 (1979), cert. denied 444 U.S. 1017, 100 S. Ct. 670, 62 L. Ed. 2d 647 (1980).

Search fell within guidelines of this rule.

*Johnson v. State*, 21 Ark. App. 211, 730 S.W.2d 517 (1987); *Jones v. State*, 304 Ark. 328, 802 S.W.2d 447 (1991).

Where the officers effected a lawful arrest, the contemporaneous search of defendant was permitted and not violative of the Fourth Amendment or Arkansas's criminal rules. *Hazelwood v. State*, 328 Ark. 602, 945 S.W.2d 365 (1997).

No error was committed by the trial court in refusing to suppress evidence that was seized incident to the defendant's arrest because, given all the information known to the police officers, they had reasonable cause to believe that defendant had committed a felony and they had authority under Ark. R. Crim. P. 4.1, this rule, and Ark. R. Crim. P. 12.2 to make the warrantless arrest and to conduct a limited search. *Edwards v. State*, 360 Ark. 413, 201 S.W.3d 909 (2005).

Where a confidential informant appeared at a drug dealer's home to buy drugs, the drug dealer's wife contacted defendant, and defendant immediately left his home carrying a package, drove to the dealer's home, entered the home without knocking, and left a short time thereafter without the package, the police had probable cause to effect a warrantless arrest of defendant because the evidence essentially established a call by a known drug dealer requesting the delivery of narcotics from a supplier, immediate movement by a known drug supplier who was the suspected supplier, direct travel by that supplier to the source of the supply request, and the apparent delivery of a package. While this proof may not have been sufficient to convict defendant, it provided sufficient probable cause to make an arrest, and a search of defendant incident to that arrest was proper. *Pullan v. State*, 104 Ark. App. 78, 289 S.W.3d 180 (2008).

#### **Seizure of Controlled Substances.**

Where the defendant was arrested for public intoxication and such arrest was proper, a packet of heroin found on the defendant when he was searched for weapons was admissible in a trial for possession of controlled substances. *Holmes v. State*, 262 Ark. 683, 561 S.W.2d 56 (1978).

Hydromorphone discovered but not confiscated by police officer who was executing an invalid search warrant was admissible in evidence as the fruit of a reasonable and lawful "pat-down" search, and would also have been admissible as a controlled substance seized without a search due to the apparent abandonment of the pills by defendant when he subsequently hid them under the seat of the police car. *Webb v. State*, 269 Ark. 415, 601 S.W.2d 848 (1980).

If an officer should discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the

Fourth Amendment does not require its suppression. *Davis v. State*, 33 Ark. App. 198, 804 S.W.2d 373 (1991).

Where police officer was lawfully conducting a pat-down search when defendant was arrested and had already found two weapons, it was reasonable for him to remove packages found to contain cocaine from defendant's pocket, which he said felt like a hard object. *Davis v. State*, 33 Ark. App. 198, 804 S.W.2d 373 (1991).

**Cited:** *Vega v. State*, 26 Ark. App. 172, 762 S.W.2d 1 (1988); *Folly v. State*, 28 Ark. App. 98, 771 S.W.2d 306 (1989); *Pyles v. State*, 329 Ark. 73, 947 S.W.2d 754 (1997); *McKenzie v. State*, 69 Ark. App. 186, 12 S.W.3d 250 (2000); *McDonald v. State*, 92 Ark. App. 1, 210 S.W.3d 915 (2005); *Nelson v. State*, 92 Ark. App. 275, 212 S.W.3d 31 (2005).

## Rule 12.2. Search of the person: permissible scope.

An officer making an arrest and the authorized officials at the police station or other place of detention to which the accused is brought may conduct a search of the accused's garments and personal effects ready to hand, the surface of his body, and the area within his immediate control.

### CASE NOTES

#### ANALYSIS

In general.

Area within control of accused.

Contemporaneous with arrest.

Invalid arrest warrant.

Search for contraband.

#### In General.

Strip searches of arrestees are permitted, in spite of an inherent intrusiveness into a person's privacy, in order to protect the safety of police officers, to maintain order in jails, and to disclose the fruit of a crime. *McDaniel v. State*, 20 Ark. App. 201, 726 S.W.2d 688, cert. denied 484 U.S. 838, 108 S. Ct. 121, 98 L. Ed. 2d 80 (1987).

#### Area Within Control of Accused.

The purpose of this rule is to permit officers to seize weapons or evidence within the reach of the suspect which might be destroyed and where evidence was seized from the defendant's room, where he was arrested, and from the rest of the house after the defendant was on the way to jail, such evidence must be suppressed. *Moore v. State*, 261 Ark. 274, 551 S.W.2d 185 (1977).

Where the defendant took her purse with her to the police station following her arrest for first-degree murder, the inventory search of the contents of the defendant's purse was permissible under this rule, and the murder victim's personal effects that were found in the defendant's purse were admissible into evidence. *Smith v. State*, 282 Ark. 535, 669 S.W.2d 201 (1984).

Even though the officers did not have a search warrant to search defendant's hospital room, the seizure of her diary, which was only five or six feet from her bed, was permissible. *Crow v. State*, 306 Ark. 411, 814 S.W.2d 909 (1991).

#### Contemporaneous with Arrest.

A search of the person, performed substantially contemporaneously with the arrest, is permissible as where the defendant was arrested at the sheriff's office and a search of her person was conducted by a matron after the arrest. *Moore v. State*, 304 Ark. 257, 801 S.W.2d 638 (1990).

Where the officers effected a lawful arrest, the contemporaneous search of defendant was permitted and not violative of the Fourth Amendment or Arkansas's criminal rules. *Hazelwood v. State*, 328 Ark. 602, 945 S.W.2d 365 (1997).

No error was committed by the trial court in refusing to suppress evidence that was seized incident to defendant's arrest because, given all the information known to the police officers, they had reasonable cause to believe that defendant had committed a felony, and they had authority under Ark. R. Crim. P. 4.1, 12.1, and this rule to make the warrantless arrest and to conduct a limited search. *Edwards v. State*, 360 Ark. 413, 201 S.W.3d 909 (2005).

#### Invalid Arrest Warrant.

The trial court erred in allowing meperidine admitted in evidence, where the meperidine was not discovered during the "pat-down" search for weapons because the pills were not in a bottle or other hard container, but were in a clear plastic bag in the sleeve of defendant's coat, but where the pills were discovered during the inventory search at the police station just prior to the incarceration of defendant who was arrested pursuant to an invalid warrant; although this rule allows the thorough search of an accused incident to incarceration, it does not authorize such search for incarceration under an invalid ar-



rest warrant. *Webb v. State*, 269 Ark. 415, 601 S.W.2d 848 (1980).

#### **Search for Contraband.**

Where defendant was arrested for drinking while driving and for driving without a valid license, and there was nothing in the record to indicate that officers suspected defendant

might be carrying contraband and arrested him on a pretext in order to conduct a search for contraband, the search was conducted pursuant to the authority granted by this rule. *McDaniel v. State*, 20 Ark. App. 201, 726 S.W.2d 688, cert. denied 484 U.S. 838, 108 S. Ct. 121, 98 L. Ed. 2d 80 (1987).

### **Rule 12.3. Search of the person: search of body cavities.**

(a) Search of an accused's blood stream, body cavities, and subcutaneous tissues conducted incidental to an arrest may be made only:

(i) if there is a strong probability that it will disclose things subject to seizure and related to the offense for which the individual was arrested; and

(ii) if it reasonably appears that the delay consequent upon procurement of a search warrant would probably result in the disappearance or destruction of the objects of the search; and

(iii) if it reasonably appears that the search is otherwise reasonable under the circumstances of the case, including the seriousness of the offense and the nature of the invasion of the individual's person.

(b) Any search pursuant to this rule shall be conducted by a physician or a licensed nurse.

#### **CASE NOTES**

##### **Violation of Rule.**

Where police officers had a matron who was neither a physician or a licensed nurse search the defendant's body cavities while in the defendant's bathroom, and one of the officers entered the bathroom during the course of the search, the search was clearly a violation of this rule and was also a violation of the

defendant's rights guaranteed in the Fourth and Fourteenth Amendments to the United States Constitution, since a search warrant does not give officers the authority to conduct any type of search they deem necessary while on the premises. *Freeman v. State*, 268 Ark. 614, 594 S.W.2d 858 (1980).

### **Rule 12.4. Search of vehicles: permissible circumstances.**

(a) If, at the time of the arrest, the accused is in a vehicle or in the immediate vicinity of a vehicle of which he is in apparent control, and if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that the vehicle contains things which are connected with the offense for which the arrest is made, the arresting officer may search the vehicle for such things and seize any things subject to seizure and discovered in the course of the search.

(b) The search of a vehicle pursuant to this rule shall only be made contemporaneously with the arrest or as soon thereafter as is reasonably practicable.

#### **1987 Unofficial Supplementary Commentary to Rule 12.4**

##### **Searches of Sealed Containers in Vehicles.**

In his concurring opinion in *Daigger v. State*, 268 Ark. 249, 595 S.W.2d 653 (1980), Justice Purtle summarizes the law pertaining to searches of vehicles as follows:

[W]hen the search of an automobile is contemporaneous with the arrest and the arresting officers have facts upon which to

reasonably believe things connected with the offense are contained in the passenger compartment of the vehicle, the officers are authorized to look into the vehicle. If things which they have probable cause, based upon facts known to them, to believe are in the vehicle are seen by them, the search is reasonable. However, when the vehicle is secured or the container to be searched is

within the exclusive control of the arresting authorities and there are no exigent circumstances and no danger of harm to anyone or loss of the items sought, a warrant is required.

268 Ark. at 253-54, 595 S.W.2d at 655.

This was an accurate statement of the law when it was written in 1980. In *New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768 (1981), the United States Supreme Court interpreted its previous decision in *Chimel v. California*, 395 U.S. 752, 23 L. Ed. 2d 685 (1969) to permit the search of the passenger compartment of an automobile and any containers such as coat pockets or luggage contained therein, as a contemporaneous incident of the lawful custodial arrest of the occupant of an automobile. A briefcase in the passenger compartment can be opened immediately, but a search of the same briefcase found in the trunk must await the issuance of a valid search warrant. Compare *Belton* with *Arkansas v. Sanders*, 442 U.S. 753, 61 L. Ed. 2d 235 (1979).

The lengthy dissent in *Daigger* of Chief Justice Fogleman, joined by Justice Mays, contains an excellent summary of Arkansas and United States Supreme Court cases on searches incidental to arrest. In addition, see *Moore v. State*, 268 Ark. 171, 594 S.W.2d 245 (1980).

#### **What Constitutes Passenger Compartment.**

The hatchback portion of an automobile is part of the passenger compartment. *Baxter v. State*, 274 Ark. 539, 626 S.W.2d 935, *cert. denied*, 457 U.S. 1118, 73 L. Ed. 2d 1331 (1982).

#### **Search Pursuant to "Reasonable Suspicion."**

Rule 3.1 permits a stop on a "reasonable suspicion" that does not require as much certainty as the "reasonable cause" needed to support a warrantless arrest under Rule 4.1. It is therefore worthy of mention that the state does not more frequently argue at trial and on appeal that justification for some searches — in particular, vehicle searches under Rule 12.4 and searches of the person under Rules 12.1-12.3 — are not grounded on Rule 3.1 read in conjunction with Rule 3.4 on the theory that where "reasonable cause" is not shown, a "reasonable suspicion" may nonetheless be found to justify a warrantless search. See dissent of Fogleman, J. in *Moore v. State*, 265 Ark. 20, 576 S.W.2d 211 (1979). See, also, *Webb v. State*, 269 Ark. 415, 601 S.W.2d 848 (1980).

#### **Search Pursuant to Rule 3.1 Stop.**

Following *Michigan v. Long*, 463 U.S. 1032,

77 L. Ed. 2d 1201 (1983), the Arkansas Court of Appeals has found that police officers making a Rule 3.1 stop may make a limited search of those portions of the passenger compartment of an automobile in which weapons could be placed or hidden if the officers have a reasonable belief that the driver or a passenger is dangerous. *Reeves v. State*, 20 Ark. App. 17, 722 S.W.2d 880 (1987). In both *Long* and *Reeves* police officers making a "stop and frisk" stop observed weapons in plain view in the automobile. In *Reeves*, while seizing a pellet gun at first thought to be a rifle, the officer discovered drugs. The Arkansas Court of Appeals upheld the admissibility of the drugs.

#### **The "Suitcase" Doctrine.**

As enacted in 1976, Rule 12.4 anticipated *Arkansas v. Sanders*, 442 U.S. 753, 61 L. Ed. 2d 235 (1979) and *New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768 (1981), so these cases did not result in dramatic changes in Arkansas law. See *Burkett v. State*, 271 Ark. 150, 607 S.W.2d 399 (1980); *Berry v. State*, 263 Ark. 446, 565 S.W.2d 418 (1978); *Daigger v. State*, 268 Ark. 249, 595 S.W.2d 653 (1980); *Sanders v. State*, 262 Ark. 595, 559 S.W.2d 704 (1977), *aff'd sub nom. Arkansas v. Sanders*, 442 U.S. 753, 61 L. Ed. 2d 235 (1979); *Scisney v. State*, 270 Ark. 610, 605 S.W.2d 451 (1980); and *Arris v. State*, 3 Ark. App. 134, 623 S.W.2d 537 (1981).

#### **Reasonable Cause Test: Warrantless Searches.**

Though *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527 (1983) dealt with standards to ascertain whether reasonable cause exists to support the issuance of a search warrant, the Arkansas Court of Appeals has also applied the *Gates* "totality of the circumstances" test as a framework for analyzing whether reasonable cause existed to support a warrantless search. See, for example, *Mock v. State*, 20 Ark. App. 72, 723 S.W.2d 844 (1987).

#### **Scope of Search vs. Right to Seize.**

In *Van Daley v. State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987), the Court of Appeals noted that "while Rules 12.1(d) and 12.4(a) limit the scope of a search to that for evidence connected with the offense for which one has been arrested, they do not so limit the items that can properly be seized. ... Once [things criminally possessed] are discovered they may be seized and used as evidence without regard to whether they are connected with the offense for which the accused was initially arrested." *Id.* at 131, 725 S.W.2d at 576 (Court's emphasis).



## CASE NOTES

## ANALYSIS

Construction.  
 Purpose.  
 Applicability.  
 Consent.  
 Contemporaneous with arrest.  
 Reasonable belief.  
 Search reasonable.  
 Seizure of items.  
 Vehicle.

**Construction.**

The term "unreasonable search" in Ark. Const., Art. 2, § 15 is interpreted by Arkansas courts in the same manner that the Supreme Court interprets that term in U.S. Const., Amend. 4. *Stout v. State*, 320 Ark. 552, 898 S.W.2d 457 (1995).

**Purpose.**

The purpose of this rule is to protect the arresting officer by allowing the search of the passenger compartment of a car incident to a lawful custodial arrest. *Stout v. State*, 320 Ark. 552, 898 S.W.2d 457 (1995).

**Applicability.**

Game and Fish officers are empowered to make arrests for violation of the game and fish laws and in making such arrests, those officers may also conduct a search of the person or property of the accused including his vehicle. *State v. Henry*, 304 Ark. 339, 802 S.W.2d 448 (1990).

Denial of appellant's, an inmate's, petition for writ of certiorari was improper because he failed to prove that he received the ineffective assistance of counsel. In part, a search incident to arrest was permissible under this rule, and the inmate did not set forth any legal theory upon which to challenge either the arrest or the search. *Lowe v. State*, 2012 Ark. 185, — S.W.3d —, 2012 Ark. LEXIS 199 (Apr. 26, 2012).

**Consent.**

Defendant's convictions for possession of drug paraphernalia with intent to manufacture methamphetamine and possession of pseudoephedrine were upheld as his argument that the search and seizure were not authorized by Ark. R. Crim. P. 12.1 and this rule was inappropriate because the trial court concluded that defendant had consented to the search, making arguments based on those rules irrelevant. *Nelson v. State*, 365 Ark. 314, 229 S.W.3d 35 (2006), appeal dismissed — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 494 (Sept. 27, 2007).

**Contemporaneous with Arrest.**

Where a search of the defendant's purse, which was found between the two front seats of her vehicle at the time of her arrest, was

conducted shortly after an illegal drug sale to undercover police officers had been made, the search did not violate this rule or the Fourth Amendment since the police had had the defendant's automobile in their sight since the time of the sale, the police had a reasonable belief that the marked bills they used to buy the drugs were in the automobile, and the search was made contemporaneously with the arrest. *Daigger v. State*, 268 Ark. 249, 595 S.W.2d 653 (1980).

Incident to a valid custodial arrest, a police officer may contemporaneously search the passenger compartment of a vehicle, as well as examine any containers found within the passenger compartment. *Campbell v. State*, 294 Ark. 639, 746 S.W.2d 37 (1988).

**Reasonable Belief.**

Where two policemen were drawn to the scene of a possible burglary at 4:30 a.m. by a burglar alarm, and found no evidence of a break-in, but noticed defendants' car with a trailer as they left, when defendants' lights went on and off suddenly, there was no reasonable cause to believe defendants had committed a felony and, consequently, no authority to make an arrest, or a search pursuant to subsection (b) of this rule. *Moore v. State*, 265 Ark. 20, 576 S.W.2d 211 (1979).

Where the police, after stopping the driver of a car for weaving across the center line, discovered several marijuana cigarettes in the passenger compartment of the vehicle, such discovery did not supply the probable cause required for a search of two sealed suitcases in the locked trunk of the car nor did it provide the reasonable belief required for such a search under this rule; therefore, the contraband found in the search of the suitcases should have been suppressed; it was unreasonable and reversible error that the police did not obtain a search warrant to search the trunk and suitcases after the vehicle was impounded. *Scisney v. State*, 270 Ark. 610, 605 S.W.2d 451 (1980), questioned *McDaniel v. State*, 65 Ark. App. 41, 985 S.W.2d 320 (1999).

The circumstance of finding a round of buckshot in a shotgun laying in a pickup truck occupied by defendants and spotting another round on the floorboard justified a reasonable belief on the part of arresting officers that the truck contained items connected with the offense of unlawful hunting of wildlife in closed season with a modern firearm. *Blair v. State*, 16 Ark. App. 1, 696 S.W.2d 755 (1985).

The presence of cigarette butts or marijuana seeds, without more, is just as consistent with having only that small amount for personal use as it is with having a cache of

marijuana; there is simply no articulable fact to indicate a cache is located in the trunk, thus, under such circumstances there is no probable cause to search a car's trunk. *State v. Villines*, 304 Ark. 128, 801 S.W.2d 29 (1990).

#### **Search Reasonable.**

Where officer had information that a crime was in progress, that the criminals had been observed rolling a large tire from the scene of the crime to a parking lot, and the hour was late at night, and where upon observing that the vehicle appeared to contain a heavy load as it seemed to be "sitting low in the rear," and was occupied by two suspects meeting the description of the information furnished him by radio, the officer stopped and searched the vehicle, such warrantless search incident to arrest was not only reasonable but it would have rendered the officer subject to criticism had he not searched the automobile. *Jackson v. State*, 266 Ark. 754, 585 S.W.2d 367 (1979), cert. denied 444 U.S. 1017, 100 S. Ct. 670, 62 L. Ed. 2d 647 (1980).

A warrantless search of the defendant's car incident to the arrest of the defendant was proper where the police were in possession of 2-day-old information that the defendant used his car to transport drugs, the defendant was outside his house in his carport where his car was located when he was arrested, he was found in possession of marijuana, and he stated that he thought there might be a derringer in his car. *Fultz v. State*, 332 Ark. 623, 966 S.W.2d 892 (1998).

#### **Seizure of Items.**

It was not error to refuse to suppress the shotgun in defendant's trial for being a felon in possession of a firearm, despite the fact that the shotgun was originally seized as being evidence of an armed robbery, for, while ARCrP 12.1(d) and subsection (a) of this rule limit the scope of a search to that for evidence connected with the offense for which one has been arrested, they do not so limit the items that can properly be seized. These rules specifically provide that the arresting officer can seize contraband, the fruits of crime, and any other things criminally possessed which are discovered in the course of a proper search incident to arrest; once such items are discovered, they may be seized and used as evidence without regard to whether they are connected with the offense for which the accused was initially arrested. *Van Daley v. State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987).

Having had probable cause to arrest the defendant for having committed robbery

while armed with a double-barreled shotgun, the officer had every right to seize the shotgun found in the defendant's car as being evidence of the commission of the offense and an item used in conjunction with that offense. *Van Daley v. State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987).

Contemporaneous search of the passenger compartment and the resulting seizure of the weapon were permissible incident to the arrest. *Campbell v. State*, 294 Ark. 639, 746 S.W.2d 37 (1988).

Where defendant failed to challenge both findings made by a trial court in denying his motion to suppress condoms and lubricating jelly that were found in his vehicle after he was arrested for computer child pornography, the reviewing court could affirm the judgment without addressing either basis of the trial court's decision. *Fuson v. State*, 2011 Ark. 374, — S.W.3d —, 2011 Ark. LEXIS 470 (Sept. 22, 2011).

#### **Vehicle.**

The hatchback area of a station wagon, as part of the "passenger compartment" of an automobile, was properly part of a search incident to a lawful arrest. *Stout v. State*, 320 Ark. 552, 898 S.W.2d 457 (1995).

The search of the defendant's vehicle could not be justified as a search incident to arrest where he was not in the vehicle or its immediate vicinity at the time of the arrest. *Izell v. State*, 75 Ark. App. 377, 58 S.W.3d 400 (2001).

Although defendant was not in the vehicle when he was arrested, he parked the truck across the street from the address provided by the officer posing as a minor female and was arrested when he walked onto the front porch of the residence, and this is sufficient for him to be considered "in the vicinity" of the vehicle for purposes of a search incident to arrest; additionally, an officer testified that her experience taught her that persons arrested for the same crime as appellant usually carried items connected to the offense in their vehicle, giving her a reasonable suspicion that there would be evidence in the vehicle connecting the arrested person to the crime. The search of appellant's truck was proper. *Fuson v. State*, 2010 Ark. App. 593, — S.W.3d —, 2010 Ark. App. LEXIS 632 (Sept. 15, 2010).

**Cited:** *Cook v. State*, 293 Ark. 103, 732 S.W.2d 462 (1987); *Vega v. State*, 26 Ark. App. 172, 762 S.W.2d 1 (1988); *McDonald v. State*, 92 Ark. App. 1, 210 S.W.3d 915 (2005); *Nelson v. State*, 92 Ark. App. 275, 212 S.W.3d 31 (2005).

### **Rule 12.5. Search of premises: permissible circumstances, time and scope.**

(a) If at the time of the arrest:



(i) the accused is in or on premises all or part of which he is apparently entitled to occupy; and

(ii) in view of the circumstances the officer has reason to believe that such premises or part thereof contain things which are:

(A) subject to seizure; and

(B) connected with the offense for which the arrest is made; and

(C) likely to be removed or destroyed before a search warrant can be obtained and served;

the arresting officer may search such premises or part thereof for such things, and seize any things subject to seizure.

(b) Search of premises pursuant to subsection (a) shall only be made contemporaneously with the arrest, and search of building interiors shall only be made consequent upon an entry into the building made in order to effect an arrest therein. In determining the necessity for and scope of the search to be undertaken, the officer shall take into account, among other things, the nature of the offense for which the arrest is made, the behavior of the individual arrested and others on the premises, the size and other characteristics of the things to be searched for, and whether or not any such things are observed while making the arrest.

#### 1987 Unofficial Supplementary Commentary to Rule 12.5

In reliance upon standards formulated in *Chimel v. California*, 395 U.S. 752, 23 L.Ed.2d 685 (1969), Rule 12.5 contains broad authority for warrantless searches of premises incident to arrests. The rule does not limit the scope of searches to the arrestee's immediate surroundings. See original commentary to Rule 12.5. Pursuant to Rule 12.5(ii)(C), searches may only be made for articles "likely to be removed or destroyed before a search warrant can be obtained." Until recently, the Arkansas Supreme Court had decided no case countenancing a warrantless seizure pursuant to a search of an area beyond the reach of a person arrested at his residence. To the contrary, the Court suppressed evidence seized from an appellant's bedroom immediately after he had been taken to the police station following his arrest. *Moore v. State*, 261 Ark. 274, 551 S.W.2d 185 (1977). And, in *Haynes v. State*, 269 Ark. 506, 602 S.W.2d 599, cert. denied, 449 U.S. 1066, 66 L.Ed.2d 611 (1980), the Arkansas Supreme Court set out a very restrictive view of the right to make a warrantless residence search incident to an arrest where grounds for a warrantless arrest existed. See supplementary commentary to Rule 10.1. But the Court did not cite or interpret Rule 12.5 in either *Moore* or *Haynes*. *Holden v. State*, 290 Ark. 458, 721 S.W.2d 614 (1986) departs from the restrictive views seemingly reflected by the *Moore* and *Haynes* opinions. It is discussed below after a brief review of *Chimel* and *Moore*.

Rule 12.5 is based upon the following language of the United States Supreme Court in

*Chimel v. California*, 395 U.S. 752, 763, 23 L.Ed.2d 685, 694 (1969):

There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs — or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.

In *Moore v. State*, police arrested appellant without a warrant at his house. While he was being taken to the police station, police searched the room in which he was arrested and an adjacent room and found items that were admitted into evidence at his trial. On appeal, the issue was the admissibility of evidence seized from the house without a warrant but incident to an arrest. Though more appropriate circumstances for application of Rule 12.5 can scarcely be imagined, the Court discussed only Rule 12.2. Why the Court did not mention Rule 12.5, if only to point out it permitted searches contemporaneous with an arrest, is especially curious when one takes into account that the Court's first opinion in the case reversed and remanded on grounds that the State had not met its burden of proof in showing that appellant's parents had consented to the search. It was only on rehearing that the argument was

made that the premises search after appellant had been removed was unlawful. Logically, therefore, it seems that the Court would have discussed Rule 12.5 after deciding that the State could not prove consent under Rule 11.4.

In *Holden v. State*, 290 Ark. 458, 721 S.W.2d 614 (1986), the Arkansas Supreme Court indicated a willingness to read Rule 12.5 more permissively. The Court upheld the admissibility of evidence seized pursuant to a warrantless search of defendant's bedroom, including the area under his bed. Without explicitly relying on Rule 12.1(a), the Court pointed to the arresting officer's concern for safety in justifying the seizure of this evidence, a police officer having testified that he was prompted to check under defendant's bed by his desire to make sure that there was no one else in the house. The Court did not discuss whether claimant had a reasonable expectation of privacy in the area under his bed. Instead, it held that the gun under the bed was "in plain view," even though the officer seizing it had to bend over and shine a light under the bed to find it. The Court gave great weight to considerations having to do with the safety of the officers even though the defendant was handcuffed and was being guarded by at least one officer while another officer searched.

The dissenting opinion of Justice Purtle argues that the case is controlled by *Chimel v. California* and *Moore v. State*. The difficulty experienced by the Court in upholding the search highlights the tension between commonsense notions of justice and judicially imposed restrictions on searches described in Justice Hickman's dissent in *Moore v. State*.

#### Validity of Warrantless Arrests.

Warrantless seizure cases decided after 1980 frequently present issues concerning the validity of warrantless arrests. In *Payton v. New York*, 445 U.S. 573, 63 L.Ed.2d 639 (1980) and *Riddick v. New York*, 445 U.S. 573, 63 L.Ed.2d 639 (1980) the United States Supreme Court suppressed evidence seized during warrantless searches incident to warrantless arrests on grounds that the warrantless arrests of appellants at their homes were themselves impermissible because the police could not show exigent circumstances precluding the obtaining of an arrest warrant. Though *Payton* and *Riddick* are not instructive on the permissible scope of residence searches incident to arrests under exigent circumstances according to a theory based on *Chimel*, they do present hurdles to be cleared at the outset by the prosecution.

In *Gaylor v. State*, 284 Ark. 215, 681 S.W.2d 348 (1984), the Arkansas Supreme Court approved the seizure of evidence lying in plain view and found by police officers in appellant's residence after a warrantless entry to arrest

appellant for a robbery committed half an hour previously. The Court observed:

The United States Supreme Court has held that the Fourth Amendment of the Constitution of the United States prohibits police officers from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest absent exigent circumstances ...

*Dorman v. U.S.*, 435 F.2d 385 (D.C. Cir. 1970), recently cited with approval in *Welsh v. Wisconsin*, 466 U.S. 740, 80 L.Ed.2d 732, 744 (1984), enumerates some exigent circumstances which may render a warrantless entry to arrest reasonable: 1) the commission of a grave offense, 2) belief that the suspect is armed, 3) a clear showing of probable cause to believe the suspect committed the crime, 4) strong reason to believe the suspect is in the premises being entered, and 5) likelihood that the suspect will escape if not swiftly apprehended. A sixth exigent circumstance to be considered is the danger of destruction of the evidence. See *United States v. Santana*, 424 U.S. 38 (1976). In addition, the peaceable entry of the premises may be considered in determining the reasonableness of police action. *Gaylor* at 217-18, 681 S.W.2d at 349-50.

In *Jackson v. State*, 271 Ark. 71, 607 S.W.2d 371 (1980), two hours after a homicide, police went to the home of appellant to arrest him. Looking through a window they were able to see him sleeping on a couch. Sticking out from under the couch was the butt of what turned out to be the murder weapon. The police entered the house, arrested him, and seized the weapon, which was later introduced as evidence at trial where defendant was convicted of murder. While the case was being appealed, the United States Supreme Court decided *Payton v. New York* and *Riddick v. New York*. The Arkansas Supreme Court treated *Jackson* as a Rule 14.3 case and remanded it to the trial court for a hearing on whether exigent circumstances existed to justify the warrantless seizure of the weapon incident to the warrantless arrest. The trial court found that such circumstances did exist, and this decision was affirmed on appeal. *Jackson v. State*, 274 Ark. 317, 624 S.W.2d 437 (1981). Taken together, *Jackson* and *Gaylor* stand for the proposition that exigent circumstances justifying a warrantless arrest exist when a defendant is taken into custody on reasonable grounds within two hours after a serious offense such as a homicide or robbery occurring late at night or early in the morning. It should be noted that the Court was unanimous in its approval of the arrest and search even though the officers fortuitously knew before the warrantless entry into appellant's home that he was asleep and



that there was no danger of destruction of evidence because it was visible through a window.

#### **Destruction of Evidence.**

Rule 12.5 recognizes that the danger that evidence may be destroyed continues after the arrest of an accused at his residence. The rule therefore authorizes an officer to search premises following an arrest for articles “likely to be removed or destroyed before a search warrant can be obtained and served.” Rule 12.5(ii)(C). The danger recognized the rule has seemingly been discounted, however, by the Court, which on at least one occasion has opined that there was no reason for theorizing that an arrestee’s family might destroy evidence. In *Moore v. State*, 261 Ark. 274, 278-C, 551 S.W.2d 185, 189 (1977), the Court observed:

The trial court’s theory that the possibility of destruction of the evidence by appellant’s family was a sufficient exigency to support the officers’ warrantless search was discounted in *Chimel v. California*, *supra*, — see dissent of White, J. There is no contention or suggestion that appellant’s mother and father were confederates in the crime and to assume that they would willingly become accessories after the fact to

such a crime is not a fact upon which one is entitled to rely as justification for the invasion of such a precious right.

While everyone would agree that such an assumption does not afford a basis for infringing upon any right of the parents, it is not obvious that the assumption makes no sense in the context of assessing whether exigent circumstances exist to justify a warrantless search affecting appellant. If the Court is unwilling to assume that one’s family or friends would be willing to destroy evidence, it is difficult to see how a warrantless seizure could ever be justified as necessary to prevent the destruction of evidence under Rule 12.5, since normally all accomplices at the scene of a search will have been arrested.

#### **Reasonable Cause Test: Warrantless Searches.**

Though *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527 (1983) dealt with the standards to be applied in ascertaining whether reasonable cause exists to support the issuance of a search warrant, the Arkansas Court of Appeals has also applied the *Gates* “totality of the circumstances” test in analyzing whether reasonable cause exists to support a warrantless search. See, for example, *Mock v. State*, 20 Ark. App. 72, 723 S.W.2d 844 (1987).

### **CASE NOTES**

#### **ANALYSIS**

Exigent circumstances.

Scope of search.

Seizure of heroin.

#### **Exigent Circumstances.**

Where there was probable cause for an arrest independent of the search, and the arrest and search of the premises were substantially contemporaneous, probable cause and exigent circumstances justified the search for and seizure of evidence linking the defendant to an armed robbery. *Gaylor v. State*, 284 Ark. 215, 681 S.W.2d 348 (1984).

#### **Scope of Search.**

While federal marshals were arresting defendant at his apartment for a violation of probation, the marshals discovered what they suspected to be cocaine in the bathroom and called the city police, who determined that the substance in the bathroom, which was in plain view under ARCrP 14.4, was cocaine; however, the city police officers improperly searched a black bag in another room without

defendant’s consent, and if the evidence found in the illegal search of black bag motivated the officers to obtain a search warrant, the illegal search would preclude application of the independent-source doctrine and the evidence would be inadmissible. *Lauderdale v. State*, 82 Ark. App. 474, 120 S.W.3d 106 (2003).

#### **Seizure of Heroin.**

Where there was probable cause for an arrest independent of the search, and the arrest and search were substantially contemporaneous, exigent circumstances would justify the warrantless search of a defendant about whom police had received reliable information that he had heroin in the automobile which he occupied, either under the “automobile exception” or as incidental to a lawful arrest. *Horton v. State*, 262 Ark. 211, 555 S.W.2d 226 (1977).

**Cited:** *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980), cert. denied 450 U.S. 1035, 101 S. Ct. 1750, 68 L. Ed 2d 232 (1981).

### **Rule 12.6. Custodial taking of property pursuant to arrest; vehicles.**

(a) Things not subject to seizure which are found in the course of a search of the person of an accused may be taken from his possession if reasonably

necessary for custodial purposes. Documents or other records may be read or otherwise examined only to the extent necessary for such purposes, including identity checking and ensuring the physical well-being of the person arrested. Disposition of things so taken shall be made in accordance with Rule 15 hereof.

(b) A vehicle impounded in consequence of an arrest, or retained in official custody for other good cause, may be searched at such times and to such extent as is reasonably necessary for safekeeping of the vehicle and its contents.

#### 1987 Unofficial Supplementary Commentary to Rule 12.6

It is now established law that warrantless inventory searches aimed at securing or protecting vehicles, their contents, and the public, rather than at obtaining evidence of crimes, are supportable under the Fourth Amendment without a showing of probable cause or exigent circumstances. *South Dakota v. Opperman*, 428 U.S. 364, 49 L.Ed.2d 1000 (1976); *Cady v. Dombrowski*, 413 U.S. 433, 37 L.Ed.2d 706 (1973); *Lipovich v. State*, 265 Ark. 55, 576 S.W.2d 720 (1979). Automobiles are the object of most vehicle searches, attacks most frequently being mounted on grounds that the searches were pretextual.

In *Colyer v. State*, 9 Ark. App. 1, 652 S.W.2d 645 (1983), a divided Arkansas Court of Appeals upheld admission into evidence of items that were seized after police searched appellant's car following his arrest for intoxication and on outstanding warrants for other offenses. Police officers answered a report that a vehicle was stuck in mud at an intersection in Berryville. Finding appellant's station wagon hopelessly mired, the officers discussed the situation with appellant and called a wrecker. The automobile had no license tags, and when the police ran a routine computer check they discovered that there were outstanding warrants for appellant for undisclosed offenses. As the wrecker arrived, appellant was arrested for drunkenness, but he was never charged with this offense. Instead, he was charged with possession of marijuana with intent to deliver and with possession of a firearm by a convicted felon. The marijuana and the firearm were discovered during a thorough inventory search of the automobile. The marijuana was discovered in or under a seat and the weapon was found under the floor of the rear of the car where the spare tire is normally kept.

The court found that the officers acted reasonably in seizing and inventorying appellant's automobile, since the police "could not wait until he sobered up to arrange for its removal." *Id.* at 6, 652 S.W.2d at 648. The court recognized that pretextual searches were not protected by *Opperman*, but declined to overturn the trial court's finding of reasonableness. Relying on *Miller v. State*, 403 So.2d

1307 (Fla. 1981), a case in which the Florida Supreme Court decided that police officers must advise a vehicle owner that it will be impounded unless he can provide a reasonable alternative, the court found that alternatives to impoundment are "proper considerations" that are "to be considered in determining what is reasonable." *Id.* at 7, 652 S.W.2d at 649.

Two dissenting judges argued against the validity of the search, relying upon *United States v. Wilson*, 636 F.2d 1161 (8th Cir. 1980). In *Wilson*, the court found that the police offered "no special justification for the search" in question. 636 F.2d at 1165. The court also found that the defendant was present during the search and was capable of making his own arrangements to safeguard his property. The court was particularly critical of the search of Wilson's trunk, finding that it was unnecessary because the police intended to retain control of the vehicle for only a short period of time until defendant posted bond.

So, in view of the decision in *Colyer* and cases discussed below, though the ability of a vehicle owner to provide reasonable alternatives to impoundment may be considered by Arkansas courts in determining the reasonableness of an inventory search, the Fourth Amendment to the Constitution of the United States does not require that the vehicle's owner be afforded alternatives in every case.

The Arkansas Court of Appeals has upheld the search of an unlocked, closed briefcase on the back seat of an automobile following the arrest of its intoxicated owner, who was alone in the car. *Henderson v. State*, 16 Ark. App. 225, 699 S.W.2d 419 (1985). The court characterized the search as an inventory search of the vehicle. The Court of Appeals relied upon recent authority found in *Illinois v. Lafayette*, 462 U.S. 640, 77 L.Ed.2d 65 (1983) and *United States v. Bloomfield*, 594 F.2d 1200 (8th Cir. 1979) in finding that an inventory is a non-investigatory procedure not requiring a showing of reasonable cause, there being, at least in theory, no question of suspicion and thus no question of reasonable cause to entertain it.

In *Illinois v. Lafayette*, appellant was ar-



rested for disturbing the peace and taken to a police station where his shoulder bag was inventoried in a routine administrative procedure incident to his incarceration. The inventory disclosed drugs which were the subject of a motion to suppress after he had been charged with their possession. The trial court suppressed the evidence, and the Illinois Court of Appeals affirmed, concluding that the defendant had a "greater privacy interest in a purse-type shoulder bag than in an automobile, and that the State's legitimate interests could have been met in a less intrusive manner, by 'sealing [the shoulder bag] within a plastic bag or box and placing it in a secured locker.'" 462 U.S. 643, 77 L.Ed.2d 69, quoting 99 Ill. App. 3rd at 834-35, 425 N.E.2d at 1386. The United States Supreme Court reversed, finding that the inventory search was reasonable and that the reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of less intrusive means to accomplish the same ends.

In *United States v. Bloomfield*, evidence seized from a knapsack belonging to defendant was suppressed. Defendant was found in his automobile unconscious, blocking traffic after suffering a seizure. His automobile was towed away and his knapsack that was zipper-closed and tied with a string was searched, yielding drugs and cash. On appeal, the Eighth Circuit Court of Appeals agreed with the lower court's conclusion that the knapsack should have been stored as a unit. The court recognized the "commonly avowed purposes of inventory searches" (594 F.2d at 1202) as follows:

(1) 'the protection of the owners' property while it remains in custody'; (2) 'the protection of the police against claims or disputes over lost or stolen property'; and (3) 'the protection of the police from potential danger.'

*Bloomfield* at 1202, quoting *South Dakota v. Opperman*, 428 U.S. at 369.

The Court of Appeals concluded that the first two purposes would be better served by locking up the knapsack as a unit. In evaluating the third purpose, the court concluded that the individual right to privacy in the circumstances presented in this case outweighed the governmental interest in protecting police, danger being unlikely. The *Bloomfield* decision has been explicitly rejected by at least one other circuit — the Eleventh — in *United States v. Laing*, 708 F.2d 1568 (11th Cir. 1983). Moreover, the *Bloomfield* approach has apparently been rejected by the United States Supreme Court in its most recent decision on inventory searches, *Colorado v. Bertine*, 479 U.S. 367, 93 L.Ed.2d 739 (1987), where the Court upheld an inventory search of closed containers in a closed backpack

found in a vehicle impounded after appellant's arrest on DWI charges. The *Bloomfield* decision was not mentioned by the Court, however.

Reversing the decision of the lower court, the Supreme Court observed as follows:

The Supreme Court of Colorado also expressed the view that the search in this case was unreasonable because Bertine's van was towed to a secure, lighted facility and because Bertine himself could have been offered the opportunity to make other arrangements for the safekeeping of his property. But the security of the storage facility does not completely eliminate the need for inventorying; the police may still wish to protect themselves or the owners of the lot against false claims of theft or dangerous instrumentalities. And while giving Bertine an opportunity to make alternate arrangements would undoubtedly have been possible, we said in *Lafayette*:

"[t]he real question is not what 'could have been achieved,' but whether the Fourth Amendment requires such steps ... The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Lafayette*, 462 U.S. at 647, 77 L.Ed.2d 65, 103 S.Ct. 2605 (emphasis in original). We conclude that here, as in *Lafayette*, reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure.

*Bertine* at 374, 93 L.Ed.2d at 746-47 (citations omitted).

The viability of *Bloomfield* after *Illinois v. Lafayette* and *Colorado v. Bertine* is doubtful, though it should be observed that the Eighth Circuit Court of Appeals continued until recently to cite *Bloomfield* for the proposition that inventorying policies might not always justify opening sealed packages. For example, in *United States v. Rabenberg*, 766 F.2d 355 (8th Cir. 1985) the court found that the Fourth Amendment to the Constitution of the United States was not offended when a police officer searched a suitcase mistakenly removed from an airport by a fourteen-year-old boy thinking it was his. The suitcase had been opened by the boy and a weapon and ammunition found inside before the police were called. The court found that the police officer could reasonably open sealed packages (found to contain drugs) in the suitcase in order to protect himself and others from "dangerous instrumentalities." *Id.* at 357.

In a concurring opinion in *Henderson v. State*, Judge Cooper, though agreeing with

the majority opinion, nonetheless opined that the term "inventory search" is an oxymoron, and that inventories should be distinguished from searches because the former are non-investigatory procedures and treating inventories as searches promotes confusion. It should be noted, however, that courts routinely refer to inventories as "inventory searches." See *Illinois v. Lafayette*. For a comprehensive discussion of inventory searches, see *Annot., Supreme Court's Views as to Constitutionality of Inventory Searches*, 77 L.Ed.2d 1466 (1985).

Finally it should be noted that Rule 12.6 does not purport to deal with "inventory" searches of persons, this subject being left to

common law development. Rule 12.6(a) deals with items not subject to seizure, while Rule 12.6(b) is instructive as to vehicles only.

#### Searches Under Forfeiture Statutes.

Where the circumstances do not disclose justification for the seizure of a vehicle pursuant to a statute imposing a forfeiture for use of a vehicle in the delivery of a controlled substance, evidence secured through a subsequent inventory search is inadmissible. *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978). Compare *Webb v. State*, 269 Ark. 415, 601 S.W.2d 848 (1980) (evidence discovered in "pat-down" search admissible even though arrest subsequently invalidated).

### RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Annual Survey of Case Law, Criminal Law, 28 U. Ark.

Little Rock L. Rev. 698.

### CASE NOTES

#### ANALYSIS

In general.  
Good cause.  
Inventory search.

#### In General.

The policies behind the warrant requirement are not implicated in the inventory search nor is the related concept of probable cause. *Folly v. State*, 28 Ark. App. 98, 771 S.W.2d 306 (1989).

#### Good Cause.

Where the police arrested the defendant driver, who was a self-proclaimed transient with no apparent ties to the local community, for being drunk on the highway and on outstanding warrants issued in two other counties, and the defendant had no license affixed to his vehicle, which vehicle was stuck in the mud in the intersection of two city streets, the police officers had good cause to impound the defendant's vehicle under subsection (b) of this rule and the police acted reasonably in doing so, as they could not wait until the defendant sobered up to arrange for its removal, and, as the defendant was to be transported elsewhere after his arrest, he could not take the vehicle with him. *Colyer v. State*, 9 Ark. App. 1, 652 S.W.2d 645 (1983).

The fact that a vehicle is legally parked does not necessarily negate the need to take the vehicle into protective custody. *Folly v. State*, 28 Ark. App. 98, 771 S.W.2d 306 (1989).

Defendant was not entitled to suppression of evidence seized from his vehicle after it was impounded following his arrest for assault of his ex-wife in her apartment because the police had good cause to impound the vehicle

after defendant's violent crime and were justified in searching the vehicle as a caretaking function under subsection (b) of this rule. *Pittman v. State*, 99 Ark. App. 177, 258 S.W.3d 408 (2007).

#### Inventory Search.

Even assuming a warrantless seizure of defendant's motor vehicle could be justified as incident to his arrest, where there was no evidence that that particular truck had been used to transport controlled substances, an inventory search could not be sustained. *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978).

Where the police impounded the defendant driver's motor vehicle after they arrested him for being drunk on the highway and on outstanding warrants issued in two other counties, the officer's subsequent inventory search was to safeguard the contents of the vehicle and to protect the department from any theft charges that the owner might later make; accordingly, once the officer unintentionally discovered a paper bag, it was the officer's duty to safeguard its contents and the officer did not act unreasonably when he determined what those contents were (marijuana) instead of closing up the bag and placing it back where it had been. *Colyer v. State*, 9 Ark. App. 1, 652 S.W.2d 645 (1983).

A police officer's inspection of the spare tire compartment, in which a rifle was discovered, did not exceed that which was reasonably necessary to safeguard the contents of an impounded vehicle during an inventory search. *Colyer v. State*, 9 Ark. App. 1, 652 S.W.2d 645 (1983).

Where both an investigative stop and a



limited protective search were reasonable, a subsequent inventory search was both reasonable and authorized. *Reeves v. State*, 20 Ark. App. 17, 722 S.W.2d 880 (1987).

Subsection (b) of this rule provides that a vehicle retained in official custody for good cause may be searched at such time and to such an extent as is reasonably necessary for safekeeping of the vehicle and its contents, so where a vehicle was in a median area, had been severely damaged in a serious accident, and was subject to being towed, an officer could have inventoried the contents thereof in a routine procedure required by the state police, and as marijuana was lying in plain view and its nature was apparent to the officer, seizure of it would be justified under the so-called "plain view doctrine." *Wood v. State*, 20 Ark. App. 61, 724 S.W.2d 183 (1987).

Inventory search made in good faith and pursuant to regulations of standard procedure is valid. *Folly v. State*, 28 Ark. App. 98, 771 S.W.2d 306 (1989).

Where an inventory is otherwise permissible, its validity is not affected by a suspicion that contraband may be found. *Folly v. State*, 28 Ark. App. 98, 771 S.W.2d 306 (1989).

Validity of the inventory was upheld where the vehicle was searched before it was towed from the point of arrest. *Folly v. State*, 28 Ark. App. 98, 771 S.W.2d 306 (1989).

Search of defendant's vehicle was a proper inventory search. *Asher v. State*, 303 Ark. 202, 795 S.W.2d 350 (1990), cert. denied 498 U.S. 1048, 111 S. Ct. 757, 112 L. Ed 2d 777 (1991).

Defendant's motion to suppress should have been granted where the officers lacked probable cause to arrest him for driving under a suspended or revoked driver's license, and consequently, were precluded from inventorying his impounded vehicle in which 60 kilograms (130 pounds) of cocaine were discovered. *Mounts v. State*, 48 Ark. App. 1, 888 S.W.2d 321 (1994).

A vehicle may be impounded and inventoried only as the consequence of a legal arrest; if an arrest was illegal, an inventory of the vehicle would also be improper. *Mounts v. State*, 48 Ark. App. 1, 888 S.W.2d 321 (1994).

An inventory search of the defendant's car was properly conducted after he was cited for not having a valid driver's license or proof of insurance since the defendant was legally "unable" to drive his car and it was standard practice to impound and inventory vehicles

under such circumstances. *Thompson v. State*, 333 Ark. 92, 966 S.W.2d 901 (1998).

Search of defendant's vehicle could not be justified as an inventory search where the vehicle was parked outside while defendant was arrested inside the home, and there was no indication that the vehicle contained any objects that were evidence of a crime or that the officers had probable cause to believe the vehicle contained any evidence of a crime, fruit of a crime, or an instrumentality of a crime. *Izell v. State*, 75 Ark. App. 377, 58 S.W.3d 400 (2001).

Section 27-22-104 requires an officer to impound only the vehicle's license plate, not the car, in the event a driver is unable to present proof of insurance and, since this rule did not authorize the impoundment of the vehicle, but merely the search after the car had been properly impounded or retained, without an independent and proper basis for the impoundment itself, the authorization to search pursuant to this rule was inapplicable. *State v. Kelley*, 362 Ark. 636, 210 S.W.3d 93 (2005).

After defendant's arrest for driving without a valid driver's licence, an officer saw marijuana seeds under the driver's seat, detected a faint odor of marijuana in the vehicle, and noticed the gas tank exhibited signs of tampering, typical of drug-smuggling; the officer gleaned probable cause to search the vehicle under subsection (b) of this rule for narcotics as he waited for the wrecker to tow the vehicle to impound. *Lopez v. State*, 2009 Ark. App. 750, — S.W.3d —, 2009 Ark. App. LEXIS 958 (2009).

Even if the search of defendant's truck had not been proper as incident to his arrest, the evidence seized would still have been admissible under the inevitable-discovery doctrine; because defendant was taken into custody at a time during which his vehicle was parked on a public street, the police impounded the vehicle and were permitted to inventory the contents for safekeeping. During the inventory process, the police would have inevitably discovered the items from the vehicle that were admitted into evidence at the trial. *Fuson v. State*, 2010 Ark. App. 593, — S.W.3d —, 2010 Ark. App. LEXIS 632 (Sept. 15, 2010).

**Cited:** *Vega v. State*, 26 Ark. App. 172, 762 S.W.2d 1 (1988); *Bratton v. State*, 77 Ark. App. 174, 72 S.W.3d 522 (2002).

## RULE 13. SEARCH AND SEIZURE PURSUANT TO WARRANT

### Rule 13.1. Issuance of search warrant.

(a) A search warrant may be issued only by a judicial officer.

(b) The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized, and shall be supported by one (1) or more affidavits or recorded testimony under oath before a judicial officer particularly setting forth the facts and circumstances tending to show that such persons or things are in the places, or the things are in possession of the person, to be searched. If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained. An affidavit or testimony is sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place. Failure of the affidavit or testimony to establish the veracity and bases of knowledge of persons providing information to the affiant shall not require that the application be denied, if the affidavit or testimony viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

(c) Before acting on the application, the judicial officer may examine on oath the affiants or witnesses, and the applicant and any witnesses he may produce, and may himself call such witnesses as he deems necessary to a decision. He shall make and keep a fair written summary of the proceedings and the testimony taken before him, except that if sworn testimony alone is offered in support of the application, such testimony shall be recorded pursuant to subsection (b) hereof.

(d) If the judicial officer finds that the application meets the requirements of this rule and that, on the basis of the proceedings before him, there is reasonable cause to believe that the search will discover persons or things specified in the application and subject to seizure, he shall issue a search warrant based on his finding and in accordance with the requirements of this rule. If he does not so find, the judicial officer shall deny the application.

(e) The proceedings upon application for a search warrant shall be conducted with such secrecy as the issuing judicial officer deems appropriate to the circumstances. (Amended February 5, 1990, effective March 1, 1990.)

**Reporter's Note, 1990 Amendment:** The underlined language [the last two sentences of (b)], suggested by the United States Supreme Court's decision in *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527 (1983), has been added to make it clear that failure to meet the "particular facts" requirement of the second

sentence of subpart (b) does not require that the warrant be quashed on [or] the evidence suppressed if this affidavit provides "a substantial basis for a finding of reasonable cause to believe" that the things seized were in a particular place.

#### 1987 Unofficial Supplementary Commentary to Rule 13.1

##### **Totality of Circumstances Test for Issuance of Search Warrants.**

The requirements of Rule 13 should be considered in light of the consequences imposed by Rule 16 (Evidentiary Exclusion) for failure to comply with Rule 13's strictures. Just as important are recent developments embodied in two decisions of the United States Supreme Court, *United States v. Leon*, 468 U.S. 897, 82 L.Ed.2d 677 (1984) and

*Massachusetts v. Sheppard*, 468 U.S. 981, 82 L.Ed.2d 737 (1984). These cases severely attenuate the impact of the exclusionary rule, a judicially created remedy to safeguard Fourth Amendment rights through deterrence of police misconduct. *Leon* at 906, 82 L.Ed.2d at 687. The Court held that the exclusionary rule will no longer bar the use of evidence obtained by police officers acting in reasonable reliance on search warrants issued by



neutral magistrates but later found by a reviewing court to be unsupported by reasonable cause. The Court went on to say that "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which the exclusion will further the purposes of the exclusionary rule." 468 U.S. at 918, 82 L.Ed.2d at 695. Reasonable cause as a touchstone for searches under warrant has been abandoned, and it is reasonably clear that exclusion of evidence seized pursuant to a defective warrant will be the exception, not the rule.

The Court has long held that the exclusionary rule is aimed at deterring police misconduct. Since suppression of evidence seized by a policeman acting in good faith in the execution of a search warrant has no deterrent effect, it does not carry out the purposes of the rule, the Court held in *Leon*. Even an erroneously issued warrant will protect such evidence from suppression. The Court did make it clear that not every warrant will afford complete protection:

Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. ... Second, the courts must also insist that the magistrate purport to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." ... A magistrate failing to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application" and who acts instead as "an adjunct law enforcement officer" cannot provide valid authorization for an otherwise unconstitutional search. ...

Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." ... "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." ... Even if the warrant application was supported by more than a "bare bones" affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, or because the form of the warrant was improper in some respect.

468 U.S. at 914-15, 82 L.Ed.2d 693-94 (citations omitted).

### Sufficiency of Affidavits for Search Warrants.

Generally speaking, pre-1983 cases in which the Arkansas Supreme Court found that an affidavit did not establish sufficient probable cause for issuance of a warrant are unreliable as precedent in view of the Court's recent adoption of the rationale of *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527 (1983).

The United States Supreme Court led up to the *Gates* decision, so to speak, with *United States v. Harris*, 403 U.S. 573, 29 L.Ed.2d 723 (1971) and *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed.2d 684 (1965), where the Court delivered the admonition that affidavits for search warrants should be tested and interpreted by magistrates and courts in a commonsensical fashion, inasmuch as they are drafted by nonlawyers in the midst of criminal investigations. Even before *Gates* was handed down, these cases were occasionally relied upon by the Arkansas Supreme Court in order to temper the stringent requirements of *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed.2d 723 (1964). See, for example, *Baxter v. State*, 262 Ark. 303, 556 S.W.2d 428 (1977).

In *Illinois v. Gates*, the United States Supreme Court established a "totality of circumstances" standard to be used to decide whether reasonable cause for issuance of a search warrant can be found from information provided by an informant. The Court abandoned the two-pronged test previously established by *Aguilar v. Texas* and *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed.2d 637 (1969). The Arkansas Supreme Court appears to have followed suit in cases such as *Watson v. State*, 291 Ark. 358, 363, 724 S.W.2d 478, 481 (1987), where it explained the standard as follows:

In *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the two-pronged test of *Aguilar* and *Spinelli* was replaced by a different test — "a practical, common sense decision," based on all the circumstances, including the veracity and basis for knowledge of persons supplying information. It is sufficient if "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Under *Gates* it is the duty of the reviewing court simply to insure that the magistrate issuing the warrant had a substantial basis for concluding that probable cause existed. We are satisfied those requirements were met in this case.

The Court has also read *Leon* and *Sheppard* to relax the affidavit requirements. For example, in *Lincoln v. State*, 285 Ark. 107, 685 S.W.2d 166 (1985), in examining whether an affidavit for a search warrant was sufficient, the Court observed:

Counsel for the appellant, in challenging

the sufficiency of the affidavit for the search warrant, relies upon the law that was applicable before the *Leon* and *Sheppard* cases, although they were decided three months before the appellant's brief was filed. *The earlier law is no longer applicable.*

*Id.* at 108, 685 S.W.2d at 167 (emphasis added).

It is accordingly clear that analysis of the sufficiency of the affidavit supporting a search warrant should begin with *Gates*, *Leon*, and *Sheppard*.

In *Lincoln* the Court observed that "deference to the magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the supporting affidavit." *Id.* at 108-09, 685 S.W.2d at 167. The warrant was based on an affidavit stating that an informant had "obtained a sample of cocaine that was purchased from Lincoln." *Id.* at 109, 685 S.W.2d at 167. At the suppression hearing, however, the affiant admitted that, instead, the informant obtained the cocaine from a third party who told the informant that it had been purchased from Lincoln.

Though Rule 13.1(b) states that "if an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained," the Court did not question the reliability of the information provided by the other informant. Neither did the Court advert either to Arkansas case law or to any of its rules on search and seizure in finding that the affidavit was sufficient to support the issuance of the search warrant. In addition, the Court never made a genuine *Leon* determination, the warrant having been found valid. The *Lincoln* decision and its implications in regard to the development of Arkansas search and seizure law are discussed in *Comment, Arkansas' Search and Seizure Laws After United States v. Leon: In Search of a Standard*, 40 Ark. L. Rev. 125 (1986).

In *Toland v. State*, 285 Ark. 415, 688 S.W.2d 718 (1985), the Arkansas Supreme Court upheld the trial court's refusal to suppress evidence in the form of marijuana seized pursuant to a warrant obtained by a law enforcement officer affiant relying upon information obtained from an unidentified informant not alleged to be reliable. The officer, however, confirmed the information obtained from the informant by flying over the marijuana field in an airplane, and this information was apparently communicated in the sworn affidavit presented to the magistrate issuing the warrant. Though the warrant's instructions on how to find the property were unintelligible, the Court upheld the search and seizure in reliance on the "totality of the

circumstances" test established by *Illinois v. Gates* and first adopted in Arkansas in *Thompson v. State*, 280 Ark. 265, 658 S.W.2d 350 (1983). The Arkansas Supreme Court also pointed out in *Toland* that had the warrant been found invalid the evidence would not be subject to suppression, since the officer was obviously acting in "good faith."

In *Thompson* the Arkansas Supreme Court pointed out that Rule 13.1(b) codified the two-prong test of *Aguilar*, but nonetheless indicated that, though the affidavit in *Thompson* met both the two-pronged test and the *Gates* totality of the circumstances test, the Court would apply the "new, more flexible" test of *Gates* in future cases. 280 Ark. at 271, 658 S.W.2d at 352. Justice Purtle, in his concurrence, questioned whether the Supreme Court could or should abrogate its Rule 13.1(b) test in favor of one provided by the United States Supreme Court offering Arkansas defendants less protection. In any event, the Arkansas Supreme Court has not modified or repealed Rule 13.1(b), so, in this sense, *Aguilar* co-exists through Rule 13.1(b) with the totality of the circumstances test of *Gates*.

*Thompson v. State* has been followed. See, for example, *Harper v. State*, 17 Ark. App. 237, 707 S.W.2d 332 (1986), in which the Arkansas Court of Appeals upheld the sufficiency of an affidavit by an affiant relying upon information provided by an unnamed confidential informant. The Court noted that *Aguilar* imposed a "more stringent" test than did *Thompson* and *Gates*, 17 Ark. App. at 246, 707 S.W.2d at 337, without squarely finding that Rule 13.1(b) had been superseded. See, also, *Wolf v. State*, 10 Ark. App. 379, 381, 664 S.W.2d 882, 883 (1984). Previously, the Arkansas Court of Appeals had indicated that the *Aguilar* standard had been "superseded" by the Arkansas Supreme Court's decision in *Thompson*, though. *Herrington v. State*, 15 Ark. App. 248, 252, 692 S.W.2d 251, 253 (1985). In addition, see *Boyd v. State*, 13 Ark. App. 132, 680 S.W.2d 911 (1984).

The new "totality of the circumstances" test is set out as follows in *Wolf v. State*, 10 Ark. App. 379, 381, 664 S.W.2d 882, 883 (1984):

The magistrate issuing the warrant must make a common sense decision based on all the circumstances set forth in the affidavit. Under this test, "the duty of the reviewing Court is simply to ensure that the magistrate had a 'substantial basis for . . . concluding' that probable cause existed" to issue the warrant. [*Illinois v. Gates*] However, conclusory statements in affidavits which give no substantial basis for determining the existence of probable cause will not be accepted. There must still be enough information presented to the magistrate to allow him to determine that there exists probable cause.



**Lack of Affidavit or Sworn Testimony.**

In *State v. Anderson*, 286 Ark. 58, 688 S.W.2d 947 (1985) the Arkansas Supreme Court observed that “how far below the standard of probable cause or a constitutionally valid warrant the United States Supreme Court is willing to go and still find good faith on the part of the police” is still an open question. 286 Ark. at 61, 688 S.W.2d at 949. The Court then recognized that its previous decisions in cases such as *McFarland v. State*, 284 Ark. 533, 684 S.W.2d 233 (1985) and *Lincoln* had not dealt with factual circumstances disclosing deficiencies of constitutional proportions. Moving to the issue at hand — whether a warrant issued in the absence of an affidavit or recorded testimony is valid under Rule 13.1(b) and, if not, whether evidence seized under the warrant should be admitted nonetheless under the rationale of *Leon* — the Court stated that “whereas probable cause and technical deficiencies in a warrant go to reasonable grounds to support a search, the requirements of the affidavit or recorded testimony additionally go to basic procedural safeguards afforded the defendant.” *Id.* at 62, 688 S.W.2d at 950. Compliance with the affidavit or recorded testimony prescription of Rule 13.1 was found to be “a threshold requirement,” *Id.* at 62, 688 S.W.2d at 950, to be resolved before addressing the question of good faith conduct on the part of the police. The Court concluded that without such a record, the defendant could not attack the warrant or have access to a “fair judicial determination of the legitimacy of the warrant.” *Id.* at 62, 688 S.W.2d at 950. The Court refused to make a “good faith” finding under *Leon*, holding instead that the Rule 13.1(b) “affidavit or recorded testimony under oath before a judicial officer” requirement was mandatory.

Two years later the court reversed field after reviewing its post-*Leon* cases in *Jackson v. State*, 291 Ark. 98, 722 S.W.2d 831 (1987). In *Jackson*, a search warrant was supported by oral testimony under oath by a deputy sheriff and an informant before a magistrate and by a sworn affidavit. The prosecution refused to divulge the testimony taken under oath, so the Arkansas Supreme Court did not consider it. The Court found that the affidavit was insufficient because it merely stated in conclusory fashion that the informant was “reliable” without giving facts to support this statement. It then opined that “in determining whether to apply the *Leon* rationale, we must be guided by our own A.R.C.P. Rule 16.2(e).” 291 Ark. at 101, 722 S.W.2d at 833. It went on to point out that it had found “substantial” violations under Rule 16.2(e) in *Anderson*, *Herrington*, and in *Stewart v. State*, 289 Ark. 272, 711 S.W.2d 787 (1986). Technical violations not requiring reversal were

found in *McFarland*, *Lincoln*, and in *Toland*. *State v. Anderson* was distinguished because in *Anderson* there was no affidavit or recorded testimony. The Court concluded that because the officer executed the warrant in good faith it would apply the *Leon* “good faith exception.” *Id.* at 102, 722 S.W.2d at 834.

Significantly, the Court went to overrule *Anderson* to the extent that it indicated that compliance with Rule 13.1 is a “threshold requirement before [the Court] will consider the question of good faith on the part of the police.” *Jackson* at 102, 722 S.W.2d at 834. Cases such as *Hendricks v. State*, 15 Ark. App. 378, 695 S.W.2d 843 (1985) (failure to provide affidavit or recorded testimony to the magistrate issuing the warrant is such a deviation from normal procedure that the Court will not consider it a defect falling within the scope of “good faith error” rule) are now of doubtful precedential value, though the Court might reach the same result by holding that the Arkansas Constitution was violated by failure to provide an affidavit. See *Herrington v. State*, 287 Ark. 228, 697 S.W.2d 899 (1985). Justice Purtle in *Jackson*, dissented, arguing that the “majority opinion effectively emasculates A.R.C.P. Rule 13.1(b) without any warning.” *Id.* at 105, 722 S.W.2d at 835.

Thus, the continued viability of Rule 13.1(b), at least where a warrant is executed by an officer acting in good faith, is questionable.

As pointed out in *Case Note, Criminal Procedure — Exclusionary Rule — No Good Faith Exception to the Arkansas Rules of Criminal Procedure — Yet*, 8 UALR L.J. 513 (1985), while the requirement of an affidavit or recorded testimony is an important procedural safeguard, it seems anomalous to invalidate a search pursuant to a warrant for want of an affidavit and yet approve warrantless searches where no procedural safeguards such as affidavits are required. Though absence of an affidavit makes it difficult to determine whether a search was based on probable cause, the *Leon* decision does not require a showing of probable cause, only an objectively verifiable good faith belief on the part of the officer that he is executing a valid warrant. 8 UALR L.J. 513, 521-22.

*State v. Hoffman*, 273 Ark. 111, 617 S.W.2d 16 (1981) furnishes an example of the kind of case that might have been decided differently had it followed the United States Supreme Court’s decision in *Leon*. A service station owner suspected that his lessees were falsifying records pertaining to gasoline sales in order to pocket cash receipts. The Court found that a long detailed affidavit relating to records completed by the lessee of a service station, but never seen by the property owner-affiant, did not establish reasonable cause to believe that any specific document would be

found in a search of the premises, even though the affiant, the magistrate issuing the warrant, and the officer executing the warrant all manifestly had reason to believe that the warrant was valid. Though the affidavit failed to establish reasonable cause under pre-*Leon* Arkansas law, the Arkansas Supreme Court might well uphold a search on these facts if the case arose today.

#### What Constitutes Oath.

The Arkansas Court of Appeals has held that an affidavit has been sworn to when it states on its face that it was subscribed and sworn to before a judge, and the judge has testified that he questioned the witness about content of the affidavit, asked if the statements in it were true, and ensured that it was signed in his presence. *Wilson v. State*, 10 Ark. App. 176, 662 S.W.2d 204 (1983). Though the judge admitted that he probably did not require the affiant to take a formal oath, the Court of Appeals found that this was unnecessary, citing *Cox v. State*, 164 Ark. 126, 261 S.W. 303 (1924), where the Court found that a statement was made under oath where the maker knew that the person receiving the statement (a clerk) regarded the act of signing as an affirmation. In addition, the court relied upon Ark. Stat. Ann. § 41-2601(3) (Repl. 1977), which defines the word "oath" for the purposes of the Fraud chapter of the Arkansas Criminal Code. The definition provides, *inter alia*, that "written statements shall be treated as if made under oath if: ... (b) the statement recites that it was made under oath, and the declarant was aware of such recitation at the time he signed the statement and intended that the statement should be considered a sworn statement."

#### Lack of Reference to Time in Affidavit.

In *Herrington v. State*, 15 Ark. App. 248, 692 S.W.2d 251 (1985), the Arkansas Court of Appeals found that an affidavit's failure to specify the time at which an informant saw marijuana on the premises in question was not fatal. The Court of Appeals recognized that the Arkansas Supreme Court had previously reversed convictions for growing marijuana on grounds that the affidavit mentioned no time during which the criminal activity had occurred. See, e.g., *Collins v. State*, 280 Ark. 453, 658 S.W.2d 877 (1983). But the Court of Appeals noted that *Collins* was decided before the *Leon* and *Sheppard* cases. The Court of Appeals' reliance upon the *Leon* decision in *Herrington* was unnecessary, however, since it went on to find that a constitutionally permissible inference could be drawn from the face of the affidavit that the observation had occurred recently. Three judges dissented, claiming that the majority had used *Leon* to overrule the Arkansas Supreme Court's decision in *Collins*.

On appeal, the Arkansas Supreme Court

reversed, finding that the reviewing Court should look to the four corners of the affidavit to determine whether it was possible to establish with certainty the time during which criminal activity was observed. *Herrington v. State*, 287 Ark. 228, 697 S.W.2d 899 (1985). It answered the question in the negative. Though the Court discussed *Leon* at length, it concluded that an affidavit setting out no reference to time is violative of Article II, Section 15 of the Arkansas Constitution.

It is unclear whether the Court is engaging in the two step process inaugurated in *Anderson* (decided before *Herrington*) and abandoned in *Jackson* (decided after *Herrington*), where the Court first decides whether the deficiency compromises a substantial right to the extent that "good faith" the part of a police officer executing the warrant is irrelevant. *Anderson* at 62-63, 688 S.W.2d at 950-51. In *Anderson*, the Court was concerned with a "basic procedural safeguard afforded the defendant": a sworn affidavit that could be reviewed after the fact. *Anderson* at 62, 688 S.W.2d at 950. No such procedural safeguard was at issue in *Herrington*, though the Court could have found that the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," *Leon* at 923, 82 L.Ed.2d 699, quoting *Brown v. Illinois*, 422 U.S. 590, 610-11, 45 L.Ed.2d 416, 431 (1975). Instead, the Court concluded that it violated the Arkansas Constitution. Whether the Arkansas Supreme Court will apply the deterrence rationale underlying the *Leon* decision to cases involving application of the exclusionary rule for violations of the Arkansas Constitution was not explored.

#### Cumulative Effect of Minor Deficiencies.

In *Harris v. State*, 264 Ark. 391, 572 S.W.2d 389 (1978), the Arkansas Supreme Court found that Rules 13.1(b), 13.2(c), 13.3(d), and 13.4 had been violated. Typically, the Court declines to order evidence suppressed without evidence of a substantial violation. *Shackleford v. State*, 261 Ark. 721, 551 S.W.2d 205 (1977). But in *Harris*, without referring to Rule 16.2, governing when motions to suppress evidence should be granted, the Court found that "an accumulation of errors requires us to reverse." 264 Ark. at 395, 572 S.W.2d at 391. Thus, the Court appeared to reverse on grounds that "the State has not demonstrated that a reasonably good faith effort was made to comply with the Rule." 264 Ark. at 395, 572 S.W.2d at 391. Compare, *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987) (technical deficiencies do not require suppression of evidence, no prejudice having been shown).

#### Disclosure of Identity of Informants.

Where an informant merely supplies infor-



mation that steers a police investigation to the defendant so that the state's case stands or falls without the informant's testimony or participation, and where the informant was not present at the time of the illegal act charged, the Arkansas Supreme Court has held that it is not error for the state to refuse to disclose the informant's identity. *Shackleford v. State*, 261 Ark. 721, 551 S.W.2d 205 (1977), relying upon *Brothers v. State*, 261 Ark. 64, 546 S.W.2d 715 (1977) and *West v. State*, 255 Ark. 668, 501 S.W.2d 771 (1973).

See, also, *Cooper v. California*, 386 U.S. 58, 17 L.Ed.2d 730 (1967). In addition, see Supplementary Commentary to Rule 17.5.

### Reliability of Informants.

Incriminating statements by an informant can go a long way toward establishing his reliability. *Baxter v. State*, 262 Ark. 303, 556 S.W.2d 428 (1977); *State v. Lechner*, 262 Ark. 401, 557 S.W.2d 195 (1977). This will no doubt continue to be the case in Arkansas cases decided on the authority of *Illinois v. Gates*.

## RESEARCH REFERENCES

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**Ark. L. Rev.** Arkansas' Search and Seizure Law After *United States v. Leon*: In Search of a Standard, 40 Ark. L. Rev. 125.

Casenote, *Hoay v. State*: A Look at the United States Supreme Court's and Arkansas's Misapplication of the Exclusionary Rule and Good Faith Exception, 57 Ark. L. Rev. 993.

**U. Ark. Little Rock L.J.** Notes, Criminal Procedure — Search Warrants — The Totality of the Circumstances Test for Determination

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## CASE NOTES

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### In General.

A search warrant need not be based upon testimony taken before a judicial officer but may be based upon an affidavit presented to him or her. *Jacobs v. State*, 317 Ark. 454, 878 S.W.2d 734 (1994).

A five minute discrepancy between the is-

suance of the search warrant and the affidavit, where the swearing of the affidavit followed the issuance of the search warrant, did not violate the section of this rule that requires that the search warrant be supported by an affidavit. *Cook v. State*, 59 Ark. App. 24, 952 S.W.2d 677 (1997).

### Construction.

To meet the requirement of subsection (b) of this rule, the affiant must state more than a mere conclusion that the informant has "proved reliable in the past" and disclose enough information to show that the informant is worthy of belief. *Akins v. State*, 264 Ark. 376, 572 S.W.2d 140 (1978).

There is not an irreconcilable conflict between the procedural provision, in subsection (b) of this rule and the substantive statute, § 16-82-201(a); the purpose of the statute's providing that warrants could issue "only" upon affidavit sworn to before a magistrate was not to restrict the issuance of search warrants to affidavits, but to insure that the information presented to magistrates and upon which they relied, was sworn to and recorded to facilitate subsequent review. *Costner v. State*, 318 Ark. 806, 887 S.W.2d 533 (1994).

**Applicability.**

The victim's account of the crime and description of her attacker, included in an affidavit, was not the statement of an informant, and her statement was therefore exempt from the reliability requirement of this rule. *Haynes v. State*, 314 Ark. 354, 862 S.W.2d 275 (1993).

**Affidavit.**

Failure to establish the bases of knowledge of the confidential informants is not a fatal defect if the affidavit viewed as a whole provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in particular places. *Langford v. State*, 332 Ark. 54, 962 S.W.2d 358 (1998).

Conclusory statement in an affidavit for a search warrant as to a "reliable informant" was not sufficient to satisfy the indicia requirement; however, the affidavit, when viewed as a whole, provided a substantial basis for a finding of reasonable cause to believe that things subject to seizure might be found in a particular location, so the failure to establish the veracity of the informant was not fatal. *Abshire v. State*, 79 Ark. App. 317, 87 S.W.3d 822 (2002).

In a possession of cocaine case, denial of defendant's motion to suppress was proper as the warrant affidavit was not fatally defective: the affidavit contained a sufficient nexus between defendant's illegal activity and his residence, the State was not required to establish the veracity and reliability of the undercover officer to whom defendant made the comment during their phone conversation that he had plenty of dope, the affidavit as a whole provided a substantial basis for a finding of reasonable cause to believe that drugs would be found at defendant's residence, and, based on the information contained in the affidavit, there was no error in concluding that it was likely that criminal activity was occurring at defendant's residence at the time the search warrant was issued. *Haynes v. State*, 83 Ark. App. 314, 128 S.W.3d 33 (2003).

Trial court did not err in denying defendant's motion to suppress evidence because defendant did not satisfy his burden of establishing a Franks violation; the trial court found that the statements a detective made in his affidavit were not false or misleading, the facts in the affidavit provided sufficient information concerning the existence and timing of criminal activity, and based on information provided by defendant, there was reasonable cause to believe that there was drug paraphernalia at his home. *Moss v. State*, 2011 Ark. App. 14, — S.W.3d —, 2011 Ark. App. LEXIS 27 (Jan. 12, 2011).

Assuming that references to a confidential informant and defendant's prior criminal history information in an affidavit for a search

warrant were improper, they were of no consequence because probable cause for the issuance of the search warrant was established through statements provided by defendant. *Moss v. State*, 2011 Ark. App. 14, — S.W.3d —, 2011 Ark. App. LEXIS 27 (Jan. 12, 2011).

**Burden of Proof.**

The state has the burden of proving that the warrant was made in compliance with the law. *Hendricks v. State*, 15 Ark. App. 378, 695 S.W.2d 843 (1985).

**Credibility of Informant.**

A search warrant affidavit may be based on hearsay information and need not necessarily be based on direct personal observations of the affiant; however, in such circumstances, the affiant must show some underlying basis for his belief that the informant is credible and reliable. *Freeman v. State*, 268 Ark. 614, 594 S.W.2d 858 (1980).

Where affidavit for search warrant named the police informant, but did not state how the informant was acquainted with the affiant, so that there were no particular facts presented as to the informant's reliability, the search warrant did not comply with the requirements of § 16-82-201 or this rule, so that the search violated Ark. Const., Art. 2, § 15, and the Fourth and Fourteenth Amendments to the United States Constitution. *State v. Prue*, 272 Ark. 221, 614 S.W.2d 221, cert. denied 454 U.S. 863, 102 S. Ct. 322, 70 L. Ed. 2d 163 (1981), overruled in part *Thompson v. State*, 658 S.W.2d 350 (1983). But see *Thompson v. State*, 280 Ark. 265, 658 S.W.2d 350 (1983).

A warrant and underlying affidavit will not be considered defective merely because the officer executing the affidavit was not a member of the law enforcement agency directly acquainted with the informant's reliability. *Moore v. State*, 297 Ark. 296, 761 S.W.2d 894 (1988).

A search warrant is flawed where there are no indicia of the reliability of the confidential informant. *Henry v. State*, 29 Ark. App. 5, 775 S.W.2d 911 (1989).

It is not fatal if the affidavit fails to establish the veracity of the confidential informant if the affidavit viewed as a whole provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place. *State v. Mosley*, 313 Ark. 616, 856 S.W.2d 623 (1993).

It is not necessary for an affiant applying for a search warrant to state reasons why a public official or public employee is a credible or reliable informant. *Haynes v. State*, 314 Ark. 354, 862 S.W.2d 275 (1993).

There was no need to establish the reliability of an informant referred to in an affidavit filed in support of an application for a search warrant, notwithstanding that the informant



was identified only by a number, where, at the same time that the affidavit was presented to the judge, the informant's own statement was also presented to the judge and that statement included the informant's name, address, date of birth, and Social Security number. *Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001).

Pursuant to subsection (b) of this rule, the affidavit presented by the officer provided reasonable cause to issue the search warrant and, thus, there was no police misconduct to deter; further, there were sufficient facts to establish the veracity of the second informant, and his statements were clearly incriminating and were based on personal observations of recent criminal activity. *Stevens v. State*, 91 Ark. App. 55, 208 S.W.3d 224 (2005).

Search warrant was not defective and satisfied the requirements of this rule as a confidential informant's information was corroborated by the personal observations of two police officers and the search warrant was not based on pure hearsay. *Morgan v. State*, 2009 Ark. 257, 308 S.W.3d 147 (2009).

Affidavit in support of a search warrant sufficiently established the reliability of two informants; one had provided reliable information in the past that led to the arrest of five individuals, and the other provided information that was personally incriminating, and the information was corroborated by surveillance and by the other informant. *Wagner v. State*, 2010 Ark. 389, — S.W.3d —, 2010 Ark. LEXIS 480 (Oct. 21, 2010).

### **Credibility of Ordinary Citizen.**

Although an affiant who is an informant must demonstrate particular facts bearing on the affiant's reliability, no additional support for the reliability of a witness is required where the witness volunteered the information as a good citizen and not as a confidential informant whose identity is to be protected. *Moore v. State*, 323 Ark. 529, 915 S.W.2d 284 (1996).

### **Defective Search Warrants.**

#### **—Inadequate Description.**

Where a search warrant identified the scene of the search only by street address with no mention of the city so that it lacked particularity required by subsection (b) of this rule, the warrant was served at night without the finding required by ARCrP 13.2(c), no receipt was given pursuant to ARCrP 13.3(d); the return required by ARCrP 13.4, was invalid, and only one informant had supplied the information it was based upon, although the affidavit in support of it said there had been four, too many rules had been disregarded, so that, although any one alone might not justify reversal and suppression of the evidence, taken as a whole, this was required. *Harris v. State*, 264 Ark. 391, 572 S.W.2d 389

(1978), questioned *Watson v. State*, 724 S.W.2d 478 (1987).

That a search warrant listed the wrong address did not require the suppression of evidence found during its execution, as the officers personally knew which premises were to be searched, the intended location was under surveillance while an officer secured the warrant, and the premises intended to be searched were in fact searched. *Ritter v. State*, 2011 Ark. 427, — S.W.3d —, 2011 Ark. LEXIS 526 (Oct. 13, 2011).

#### **—Sufficiency of Affidavit.**

Affidavit met the requirements of this rule regarding the particularity of facts bearing on the informant's reliability. *Shackleford v. State*, 261 Ark. 721, 551 S.W.2d 205 (1977).

While the conclusory statement, in an affidavit for a search warrant, that the informant had previously given reliable information to the police would not be sufficient under this rule, where the affidavit also stated that the informant witnessed and participated in recent drug sales and that the defendant had a reputation with police agents as a drug seller, such affidavit was sufficient to establish the informant's reliability, particularly since the informant's statements were declarations against interest. *Baxter v. State*, 262 Ark. 303, 556 S.W.2d 428 (1977).

Affidavit held sufficient. *State v. Lechner*, 262 Ark. 401, 557 S.W.2d 195 (1977).

Where a search warrant affidavit was based on hearsay, the affiant was required by subsection (b) of this rule to show that there was a substantial basis for crediting the hearsay information, and this requirement was not satisfied by the informant's own personal observations alone, nor was a statement by the affiant that the informant was reliable sufficient to support the issuance of a search warrant. *Freeman v. State*, 268 Ark. 614, 594 S.W.2d 858 (1980).

Where a search warrant affiant stated in his affidavit that he had overheard a conversation in which the defendant discussed selling marijuana, but his testimony at trial showed that he had actually only overheard the defendant's wife's voice, there was a distinct inconsistency which diminished the accuracy of the affidavit, and in light of subsection (b) of this rule and cases requiring "particularity" in an affidavit when it is based on hearsay, the court held that the affidavit was insufficient to support the search warrant that was issued. *Freeman v. State*, 268 Ark. 614, 594 S.W.2d 858 (1980).

The affidavit's language "could be removed" could not be construed to convey the meaning that the controlled substance was in "danger of imminent removal," which was required to justify a nighttime search. *State v. Broadway*, 269 Ark. 215, 599 S.W.2d 721 (1980).

An affidavit should speak in factual and not

mere conclusory language, for it is the function of the judicial officer, before whom the proceedings are held, to make an independent and neutral determination based upon facts, not conclusions, justifying an intrusion into one's home. *State v. Broadway*, 269 Ark. 215, 599 S.W.2d 721 (1980).

Whereas probable cause and technical deficiencies in a warrant go to reasonable grounds to support a search, the requirements of the affidavit or recorded testimony additionally go to basic procedural safeguards afforded the defendant; without some record, the defendant is limited in his attack on the warrant and is without fair judicial determination of the legitimacy of the warrant. Thus, in view of the substantial nature of that requirement and its legislative sanction, it cannot be disregarded or found within any good faith exception. *State v. Anderson*, 286 Ark. 58, 688 S.W.2d 947 (1985), overruled on other grounds, *Jackson v. State*, 291 Ark. 98, 722 S.W.2d 831 (1987).

Where affidavit did not provide the issuing magistrate any particular facts bearing on the informant's reliability as required by subsection (b) of this rule, the conclusory language "reliable informant" was not sufficient to satisfy the particular facts requirement. *Jackson v. State*, 291 Ark. 98, 722 S.W.2d 831 (1987).

Contention that judge violated subsection (c) of this rule by failing to keep the affidavit while the warrant was being executed was held of no consequence where the affidavit was returned with the warrant and no harm resulted. *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987).

Affidavit held insufficient. *Tatum v. State*, 21 Ark. App. 237, 731 S.W.2d 227 (1987).

Critical flaw in the affidavit is the absence of any indication of when the criminal activity was observed. *Henry v. State*, 29 Ark. App. 5, 775 S.W.2d 911 (1989).

Where there is no claim that the contents of an affidavit do not support the issuance of a search warrant, the absence of an affidavit itself is inconsequential. *Mays v. State*, 308 Ark. 39, 822 S.W.2d 846 (1992).

Where the affidavit, viewed as a whole, established that drugs and a fugitive felon were seen inside the residence of defendant within the past four hours, this was sufficient to establish probable cause to issue a search warrant for the premises. *State v. Mosley*, 313 Ark. 616, 856 S.W.2d 623 (1993).

Subsection (c) of this rule requires the recollection of oral, sworn testimony given in support of an affidavit for a search warrant. *Moya v. State*, 335 Ark. 193, 981 S.W.2d 521 (1998).

This rule does not deal with misleading information or omissions in an affidavit supporting a warrant, and an affidavit does not

have to contain facts establishing the veracity and reliability of nonconfidential informants such as police officers, public employees, victims, and other witnesses whose identity is known. *State v. Rufus*, 338 Ark. 305, 993 S.W.2d 490 (1999).

There was probable cause in a search warrant affidavit to issue a warrant to search defendant's shop because, in addition to the information obtained through the informants, the affidavit contained defendant's admission that he had left the shop about ten minutes before his vehicle was stopped, and information that the stop of his vehicle resulted in seizure of baggies of methamphetamine. Statements in the affidavit were not misleading in that they did not indicate to the magistrate that paraphernalia was being sold from the shop itself. *Johnson v. State*, 98 Ark. App. 245, 254 S.W.3d 794 (2007).

Where a detective presented to a magistrate an affidavit describing two controlled purchases of methamphetamine at defendant's residence, the affidavit met the requirements of subsection (b) of this rule by providing reasonable cause to believe that methamphetamine and material related to its sale would be found on the premises to be searched. *Jones v. State*, 2009 Ark. App. 676, — S.W.3d —, 2009 Ark. App. LEXIS 845 (Oct. 21, 2009).

#### —Supporting Documentation.

Search warrant was defective where affidavit was unsigned, no written summary of the proceedings in front of the judge was made and no record was made of those proceedings, and there was no evidence that the witnesses were sworn. *Hendricks v. State*, 15 Ark. App. 378, 695 S.W.2d 843 (1985).

Although unrecorded oral testimony may not be considered by the trial court or appellate courts when determining whether there was sufficient probable cause to issue a search warrant, where there is a written affidavit in support of the search warrant that later is ruled deficient, an appellate court will go beyond the four corners of the affidavit and consider unrecorded oral testimony to determine whether the officers executing the search warrant did so in objective good faith reliance on the judge's having found probable cause to issue the search warrant. *Moya v. State*, 335 Ark. 193, 981 S.W.2d 521 (1998).

#### —Suppression of Evidence.

Motion to suppress evidence seized under the authority of a search warrant should have been granted, where the affidavit relied upon by the issuing magistrate did not contain sufficient information and where the state failed to prove that the sheriff's oral statement to the magistrate concerning the basis for the informant's knowledge was made under oath or was recorded. *Lunsford v. State*,



262 Ark. 1, 552 S.W.2d 646 (1977).

Where search warrant was obtained without either affidavits or recorded testimony, in violation of the provisions set forth in subsection (b) of this rule, the trial court should have granted the defendant's motion to suppress the evidence illegally obtained in the search of the defendant's home. *Anderson v. State*, 13 Ark. App. 68, 679 S.W.2d 806 (1984), *aff'd* 286 Ark. 58, 688 S.W.2d 947 (1985).

If the magistrate issuing a warrant is misled by information in the affidavit and the affiant knew it was false or there was a reckless disregard for the truth, the evidence may be suppressed despite the good faith reliance of the police upon the warrant. *Holloway v. State*, 293 Ark. 438, 738 S.W.2d 796 (1987).

Trial court erred in not suppressing evidence seized pursuant to a search warrant based on an insufficient affidavit. *Tatum v. State*, 21 Ark. App. 237, 731 S.W.2d 227 (1987).

The trial court's denial of the defendant's suppression motion was appropriate based on the officers' objective good faith reliance on the issuance of a search warrant where (1) the officers prepared a valid anticipatory search warrant for one apartment, but before they could issue the warrant, the circumstances changed when a package containing a contraband was moved to a second apartment, (2) the investigating officer immediately informed the judge who issued the warrant of the change, and (3) they then acted together to make the necessary corrections on the warrant and both initialed the changes. *Moya v. State*, 335 Ark. 193, 981 S.W.2d 521 (1998).

#### —Testimony Under Oath.

Although it is not necessary that all the information that furnishes the basis for the issuing magistrate's finding of probable cause be stated in an affidavit, it is necessary that the information be given to the magistrate under oath. *Lunsford v. State*, 262 Ark. 1, 552 S.W.2d 646 (1977).

#### —Time of Criminal Activity.

It is the uniform rule that some mention of time must be included in the affidavit used for a search warrant; the only softening of this position occurs when time can be inferred from the information in the affidavit. Time is crucial because a magistrate must know that criminal activity or contraband exists where the search is to be conducted at the time of the issuance of the warrant, not that it may have been there weeks or months before. *Collins v. State*, 280 Ark. 453, 658 S.W.2d 877 (1983).

Where an affidavit for a search warrant made no mention of the time during which the alleged criminal activity occurred or was taking place, the affidavit was insufficient to support the issuance of the search warrant,

and therefore the evidence seized pursuant to the warrant had to be suppressed. *Collins v. State*, 280 Ark. 453, 658 S.W.2d 877 (1983).

Where an affidavit in support of a search warrant for child pornography omitted any reference to when the informant observed alleged criminal activity and contraband in defendant's home, or facts from which this could be reasonably inferred, the trial court erred in refusing to suppress evidence seized in the search of defendant's home. *George v. State*, 84 Ark. App. 275, 140 S.W.3d 492 (2003), *rev'd* 189 S.W.3d 28 (2004).

#### Disqualification of Judge.

The circuit judge who tried the case was not required to disqualify himself when, in the process of a suppression hearing to determine the validity of the search warrant, it became apparent he would have to rule on the propriety of the warrant he had earlier approved. *Holloway v. State*, 293 Ark. 438, 738 S.W.2d 796 (1987).

#### Good Faith Reliance.

Notwithstanding that a recorded statement given by an investigator was not under oath as required by subsection (b) of this rule and that the contents of the written affidavit, standing alone, failed to give the judge probable cause for issuing the warrant, the search was valid because the executing officers acted with an objective good-faith reliance upon the judge's issuance of the warrant. *Wray v. State*, 69 Ark. App. 170, 11 S.W.3d 9 (2000).

Evidence seized in the defendants' homes was not subject to suppression, notwithstanding that search warrants for the defendants' homes were not supported by probable cause, where the officers who conducted the search acted in good faith on a determination of probable cause by the magistrate and did not mislead the magistrate to obtain the warrants. *Yancey v. State*, 345 Ark. 103, 44 S.W.3d 315 (2001).

Trial court properly denied defendant's motion to suppress evidence in his trial for possession of drugs based on the good faith exception to the exclusionary rule even though the deputy sheriff, in preparing the affidavit to support the search warrant, used a preexistent computer file to list the items that were sought during the search. *Davidson v. State*, 76 Ark. App. 464, 68 S.W.3d 331 (2002), *cert. denied* 537 U.S. 820, 123 S. Ct. 98, 154 L. Ed. 2d 28 (2002).

Although there was circumstantial evidence to support the inference that defendant was a drug dealer, nothing in the search warrant affidavit supported the inference that he had evidence in his home and, thus, the affidavit failed to provide a substantial basis on which to find probable cause; however, the good-faith exception to the requirement of a valid warrant was proper because

the officer acted in good-faith reliance on a facially-valid warrant as it was objectively reasonable for him to conclude that the search was supported by probable cause. *Hampton v. State*, 90 Ark. App. 174, 204 S.W.3d 572 (2005).

#### **Reasonable Cause.**

Where affidavit in support of search warrant sought documentary evidence related to cash receipts, money and deposit slips, both personal and business, tending to show a violation of Arkansas law, such a dragnet description of anything incriminating which might be found in building occupied by operators of affiant's gasoline station did not establish the necessary reasonable cause to believe that any specific documents would actually be found by a search of the premises; thus the evidence seized was properly suppressed. *State v. Hoffman*, 273 Ark. 111, 617 S.W.2d 16 (1981).

Testimony of officers showed adequate probable cause to issue a search warrant, since the described activities met the statutory definition of the crime. *Century Theaters, Inc. v. State*, 274 Ark. 484, 625 S.W.2d 511 (1981).

Probable cause for a search warrant does not require an affiant to assert facts that establish conclusively or beyond a reasonable doubt that a violation of the law exists at the place to be searched. *Vanderkamp v. State*, 19 Ark. App. 361, 721 S.W.2d 680 (1986); *Hawk v. State*, 38 Ark. App. 1, 826 S.W.2d 824 (1992).

Subsection (c) of this rule requires recitation of oral testimony; the purposes of such a rule are to facilitate subsequent review for the existence of probable cause and to avoid the possibility of justification for a search becoming based upon facts or evidence discovered in the course of execution of the warrant and, in the event the probable cause is based upon hearsay, explaining the reliability of the informant. These considerations are particularly appropriate for the review of ex parte proceedings involving the valued right of privacy; they also serve to minimize the necessity of calling issuing magistrates to prove what can easily be documented. *Jackson v. State*, 291 Ark. 98, 722 S.W.2d 831 (1987).

Objective good faith reliance by a police officer on a facially valid search warrant will avoid the application of the exclusionary rule in the event the magistrate's assessment of probable cause is found to be in error. *Jackson v. State*, 291 Ark. 98, 722 S.W.2d 831 (1987).

Evidence sufficient to establish reasonable cause for issuance of search warrant. *Brannon v. State*, 26 Ark. App. 149, 761 S.W.2d 947 (1988).

Where officer did not act solely upon the advice or information given him by unnamed confidential informants and employed independent police work to corroborate or confirm

many of the tips given by informants, affidavit offered the magistrate sufficiently verified information to show there was a fair probability that defendant's car contained controlled substances at the time the warrants were issued, and although it might not meet the "reliability" or "veracity" test established in *Aguilar*, officer's affidavit sufficed for the practical, common sense judgment called for in making a probable cause determination under the standard in *Gates*. *Rainwater v. State*, 302 Ark. 492, 791 S.W.2d 688 (1990).

The corroboration of three independent informants coupled with the confirmation of their information by police investigative work provided reasonable cause. *Hawk v. State*, 38 Ark. App. 1, 826 S.W.2d 824 (1992).

Search warrant upheld where investigator's affidavit set forth particular facts bearing on the informants' reliability, related the means by which the information was obtained, and provided a substantial basis for a finding of reasonable cause to believe that contraband subject to seizure would be found on defendant's property and that defendant was in the business of selling drugs. *Beshears v. State*, 320 Ark. 573, 898 S.W.2d 49 (1995).

Search warrants for the defendants' homes were not supported by reasonable cause where the warrants were obtained after an officer saw the defendants watering marijuana plants in a remote wooded area several miles from their homes; such conduct did not create reasonable cause to believe that contraband would be found in the defendants' homes. *Yancey v. State*, 345 Ark. 103, 44 S.W.3d 315 (2001).

There was no violation of defendants' Fourth Amendment rights when officers drove up the driveway to their house looking for a probationer in the area, discovered marijuana growing in plain view, and then obtained a search warrant as a result; further, under § 16-82-201(a), the argument that the warrant was issued by a magistrate in a separate county was of no merit. *Lancaster v. State*, 81 Ark. App. 427, 105 S.W.3d 365 (2003).

Court did not err in denying defendant's motion to suppress evidence because the facts provided in the investigator's affidavit for a search warrant gave rise to an inference that a crime had been committed; hence, defendant's conviction for the capital murder of his wife was upheld. *Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004).

Probable cause existed for a search warrant for defendants' home where it was based on officers' observations of one defendant, who purchased at various stores materials used to manufacture methamphetamine and returned to the home address afterward; hence, defendants' motion to suppress evidence ob-



tained in the search was properly denied. *Widen v. State*, 86 Ark. App. 246, 185 S.W.3d 94 (2004).

Reasonable cause existed to issue search warrants where affidavits cited anonymous tips and indicated that a police canine alerted numerous times on defendant's storage unit; further, an officer testified that the dog cost \$10,000, that he had used the dog in the past, and that "he did a good job", thus, there was information known to one of the executing officers that bolstered the reliability of the canine. *Blevins v. State*, 95 Ark. App. 218, 235 S.W.3d 921 (2006).

#### **Reliability.**

For purposes of subsection (b) of this rule, it is not necessary for the affidavit to establish the reliability of a public official. *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996).

Factors which indicated reliability sufficient for the requirement of subsection (b) of this rule included the fact that the informants' statements tended to incriminate them, that their statements were based on personal observations of recent criminal activity, and that one statement could be corroborated. *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996).

Defendant's convictions for aggravated assault, possession of drug paraphernalia, and maintaining a drug premises were proper because any failure to establish a confidential informant's reliability or basis of knowledge was not a fatal defect to this warrant under subsection (b) of this rule. The affidavit established probable cause to search the premises because it recited the affiant's monitoring of the informant's controlled buy of methamphetamine there on December 20, 2007. *Ingle v. State*, 2010 Ark. App. 410, — S.W.3d —, 2010 Ark. App. LEXIS 441 (2010).

Defendant's motion to suppress evidence was properly denied as a search warrant did establish the reliability of a confidential informant (CI) under this rule by a police officer's affidavit independently confirming some of the information the CI gave him and stating that the CI had given the officer reliable information in the past. As the CI told the officer that defendant was attempting to clean up the crime scene by destroying the evidence, there was a reasonable cause to believe that the items identified in the warrant would be gone, which justified the nighttime search under Ark. R. Crim. P. 13.2(c)(ii). *Fowler v. State*, 2011 Ark. App. 321, — S.W.3d —, 2011 Ark. App. LEXIS 350 (May 4, 2011).

#### **Standing to Challenge Warrant.**

Where there was no evidence to suggest that defendant was an overnight guest in the searched apartment, no evidence presented regarding defendant's relationship to the occupant-owners, and no evidence that defen-

dant had any other purpose in the apartment aside from his illegal activity, the court could not reach the constitutionality of the search because defendant failed to show he had a reasonable expectation of privacy in the apartment that was ultimately searched. *Whitham v. State*, 69 Ark. App. 62, 12 S.W.3d 638 (2000).

#### **Time of Search.**

The trial judge did not err in its denial of defendant's motion to suppress evidence obtained pursuant to a nighttime search warrant where the affidavit filed to obtain the warrant showed drugs had been purchased at defendant's residence that day; there was a danger and difficulty because of a one-door entrance; the drugs were in danger of removal or disposal due to the small size of the pills; the defendant primarily sells late at night, and the issuing judge stated in the search warrant that he was satisfied there was probable cause to issue a search warrant that could be executed at any time, day or night. *Houston v. State*, 41 Ark. App. 67, 848 S.W.2d 430 (1993).

A nighttime search warrant was properly issued, where a confidential informant purchased drugs from the defendants during nighttime hours with marked bills, in order to permit the retrieval of the marked bills and to prevent the possible destruction of evidence. *Hale v. State*, 61 Ark. App. 105, 968 S.W.2d 627 (1998).

#### **Totality of Circumstances.**

The United States Supreme Court recently enunciated a new test for the review of search issues where an officer obtains a search warrant on the basis of an informant's statement; the new test is a totality of the circumstances test whereby the issuing magistrate is to make a practical, common sense decision based on all the circumstances set forth in the affidavit. The Arkansas Supreme Court adopted and hereafter will apply the new, more flexible, totality of the circumstances test. *Thompson v. State*, 280 Ark. 265, 658 S.W.2d 350 (1983).

Under the "totality of circumstances" test, the magistrate issuing the warrant must make a practical, commonsense decision based on all the circumstances set forth in the affidavit; it is then the duty of the reviewing court to simply ensure that the magistrate had a substantial basis for concluding the probable cause existed to issue the warrant. However, conclusory statements in affidavits, which give no substantial basis for determining the existence of probable cause, will not be accepted. *Vanderkamp v. State*, 19 Ark. App. 361, 721 S.W.2d 680 (1986); *Tatum v. State*, 21 Ark. App. 237, 731 S.W.2d 227 (1987).

Requirement that the magistrate make a practical, common sense determination

whether there is probable cause for a search warrant based upon the totality of the circumstances, was met. *Holloway v. State*, 293 Ark. 438, 738 S.W.2d 796 (1987).

Considering totality of circumstances, issuance of search warrant was proper. *Edwards v. State*, 300 Ark. 4, 775 S.W.2d 900 (1989).

A search warrant was properly issued, notwithstanding a lack of particular facts bearing on the reliability of an informant, where (1) a number of sheriff's deputies and task force agents confirmed the smell of ether originating from the residence after receiving reports that a methamphetamine lab and a chop shop were located at the residence, (2) members of the drug task force personally observed counter-surveillance measures being employed at the residence, and (3) aerial surveillance corroborated the presence of a large collection of automobiles. *Fouse v. State*, 73 Ark. App. 134, 43 S.W.3d 158 (2001).

Court properly denied a motion to suppress evidence where defendant possessed numerous digital and still images of 14 year-old girls posing nude and exposing their breasts, the information was provided to officers by the

girls themselves, and, based upon the nature of the criminal activity, defendant was likely to have possessed the materials at the time the search warrant was executed. *George v. State*, 358 Ark. 269, 189 S.W.3d 28 (2004), cert. denied 543 U.S. 1163, 125 S. Ct. 1329, 161 L. Ed. 2d 136 (2005).

Where a search warrant affidavit contained false statements, but was sufficient to establish probable cause after the false statements were corrected, evidence obtained through the warrant was admissible. *Winters v. State*, 89 Ark. App. 146, 201 S.W.3d 4 (2005).

**Cited:** *Boyd v. State*, 13 Ark. App. 132, 680 S.W.2d 911 (1984); *Davis v. State*, 293 Ark. 472, 739 S.W.2d 150 (1987); *Hall v. State*, 302 Ark. 341, 789 S.W.2d 456 (1990); *Sossamon v. State*, 31 Ark. App. 131, 789 S.W.2d 738 (1990); *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997); *Deere v. State*, 59 Ark. App. 174, 954 S.W.2d 943 (1997); *McCormick v. State*, 74 Ark. App. 349, 48 S.W.3d 549 (2001); *Eastin v. State*, 370 Ark. 10, 257 S.W.3d 58 (2007); *Wormley v. State*, 2010 Ark. App. 474, — S.W.3d —, 2010 Ark. App. LEXIS 488 (June 2, 2010).

### Rule 13.2. Contents of search warrant.

(a) A search warrant shall be dated, issued in duplicate, and shall be addressed to any officer.

(b) The warrant shall state, or describe with particularity:

(i) the identity of the issuing judicial officer and the date and place where application for the warrant was made;

(ii) the judicial officer's finding of reasonable cause for issuance of the warrant;

(iii) the identity of the person to be searched, and the location and designation of the places to be searched;

(iv) the persons or things constituting the object of the search and authorized to be seized; and

(v) the period of time, not to exceed five (5) days after execution of the warrant, within which the warrant is to be returned to the issuing judicial officer.

(c) Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days. Upon a finding by the issuing judicial officer of reasonable cause to believe that:

(i) the place to be searched is difficult of speedy access; or

(ii) the objects to be seized are in danger of imminent removal; or

(iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy;

the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or night, and within a reasonable time not to exceed sixty (60) days from the date of issuance.

(d) If the warrant authorizes the seizure of documents other than lottery tickets, policy slips, and other nontestimonial documents used as instru-



mentalities of crime, the warrant shall require that it be executed in accordance with the provisions of Rule 13.5 and may, in the discretion of the issuing judicial officer, direct that any files or other collections of documents, among which the documents to be seized are reasonably believed to be located, shall be impounded under appropriate protection where found.

### 1987 Unofficial Supplementary Commentary to Rule 13.2

#### Description of Places to Be Searched.

In *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987), the Court reviewed a warrant describing a place to be searched by reference to a legal description of a farm, complete with directions for reaching a house on it. The Court found that the warrant was not overly broad and that seizures of drugs and stolen property from appellant's barn and from a cattle feeder were lawful.

In *Maryland v. Garrison*, 480 U.S. 79, 94 L.Ed.2d 72 (1987), the United States Supreme Court decided that a search warrant setting out an ambiguous description of a place to be searched was nonetheless valid and that items seized from the wrong apartment on the third floor of a building were admissible into evidence. The Court found that the police officer who obtained the warrant reasonably believed that only one tenant occupied the third floor, when in fact two tenants lived there. Contraband discovered in the wrong apartment before police realized their mistake, was found to be admissible. The Court held that a warrant's validity must be judged in light of information available to officers at the time they obtained the warrant.

#### Nighttime Searches.

In *State v. Broadway*, 269 Ark. 215, 599 S.W.2d 721 (1980), the Court decided that the affiant did not supply to the issuing magistrate information showing that reasonable cause existed to believe that drugs subsequently seized at night under a warrant were in danger of "imminent removal" under Rule 13.2(c). The Court ordered the evidence suppressed. The warrant permitted a search at night, and the search was in fact conducted after 8:00 p.m. If this case arose today, the Arkansas Supreme Court might well decide it differently on the authority of *United States v. Leon*, 468 U.S. 897, 82 L.Ed.2d 677 (1984) and Rule 16.2(e) (requiring suppression only upon showing of substantial violation of rules) as interpreted by cases such as *Jackson v. State*, 291 Ark. 98, 722 S.W.2d 831 (1987).

A warrant to search at night — i.e., [not] between the hours of 6:00 a.m. and 8:00 p.m. (Rule 13.2(c)) — must be supported by an affidavit providing the issuing official with "reasonable cause" to believe that the circumstances are as specified in Rule 13.2(c). *Boyd v. State*, 13 Ark. App. 132, 680 S.W.2d 911 (1984); *Harris v. State*, 262 Ark. 506, 558 S.W.2d 143 (1977). Prior to the United States

Supreme Court decision in *Leon*, in nighttime search cases the state was called upon to negotiate two hurdles — viz, that the affidavit showed probable cause for a search and that it demonstrated reasonable cause to believe things specified by Rule 13.2(c). Under *Leon*, good faith can save a warrant not supported by probable cause. It should also be noted that in *Harris* the Arkansas Supreme Court found that evidence seized pursuant to a warrant executed at night, but not supported by an affidavit showing exigent circumstances justifying a nighttime search, need not be suppressed. The Court found that this was not a "substantial violation of appellant's rights" under Rule 16.2 or Article 2, Section 15 of the Arkansas Constitution. 262 Ark. at 509, 558 S.W.2d at 145. The Court also found that no "substantial violation" flowed from the warrant's failure to recite that the magistrate found reasonable cause for its issuance, that it be executed between 6:00 a.m. and 8:00 p.m., that it be executed within 60 days, or that a return be made within five days after execution. *Id.* at 509, 558 S.W.2d at 145.

It is not necessary for a valid nighttime search under a warrant that the affidavit provide reasonable cause for believing that the warrant can be safely or successfully executed only at night. *Lewis v. State*, 7 Ark. App. 38, 644 S.W.2d 303 (1983).

The Arkansas Supreme Court has not interpreted Rule 13.2(c) to require that officers executing a search warrant begin a search well before 8:00 p.m. in order to ensure completion by that time. *Brothers v. State*, 261 Ark. 64, 546 S.W.2d 715 (1977).

For an examination of *United States v. Leon*, see Comment, *Arkansas' Search and Seizure Law After United States v. Leon: In Search of a Standard*, 40 Ark. L. Rev. 125 (1986).

#### Return Date.

Rule 13.2(b)(v) provides that warrants are to be returned to the issuing judicial officer within five days of execution. Where a return is actually made within the time provided by the rule, the Court routinely finds that the warrant's failure to state a return date is not grounds for suppression under Rules 13.2 and 16.2(e). *Baxter v. State*, 262 Ark. 303, 556 S.W.2d 428 (1977); *Harris v. State*, 262 Ark. 506, 558 S.W.2d 143 (1977).

#### Seizure of Items in Plain View.

In *Gatlin v. State*, 262 Ark. 485, 559 S.W.2d

12 (1977), the Arkansas Supreme Court ordered suppressed several items, including a plastic bag containing \$807 seized by officers conducting a search under a warrant only authorizing seizure of controlled substances. The Court held that the money and other items forming the basis for a conviction of theft by receiving would have been admissible had the state shown at trial that their discovery was inadvertent and that their incriminating nature was "immediately apparent." *Id.* at 490, 559 S.W.2d at 15, relying on *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed.2d 564 (1971); and *United States v. Johnson*, 541 F.2d 1311 (8th Cir. 1976). There was no evidence that the officers making the search knew that the items seized had been stolen, so their incriminating nature could not have been immediately apparent. Neither was there any testimony that discovery of the goods was inadvertent. Therefore, the Court ruled, these items were not admissible under Rule 14.4.

The circumstances in *Gatlin* must be distinguished from those in cases such as *McQueen v. State*, 283 Ark. 232, 675 S.W.2d 358 (1984), where officers with a search warrant seized \$640 cash not listed on the warrant as well as enumerated items in a search of defendant's residence. The evidence was introduced at appellant's trial for aggravated robbery and theft of property. The Supreme Court upheld the seizure of the money on testimony that its discovery was inadvertent, the incriminating nature of the money being "immediately apparent" since officers knew claimant had stolen a large sum of cash. See,

also, *Heard v. State*, 272 Ark. 140, 612 S.W.2d 312 (1981), where officers executing a warrant seized a cash box that was subsequently introduced at appellant's burglary trial, inadvertence having been shown and the incriminating nature of the article being immediately apparent to the officers.

These cases must, however, be read in conjunction with the most recent "plain view" case, *Arizona v. Hicks*, 480 U.S. 321, 94 L.Ed.2d 347 (1987). A man in his apartment was injured by a bullet fired through the floor of the apartment immediately above him. Police entered the upper apartment without a warrant and, upon noticing expensive stereo equipment incompatible with the other appointments, copied serial numbers of components, moving some of them in the process. The United States Supreme Court affirmed the lower court's suppression of the stereo equipment, finding that the moving of the equipment was a search separate and apart from the search that was the lawful objective of entering the apartment. The Court found that the plain view doctrine did not protect the seizure because the officer inspecting the equipment concededly did not have reasonable cause to believe it stolen.

What is as noteworthy is that Justice White, in his concurring opinion, pointed out that the "inadvertent discovery" prong of the plain view exception has never been accepted by a majority of the Court and that the dissent's assertions in reliance on this requirement were erroneous. 480 U.S. at 329, 94 L.Ed.2d at 357.

## RESEARCH REFERENCES

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**U. Ark. Little Rock L.J.** Derden, Survey of Arkansas Law: Criminal Procedure, 2 U. Ark. Little Rock L.J. 203.

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**U. Ark. Little Rock L. Rev.** Annual Survey of Case Law: Criminal Law, 29 U. Ark. Little Rock L. Rev. 849.

## CASE NOTES

### ANALYSIS

Contents of affidavit.

Items in plain view.

Night searches.

— In general.

— Affidavit.

— Appeal.

— Compliance with rule.

— Good cause.

— Imminent removal.

— Successful execution.

— Vehicles.

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Probable cause.

Review.

Stale information.

Substantial compliance.

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Time of search.

### Contents of Affidavit.

Although affidavit did contain some general conclusory language, the language read in



conjunction with additional factual information in the affidavit, such as the residence's location on a corner lot and the lack of immediate cover for the approaching officers, could support a finding of reasonable cause of a nighttime search; while the factual information in the affidavit was not extensive, the statements could not be characterized as wholly conclusory or as having no factual basis. *Foster v. State*, 46 Ark. App. 35, 876 S.W.2d 594 (1994).

In a possession of cocaine case, denial of defendant's motion to suppress was proper as the warrant affidavit was not fatally defective: the affidavit contained a sufficient nexus between defendant's illegal activity and his residence, the State was not required to establish the veracity and reliability of the undercover officer to whom defendant made the comment during their phone conversation that he had plenty of dope, the affidavit as a whole provided a substantial basis for a finding of reasonable cause to believe that drugs would be found at defendant's residence, and, based on the information contained in the affidavit, there was no error in concluding that it was likely that criminal activity was occurring at defendant's residence at the time the search warrant was issued. *Haynes v. State*, 83 Ark. App. 314, 128 S.W.3d 33 (2003).

#### Items in Plain View.

Where police officers who entered defendant's home pursuant to search warrant for controlled substances seized certain items, including money, a television, and firearms, they claimed to have found in "plain view," such seizure was unlawful in the absence of any showing that the officers had knowledge of any particular stolen items at defendant's residence or that the discovery of the items was inadvertent. *Gatlin v. State*, 262 Ark. 485, 559 S.W.2d 12 (1977).

#### Night Searches.

Probable cause did not exist to support a nighttime search because none of the nighttime search conditions of subsection (c) of this rule applied, and the search of defendant's trailer by the police officer was invalid given that a search warrant should not have been issued; however, the evidence seized as a result of the search did not have to be suppressed as the evidence showed the officer believed in good faith that the search and seizure was justified under the circumstances. *Crain v. State*, 78 Ark. App. 153, 79 S.W.3d 406 (2002).

Although the language of the warrant could have been plainer, the warrant expressly stated that a warrant for a nighttime search had been applied for, grounds for a nighttime search existed, and it commanded that the search be conducted; even assuming that the language was insufficient to constitute an

unambiguous command to execute a nighttime search, it was sufficient to justify the executing officers in the good-faith belief that they were authorized to do so. *Wilson v. State*, 88 Ark. App. 158, 196 S.W.3d 511 (2004).

In a case in which defendant pled guilty to possession of child pornography, in violation of 18 U.S.C.S. § 2252(a)(4)(B), reserving the right to appeal the district court's denial of his motion to suppress, the appellate court put aside his reliance on the Supreme Court of Arkansas ruling that the officer's affidavit and the state court warrant failed to comply with subsection (c) of this rule. Since the evidence obtained by the officer was offered in defendant's federal prosecution, the legality of the search and seizure was not determined by reference to a state statute, but rather was resolved by Fourth Amendment analysis. *United States v. Kelley*, 652 F.3d 915 (8th Cir. 2011).

#### —In general.

The warrant must contain not only a finding of justification for a nighttime search, but also an appropriate order authorizing the same. *Carpenter v. State*, 36 Ark. App. 211, 821 S.W.2d 51 (1991).

The word "or" at the end of subdivision (c)(2) of this rule makes it clear that the existence of any one of the factors enumerated in subsection (c) of this rule may justify a nighttime search. *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996).

Trial court erred in denying defendant's motion to suppress as the search warrant did not authorize a nighttime search; the warrant was executed at 8:35 p.m., without exigent circumstances, which was well beyond the 8:00 p.m. deadline set out in this rule and the a lapse of time that could not be regarded as negligible. *Dodson v. State*, 88 Ark. App. 380, 199 S.W.3d 115 (2004).

#### —Affidavit.

A factual basis must be stated in the affidavit, or in sworn testimony, before a nighttime search warrant may be validly issued. *Coleman v. State*, 308 Ark. 631, 826 S.W.2d 273 (1992); *Holmes v. State*, 39 Ark. App. 94, 839 S.W.2d 226 (1992).

The affidavit was sufficient to support issuance of warrant for nighttime search. *Coleman v. State*, 308 Ark. 631, 826 S.W.2d 273 (1992).

An affidavit authorizing a nighttime search must set out facts showing reasonable cause to believe that circumstances exist which justify a nighttime search. *Thompson v. State*, 42 Ark. App. 254, 856 S.W.2d 319 (1993).

Affidavit in support of a nighttime search warrant met the requirements of this rule where it stated that the evidence sought was easily concealed or destroyed and that surveillance cameras on the outside of the resi-

dence to be searched would reveal the officers to the occupants and thereby create a risk to the officers' safety. *Tate v. State*, 357 Ark. 369, 167 S.W.3d 655 (2004).

Night time search was valid because an officer's reliance on the search warrant's nighttime provision was objectively reasonable. The affidavit did not contain any material false statements or misrepresentations, and testimony established specific knowledge that the contraband would be in imminent danger of removal if the search were executed during the day, as well as the fact that the warrant could only be safely executed at nighttime; therefore, under the good-faith exception the nighttime aspect of the search was valid. *Johnson v. State*, 98 Ark. App. 245, 254 S.W.3d 794 (2007).

Defendant's motion to suppress evidence was properly denied as a search warrant did establish the reliability of a confidential informant (CI) under Ark. R. Crim. P. 13.1 by a police officer's affidavit independently confirming some of the information the CI gave him and stating that the CI had given the officer reliable information in the past. As the CI told the officer that defendant was attempting to clean up the crime scene by destroying the evidence, there was a reasonable cause to believe that the items identified in the warrant would be gone, which justified the nighttime search under subdivision (c)(ii) of this rule. *Fowler v. State*, 2011 Ark. App. 321, — S.W.3d —, 2011 Ark. App. LEXIS 350 (May 4, 2011).

#### —Appeal.

Failure to request a ruling on the propriety of the nighttime search waived the issue and it could not be subsequently raised on appeal. *Gatlin v. State*, 262 Ark. 485, 559 S.W.2d 12 (1977); *Holloway v. State*, 293 Ark. 438, 738 S.W.2d 796 (1987).

#### —Compliance with Rule.

Where a search was started about eight p.m. and completed as soon thereafter as possible, the failure to strictly comply with this rule was not willful, no additional invasion of privacy occurred, defendant suffered no prejudice and therefore, suppression was not warranted. *Brothers v. State*, 261 Ark. 64, 546 S.W.2d 715 (1977).

The execution of a search warrant at 8:10 p.m. was not a substantial violation of subsection (c) of this rule, where the defendants refused the police officers' request for a consensual search of their home at 5:30 p.m., where the defendants allowed several officers to remain in their home until the warrant could be obtained, where the defendants' attorney was present at the house from 7:00 p.m. on, and where the search warrant was signed by the issuing judicial officer at 7:55

p.m.; therefore, the search was valid. *United States v. Koller*, 559 F. Supp. 539 (E.D. Ark. 1983).

Where police officers began a search pursuant to an apparently sufficient search warrant at 7:10 p.m., but interrupted the search for about two hours while they had the affidavit amended in order to give more credibility to the warrant, the evidence obtained in the search was admissible even though the search was not concluded until 10:40 p.m., since only an abundance of caution by the searching officers caused the delay. *James v. State*, 280 Ark. 359, 658 S.W.2d 382 (1983).

Where defendants contended that the court should have granted the motion to suppress because the search was commenced after dark, the argument was without merit since the search was commenced before eight p.m., which complies with subsection (c) of this rule. *Moore v. State*, 297 Ark. 296, 761 S.W.2d 894 (1988).

Insufficient facts were presented in the affidavit to support a nighttime search, where the facts that were presented simply traced this rule and were conclusory. *Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991).

The rule does not require that the search warrant must state, with particularity, the judicial officer's finding of reasonable cause to believe that circumstances are present justifying a nighttime search; thus, a judicial officer's failure to specifically state in the warrant that a night-time search is justified does not substantially violate a defendant's rights. *Anhalt v. State*, 70 Ark. App. 10, 13 S.W.3d 603 (2000).

Nighttime search warrant was properly issued as defendant's comments that he knew he was being watched and the fact that there were other individuals who had been transporting bags in and out of the business late at night were sufficient to give cause to believe that the requirements of this rule were met. *Davis v. State*, 367 Ark. 330, 240 S.W.3d 115 (2006).

Circuit court erred in denying appellant's motion to suppress evidence found during a nighttime search of his home because the affidavit and warrant lacked a factual basis to support a nighttime search; the affidavit only contained a conclusory statement that the objects to be seized were in danger of imminent removal and thus lacked all indicia of reasonable cause to justify a nighttime search. Under an objective standard, officers should have known that an affidavit not stating facts that supported a nighttime search was in violation of subsection (c) of this rule, and thus the Leon good-faith exception did not apply. *Kelley v. State*, 371 Ark. 599, 269 S.W.3d 326 (2007).



### —Good Cause.

Good cause must exist and be found by the issuing judicial officer to exist to authorize entry into a citizen's privacy in the nighttime. *Harris v. State*, 264 Ark. 391, 572 S.W.2d 389 (1978), questioned *Watson v. State*, 724 S.W.2d 478 (1987).

Totality of information provided a sufficient basis for permitting search after eight p.m. *Holloway v. State*, 293 Ark. 438, 738 S.W.2d 796 (1987).

Where affidavit provided that illegal drugs were located at residence and that previous purchases of drugs had occurred there, but, there was nothing to give reasonable cause to believe the drugs would be disposed of, removed, or hidden before the next morning, issuance of nighttime search warrant was in error. *Hall v. State*, 302 Ark. 341, 789 S.W.2d 456 (1990); *State v. Martinez*, 306 Ark. 353, 811 S.W.2d 319 (1991).

Where no factual basis supports the issuance of a warrant for a nighttime search, the executing officers' good-faith exception is not applicable. *Richardson v. State*, 314 Ark. 512, 863 S.W.2d 572 (1993).

While subjectively the police officers executing the warrant apparently believed they were complying with the law since the printed form appeared to authorize a search until ten (10) p.m., an objective standard is applied in deciding whether the executing officers acted in good faith; the objective standard requires officers to have a reasonable knowledge of what the criminal procedure rules require. *Richardson v. State*, 314 Ark. 512, 863 S.W.2d 572 (1993).

Conclusory statements do not suffice to establish the requisite factual basis for reasonable cause to justify a nighttime search. *Thompson v. State*, 42 Ark. App. 254, 856 S.W.2d 319 (1993).

There was a sufficient factual basis to support the execution of a nighttime search of a house for drugs where (1) the house to be searched was located on a cul-de-sac, indicating that there was only one way for the police officers to approach it, (2) there were firearms and a vicious dog present at the house, and (3) the drugs were kept in a single container. Leftover materials used in the manufacturing process were disposed of and burned at a distant location, and sales of the drug were conducted away from the home. *Townsend v. State*, 68 Ark. App. 269, 6 S.W.3d 133 (1999).

Court found that facts were sufficient to justify a nighttime, no-knock search where, at the suppression hearing, an officer testified that a confidential informant was told by defendant's girlfriend that she could see the two staircases that led to defendant's apartment through the window and that, without being seen, she could see who was outside prior to unlocking the door; also, both defen-

dant and his girlfriend told the informant that, if they were to see law enforcement through the window, they would attempt to flush the methamphetamine and destroy the evidence. *Holt v. State*, 85 Ark. App. 308, 151 S.W.3d 1 (2004).

### —Imminent Removal.

Where there was ample evidence of the possible imminent removal of the objects of the search, nighttime search was properly authorized and did not violate this section. *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980), cert. denied 450 U.S. 1035, 101 S. Ct. 1750, 68 L. Ed 2d 232 (1981); *Murray v. State*, 275 Ark. 46, 628 S.W.2d 549 (1982); *Boyd v. State*, 13 Ark. App. 132, 680 S.W.2d 911 (1984).

Where affidavit supporting the warrant stated that sheriff's deputies had observed known drug users enter house, stay a short time and leave; confidential informant had observed contraband in the house a short time before the warrant was issued; and the deputy executing the affidavit believed there was a danger the drugs would be sold or moved, information provided a sufficient basis for a nighttime search. *Sossamon v. State*, 31 Ark. App. 131, 789 S.W.2d 738 (1990).

Nighttime search held justified on the ground that it was necessary to conduct the search as quickly as possible after a drug purchase reported by confidential informants in order to prevent the marked money from being removed. *Neal v. State*, 320 Ark. 489, 898 S.W.2d 440 (1995).

Nighttime search of defendants' home was proper where the search warrant affidavit gave reasonable cause for the officers to believe that the specified items of the search would be disposed of or destroyed; defendant's comment to the police that he had photographs that were too revealing, coupled with defendant's knowledge an investigation was in progress, raised the real danger that he would attempt to destroy evidence such that it justified a nighttime search. *Cummings v. State*, 353 Ark. 618, 110 S.W.3d 272 (2003).

### —Successful Execution.

Where the judicial officer who issued the warrant could have reasonably believed that the occurrence of daytime sales of drugs were so difficult to predict that the warrant could be successfully executed only at nighttime when many sales take place and when supplies were likely to be present in the back room of defendant's residence, evidence seized would not be suppressed because taken in nighttime search. *Lewis v. State*, 7 Ark. App. 38, 644 S.W.2d 303 (1982).

### —Vehicles.

The policy considerations that led to the adoption of subsection (c) of this rule, restricting night-time searches of dwellings pursuant

to a search warrant, simply do not pertain to a search of a van at a police station. *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001), cert. denied 535 U.S. 1055, 122 S. Ct. 1914, 152 L. Ed. 2d 823 (2002).

#### **Place to Be Searched.**

Where a search warrant merely described the place to be searched as "the house occupied by [the defendant]" but the attached affidavit described the location and appearance of the house in detail, there was substantial compliance with the requirements of subdivision (b)(iii) of this rule. *Baxter v. State*, 262 Ark. 303, 556 S.W.2d 428 (1977).

Description contained in the search warrant of the premises to be searched identifying them as "the Butch Gatlin" residence was sufficient inasmuch as houses in rural areas are commonly known by the name of the owner rather than by any technical legal description. *Gatlin v. State*, 262 Ark. 485, 559 S.W.2d 12 (1977).

Warrant that included a legal description of the farm and directions for reaching the house met the requirements of subdivision (b)(iii) of this rule that the place to be searched be described with particularity. *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987).

Search which mistakenly listed defendant's apartment as "4A" instead of "4B," did not fail to describe his apartment with sufficient particularity. *Jones v. State*, 45 Ark. App. 28, 871 S.W.2d 403 (1994).

Where scope of a search warrant authorized the search of the premises of a specific trailer, the term "premises" also encompassed the land of the property and other buildings and structures thereon. *Norman v. State*, 326 Ark. 210, 931 S.W.2d 96 (1996).

That a search warrant listed the wrong address did not require the suppression of evidence found during its execution, as the officers personally knew which premises were to be searched, the intended location was under surveillance while an officer secured the warrant, and the premises intended to be searched were in fact searched. *Ritter v. State*, 2011 Ark. 427, — S.W.3d —, 2011 Ark. LEXIS 526 (Oct. 13, 2011).

#### **Probable Cause.**

Where the affidavit set forth information: as to the presence of cocaine and drug paraphernalia, such as scales, pipes, baggies, and cutting agents, in appellant's home; the presence of records, documents, and U.S. currency believed to be associated with the distribution of controlled substances; that appellant had sold cocaine in his home to a reliable confidential informant; that the confidential informant had observed additional quantities of cocaine in addition to that purchased by the informant; that appellant was believed to be

involved in heavy trafficking of the controlled substance; and that permission to execute a search of appellant's home at any time of the day or night was requested to prevent the further loss of evidence; there was probable cause to issue a search warrant that could be executed at any time, day or night. *Holmes v. State*, 39 Ark. App. 94, 839 S.W.2d 226 (1992).

Court properly denied a motion to suppress evidence where the search warrant contained an adequate description of the property to be seized as it properly identified evidence associated with the producing, directing, or promoting sexual performances and employing or consenting to the use of child in sexual performances; the evidence included nude photographs and video seen by the victims. *George v. State*, 358 Ark. 269, 189 S.W.3d 28 (2004), cert. denied 543 U.S. 1163, 125 S. Ct. 1329, 161 L. Ed. 2d 136 (2005).

Probable cause was shown where the affidavit stated that a member of defendant's family informed police officers that defendant was manufacturing methamphetamine at his home on a regular basis and also stated that the family member informed the affiant that materials used in the manufacture of methamphetamine were located on defendant's premises at that time. *Wilson v. State*, 88 Ark. App. 158, 196 S.W.3d 511 (2004).

#### **Review.**

In reviewing a trial court's ruling on a motion to suppress because of an alleged insufficiency of the affidavit, the Supreme Court makes an independent determination based upon the totality of the circumstances and reverses the trial court's ruling only if it is clearly against the preponderance of the evidence. *Coleman v. State*, 308 Ark. 631, 826 S.W.2d 273 (1992); *Holmes v. State*, 39 Ark. App. 94, 839 S.W.2d 226 (1992).

In a possession of drug paraphernalia with intent to manufacture and possession of a controlled substance case, the search warrant was valid and the trial court properly denied defendant's motion to suppress the evidence seized from the shared residence because: (1) the distinctive odor of a methamphetamine lab was a valid contributing factor in establishing probable cause for the warrant; (2) the search warrant was supported by more than mere conclusory statements; (3) the initial search of the residence was limited to the common area outside the residence where no warrant was required, and the search inside the residence was pursuant to a search warrant; (4) even if the landlord's statements were completely eliminated, there were still sufficient facts to support probable cause to search the residence; and (5) the partially incorrect address listed in the search warrant did not make the search warrant defective, especially since the affidavit correctly identified the residence and officer who had ob-



tained the search warrant and had previously been to the residence would later, himself, conduct the search. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003).

#### **Stale Information.**

Defendant's convictions for aggravated assault, possession of drug paraphernalia, and maintaining a drug premises were proper because the totality of the circumstances established that the warrant was not stale when it was executed; it was executed 17 days after it was issued, and 18 days after a controlled buy occurred at the premises. Further, even though it was not included in the affidavit, the confidential informant told the affiant that the residence was one of his regular stops and that he had bought drugs there many times; therefore, it was not error for the circuit court to determine that the warrant was timely executed two-and-one-half weeks after its issuance, given evidence of the controlled buy and of other drug purchases occurring over a period of time. *Ingle v. State*, 2010 Ark. App. 410, — S.W.3d —, 2010 Ark. App. LEXIS 441 (2010).

#### **Substantial Compliance.**

Where there was no return date on a warrant as required by subdivision (b)(v) of this rule but return was made on the same date the warrant was issued and there was no showing of any prejudice to the defendants, the violation was not substantial and did not require suppression of the fruits of the search. *Baxter v. State*, 262 Ark. 303, 556 S.W.2d 428 (1977).

The requirement that the warrant state with particularity the finding of reasonable cause does not require the warrant to recite in detail each specific fact from which the judicial officer concludes that probable cause has been shown, but means that the warrant shall include a finding that there was probable cause for the search and, accordingly, where a search warrant stated that there was "reasonable grounds" for issuance of such warrant there was substantial compliance with this rule. *Baxter v. State*, 262 Ark. 303, 556 S.W.2d 428 (1977).

The absence of the recitations required by this rule did not substantially prejudice defendant where the warrant was executed and the return made within a few hours after the warrant was issued, the officer offered a sworn statement that evidence of the crimes might be disposed of by morning, and the magistrate's actual issuance of the search warrant established his finding of probable cause even more positively than the insertion of a conclusory finding to that effect would have. *Harris v. State*, 262 Ark. 506, 558 S.W.2d 143 (1977).

Where a search warrant identified the scene of the search only by street address

with no mention of the city so that it lacked particularity required by ARCrP 13.1(b); the warrant was served at night without the finding required by subsection (c) of this rule; no receipt was given pursuant to ARCrP 13.3(d); the return required by ARCrP 13.4 was invalid, and only one informant had supplied the information it was based upon, although the affidavit in support of it said there had been four, too many rules had been disregarded, so that, although any one alone might not justify reversal and suppression of the evidence, taken as a whole this was required. *Harris v. State*, 264 Ark. 391, 572 S.W.2d 389 (1978), questioned *Watson v. State*, 724 S.W.2d 478 (1987).

Warrant was held not defective under subdivision (b)(i) of this rule as failing to state precisely where the application occurred where the date, county, and state stated in the absence of any showing as to why greater exactitude was required. *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987).

Where warrant was returned on the seventh day, whereas five days are allowed under subdivision (b)(v) of this rule, but on the fifth day the officer called the magistrate to discuss returning the warrant and was informed that the following Monday would be acceptable, the warrant was executed within the allotted time, and there was a good faith reliance with no resulting prejudice to the defendant. *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987).

Although a warrant did not describe with particularity the items sought from a defendant's home, an affidavit, which was issued simultaneously, stated with particularity the items sought; therefore, the warrant substantially complied with this rule and there was no clear error in denying defendant's motion to suppress the evidence seized. *Simmons v. State*, 2009 Ark. App. 705, — S.W.3d —, 2009 Ark. App. LEXIS 886 (2009).

#### **Suppression of Evidence.**

Defendant's claim that a nighttime search of his residence violated subsection (c) of this rule is irrelevant to determining whether the fruits of the search are admissible in federal court. *United States v. Maholy*, 1 F.3d 718 (8th Cir. 1993).

Based on a search pursuant to a federal warrant, the officers knew the mailed package contained drugs, but when the officers delivered the package to defendant, entered defendant's residence through a closed screen door without a warrant, then pursued defendant, who fled to the bathroom with the package, the purported exigent circumstances were manufactured by the officers and the trial court erred in denying defendant's motion to suppress. *Mann v. State*, 84 Ark. App. 225, 137 S.W.3d 411 (2003), aff'd 161 S.W.3d 826 (2004).

**Time of Search.**

Warrant which was defective for not stating the time within which it was to be returned and for failure to indicate reasonable cause for authorizing its execution at any time day or night was not invalid inasmuch as it was actually returned within five days as permitted by subdivision (b)(v) of this rule and the search was conducted at 12:15 p.m. which is within the hours provided by subsection (c) of this rule. *Pridgeon v. State*, 262 Ark. 428, 559 S.W.2d 4 (1977).

Nighttime search justified where co-defendants were close-knit members of a cult, and, upon discovering that one had been taken into custody, the other co-defendants were likely to destroy any evidence that might be in their possession or at their residence, such as photographs, knives, and clothing. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

Technical violation on warrant, which contained a time frame of 6:00 a.m. through 8:00 a.m. instead of 6:00 a.m. through 8:00 p.m., held not a substantial violation requiring suppression of the evidence obtained with the warrant. *Brown v. State*, 55 Ark. App. 107, 932 S.W.2d 777 (1996).

In defendant's drug case, the court properly

denied defendant's motion to suppress evidence as a nighttime search warrant was proper where there was no evidence that the officer made any material false statements or misrepresentations in his affidavit, there was no evidence that the judicial officer who signed the search warrant abandoned his detached and neutral role, and the affidavit provided evidence which could create disagreement among judges as to the existence of probable cause; although a lack of manpower to secure the residence overnight to prevent a danger to anyone who entered was not a sound basis for a nighttime search warrant, the good-faith exception to the exclusionary rule was applicable because a reasonable, well-trained officer could have believed that a nighttime search was justified. *Loy v. State*, 88 Ark. App. 91, 195 S.W.3d 370 (2004).

**Cited:** *United States v. Price*, 441 F. Supp. 814 (E.D. Ark. 1977); *Wilkens v. State*, 261 Ark. 243, 547 S.W.2d 116 (1977); *Williams v. State*, 271 Ark. 435, 609 S.W.2d 37 (1980); *McFarland v. State*, 284 Ark. 533, 684 S.W.2d 233 (1985); *Deere v. State*, 59 Ark. App. 174, 954 S.W.2d 943 (1997); *Townsend v. State*, 68 Ark. App. 269, 6 S.W.3d 133 (1999); *McCormick v. State*, 74 Ark. App. 349, 48 S.W.3d 549 (2001).

**Rule 13.3. Execution of a search warrant.**

(a) A search warrant may be executed by any officer. The officer charged with its execution may be accompanied by such other officers or persons as may be reasonably necessary for the successful execution of the warrant with all practicable safety.

(b) Prior to entering a dwelling to execute a search warrant, the executing officer shall make known the officer's presence and authority for entering the dwelling and shall wait a period of time that is reasonable under the circumstances before forcing entry into the dwelling. The officer may force entry into a dwelling without prior announcement if the officer reasonably suspects that making known the officer's presence would, under the circumstances, be dangerous or futile or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. For purposes of this rule, a "dwelling" means a vehicle, building, or other structure (i) where any person lives or (ii) which is customarily used for overnight accommodation of persons whether or not a person is actually present. Each unit of a structure divided into separately occupied units is itself a dwelling.

(c) In the course of any search or seizure pursuant to the warrant, the executing officer shall give a copy of the warrant to the person to be searched or the person in apparent control of the premises to be searched. The copy shall be furnished before undertaking the search or seizure unless the officer has reasonable cause to believe that such action would endanger the successful execution of the warrant with all practicable safety, in which case he shall, as soon as is practicable, state his authority and purpose and furnish a copy of the warrant. If the premises are unoccupied by anyone in



apparent and responsible control, the officer shall leave a copy of the warrant suitably affixed to the premises.

(d) The scope of search shall be only such as is authorized by the warrant and is reasonably necessary to discover the persons or things specified therein. Upon discovery of the persons or things so specified, the officer shall take possession or custody of them and search no further under authority of the warrant. If in the course of such search, the officer discovers things not specified in the warrant which he reasonably believes to be subject to seizure, he may also take possession of the things so discovered.

(e) Upon completion of the search, the officer shall make and deliver a receipt fairly describing the things seized to the person from whose possession they are taken or the person in apparent control of the premises from which they are taken. If practicable, the list shall be prepared in the presence of the person to whom the receipt is to be delivered. If the premises are unoccupied by anyone in apparent and responsible control, the executing officer shall leave the receipt suitably affixed to the premises.

(f) The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of deadly force, against persons, or to effect an entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety. The use of deadly force in the execution of a search warrant, other than in self-defense or defense of others, is justifiable only if the executing officer reasonably believes that there is a substantial risk that the persons or things to be seized will suffer, cause, or be used to cause death or serious bodily harm if their seizure is delayed, and that the force employed creates no unnecessary risk of injury to other persons. (Amended December 12, 2002.)

**Reporter's Notes, 2002 Amendment:** A new subsection ("b") was added which incorporates the "knock and announce" requirement into the rules governing the execution of a search warrant. The subsection requires an officer executing a search warrant to "make known the officer's presence and authority"

rather than "knock and announce the officer's presence and authority" before forcing entry so as to cover the situation where knocking would be superfluous because the occupant of the dwelling is outside the dwelling when the officer approaches to serve the warrant. The remaining subsections were redesignated.

## RESEARCH REFERENCES

**Ark. L. Rev.** Recent Developments, 56 Ark. L. Rev. 703 (2003).

**U. Ark. Little Rock L.J.** Holt, Survey of Criminal Procedure, 3 U. Ark. Little Rock L.J. 198.

## CASE NOTES

### ANALYSIS

Affixing warrant to premises.  
Copy of warrant.  
Entry justified.  
Failure to comply with rules.  
Length of search.  
Receipt of things seized.  
Scope of search.

### Affixing Warrant to Premises.

Where, at the time search was conducted, the defendant was not present and the officers left a copy of the search warrant on the kitchen table inside the residence, the officers' method of affixing the warrant and return to the premises was reasonable. *Rogers v. State*, 10 Ark. App. 19, 660 S.W.2d 949 (1983).

**Copy of Warrant.**

Where one of two defendants was present when a search warrant was executed and was allowed to read it but was not given a copy, this rule was not fully complied with. *Baxter v. State*, 262 Ark. 303, 556 S.W.2d 428 (1977).

Where defendant's asserted failure to exhibit the warrant to the owner of the residence or failure to leave a copy of the warrant and a receipt of the items seized, where two of the officers conducting the search testified that the warrant was shown and explained to owner of the residence, the search warrant stated that a copy of the warrant and a receipt were given, and the defendant offered no evidence to the contrary the search was valid. *Pridgeon v. State*, 262 Ark. 428, 559 S.W.2d 4 (1977).

Failure to provide property owner with a copy of a warrant to search his property will not necessarily lead to suppression of evidence seized pursuant to the warrant, unless prejudice or deliberate disregard of the rule is shown. *United States v. Schroeder*, 129 F.3d 439 (8th Cir. 1997).

Any violation of the requirement that a copy of a search warrant be delivered to the person in apparent control of the premises to be searched was not substantial and, therefore, did not constitute a ground for suppression of evidence found during the search where the defendant was present when the search was conducted and both he and his attorney later received a copy of the search warrant. *Moya v. State*, 335 Ark. 193, 981 S.W.2d 521 (1998).

The provisions of subsection (b) of this rule were complied with as soon as practicable where (1) upon entering an apartment to conduct a search, the first two officers through the door secured the first two suspects inside, (2) as another officer continued through the apartment, he heard a toilet flush, forced open the door to a bathroom, and discovered the defendant flushing bags of drugs down the toilet, and (3) the search warrant was served later that day. *Moya v. State*, 335 Ark. 193, 981 S.W.2d 521 (1998).

**Entry Justified.**

Where police officers executing a search warrant for drugs in a trailer home heard loud music coming from the trailer, knocked on the door, loudly called out "police officers" and, receiving no answer after a brief wait, pushed open the unlocked door, the entry was justified since the hour was reasonable, the officers knew that the trailer's owner had prior felony convictions and the physical evidence being searched for was particularly susceptible to easy destruction. *Dodson v. State*, 4 Ark. App. 1, 626 S.W.2d 624, cert. denied 457 U.S. 1136, 102 S. Ct. 2966, 73 L. Ed 2d 1355 (1982).

Defendant's Fourth Amendment rights

were not violated when police executing a warrant conducted a no-knock entry because they were justified in feeling concern for their safety and the disposal of evidence based on cameras outside the residence, the drug operation, and the fact that there were blocked windows and doors. *Hart v. State*, 368 Ark. 237, 244 S.W.3d 670 (2006).

**Failure to Comply with Rules.**

Where a search warrant identified the scene of the search only by street address with no mention of the city so that it lacked the particularity required by ARCrP 13.1(b); the warrant was served at night without the finding required by ARCrP 13.2(c); no receipt was given pursuant to subsection (d) of this rule; the return required by ARCrP 13.4 was invalid, and only one informant had supplied the information it was based upon, although the affidavit in support of it said there had been four, too many rules had been disregarded, so that, although any one alone might not justify reversal and suppression of the evidence, taken as a whole, suppression was required. *Harris v. State*, 264 Ark. 391, 572 S.W.2d 389 (1978), questioned *Watson v. State*, 724 S.W.2d 478 (1987).

The Fourth Amendment governed the case, not this rule, and the officer was not required by the Fourth Amendment to show defendant the validly obtained search warrant prior to the search. Even if the Fourth Amendment required the officer to show defendant the warrant at some point, the officer met this burden by placing the warrant on the coffee table in the living room for defendant to review. *United States v. Porter*, 654 F. Supp. 2d 938 (E.D. Ark. 2009).

**Length of Search.**

Although the search was lengthy, it was not unreasonable, based upon the totality of the circumstances, where the evidence revealed that the item listed on the warrant was never found, and what transpired during the search gave the officers reasonable cause to believe that other items were subject to seizure. *Campbell v. State*, 27 Ark. App. 82, 766 S.W.2d 940 (1989).

**Receipt of Things Seized.**

Where all of the evidence was seized from one location, making the possibility of confusion virtually nonexistent, the failure to comply with the strict requirements of subsection (d) of this rule caused no prejudice to the defendant and did not require reversal of the conviction. *Boyd v. State*, 13 Ark. App. 132, 680 S.W.2d 911 (1984).

Where subsection (d) of this rule was not followed, but there was no dispute whatever over the identity or location of the things which were seized, the argument was held without substance. *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987).



**Scope of Search.**

Where scope of a search warrant authorized the search of the premises of a specific trailer, the term "premises" also encompassed the land of the property and other buildings and structures thereon. *Norman v. State*, 326 Ark. 210, 931 S.W.2d 96 (1996).

Court properly denied a motion to suppress evidence where, although items other than those specified in the search warrant were seized, the officers properly seized the additional tapes, disks, gun, and drug parapher-

nalía because they were in plain view. *George v. State*, 358 Ark. 269, 189 S.W.3d 28 (2004), cert. denied 543 U.S. 1163, 125 S. Ct. 1329, 161 L. Ed. 2d 136 (2005).

**Cited:** *United States v. Price*, 441 F. Supp. 814 (E.D. Ark. 1977); *State v. Prue*, 272 Ark. 221, 614 S.W.2d 221, cert. denied 454 U.S. 863, 102 S. Ct. 322, 70 L. Ed. 2d 163 (1981), overruled in part *Thompson v. State*, 658 S.W.2d 350 (1983); *Deere v. State*, 59 Ark. App. 174, 954 S.W.2d 943 (1997).

**Rule 13.4. Return of a search warrant.**

(a) If a search warrant is not executed, the officer shall return the warrant to the issuing judicial officer within a reasonable time, not to exceed sixty (60) days from the date of issuance, together with a report of the reasons why it was not executed. If the issuing judicial officer is unavailable, the warrant may be returned to any judicial officer of a circuit or district court within the county in which the warrant was issued.

(b) An officer who has executed a search warrant or, if such officer is unavailable, another officer acting in his behalf, shall, as soon as possible and not later than the date specified in the warrant, return the warrant to the issuing judicial officer together with a verified report of the facts and circumstances of execution, including a list of things seized. If the issuing judicial officer is unavailable, the warrant may be returned to any judicial officer of a circuit or district court within the county in which the warrant was issued.

(c) Subject to the provisions of subsection (d), the judicial officer to whom an executed warrant is returned shall cause the warrant, report, and list returned to him to be filed with the record of the proceedings on the application for the warrant. In any event, the judicial officer shall cause the list to be given such public notice as he may deem appropriate.

(d) If the judicial officer to whom an executed warrant is returned does not have jurisdiction to try the offense in respect to which the warrant was issued or the offense apparently disclosed by the things seized, he may transmit the warrant and the record of proceedings for its issuance, together with the documents submitted on the return, to an appropriate court having jurisdiction to try the offense disclosed. (Amended October 6, 2011, effective November 1, 2011.)

**Reporter's Notes, 2011 Amendment:** The 2011 amendments added the last sentences of subparagraphs (a) and (b) and made

conforming amendments to subparagraphs (c) and (d).

**1987 Unofficial Supplementary Commentary to Rule 13.4**

Even where no return of a warrant is made within the five day period specified in Rule 13.2(b), absent prejudice, suppression of evidence seized under the warrant is not re-

quired. *Boyd v. State*, 13 Ark. App. 132, 680 S.W.2d 911 (1984). See, also, Supplementary Commentary to Rule 13.2; *Harris v. State*, 262 Ark. 506, 558 S.W.2d 143 (1977).

## RESEARCH REFERENCES

**Ark. L. Rev.** Arkansas' Search and Seizure Law After *United States v. Leon*: In Search of a Standard, 40 Ark. L. Rev. 125.

## CASE NOTES

## ANALYSIS

Failure to return warrant.  
Filing.  
Listing of articles seized.  
Return invalid.  
Separate return.  
Transfer.  
Verification.

**Failure to Return Warrant.**

Where the officer failed to return the search warrant to the court from which it was issued within five days, pursuant to subsection (b) of this rule, but such failure caused no prejudice to the defendant, a reversal of the conviction was not required. *Boyd v. State*, 13 Ark. App. 132, 680 S.W.2d 911 (1984).

Where the judicial officer had directed the prosecutor to file the search warrants with the circuit court and the failure to return the warrants was not willful and caused the defendant no prejudice, the motion to suppress evidence was properly denied. *McFarland v. State*, 284 Ark. 533, 684 S.W.2d 233 (1985).

**Filing.**

Failure of judge, pursuant to subsection (c) of this rule, to file the material until sometime later did not invalidate a warrant where no prejudice, nor even any inconvenience resulted and the delay was inconsequential. *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987).

Where wrong date was put on return of service originally, and there was no evidence that it was willful and no evidence that defendant was prejudiced by the failure to originally file the return with the date of execution correctly stated, and an amended return was filed with the date corrected, making the filing timely, the trial court did not err in denying the motion to suppress that was based upon the contention that the return was not timely filed. *Safley v. State*, 32 Ark. App. 111, 797 S.W.2d 468 (1990).

**Listing of Articles Seized.**

A return of search warrant mistakenly marked "investigative report" and neglecting to itemize some of the articles seized was not prejudicial where the report contained all the essential information without any substantial omissions or inaccuracies. *Brothers v. State*, 261 Ark. 64, 546 S.W.2d 715 (1977).

A motion to suppress was properly denied where the itemization on the back of a re-

turned search warrant listed only three grams of heroin, one and one-half ounces of marijuana and three credit cards, even though cocaine was also found in the course of the search, since the claimed irregularity resulted in no prejudice to the defendant's rights. *Shackleford v. State*, 261 Ark. 721, 551 S.W.2d 205 (1977).

**Return Invalid.**

Where a search warrant which identified the scene of the search only by street address with no mention of the city so that it lacked the particularity required by ARCrP 13.1(b), was served at night without the finding required by ARCrP 13.2(c), where no receipt was given pursuant to ARCrP 13.3(d), where the return required by this rule was invalid, and only one informant had supplied the information it was based upon, although the affidavit in support of it said there had been four, too many rules had been disregarded, so that, although any one alone might not justify reversal and suppression of the evidence, taken as a whole, this was required. *Harris v. State*, 264 Ark. 391, 572 S.W.2d 389 (1978), questioned *Watson v. State*, 724 S.W.2d 478 (1987).

**Separate Return.**

Warrant would not be invalidated because there was no return on the face of it, where the return was attached to the warrant; there is no rule or reason that would prevent the return being made on a separate, attached document. *Wilson v. State*, 10 Ark. App. 176, 662 S.W.2d 204 (1983).

**Transfer.**

Subsection (d) of this rule is not mandatory, as it states "he may transmit the warrant, etc." *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987).

**Verification.**

Where officer's signature appeared under the statement, swearing to truth of his testimony and return was signed by the municipal judge return was valid even though there was no formal oath-taking and the return probably was not signed in the judge's presence, since substantial compliance with the requirement of subsection (b) of this rule that a "verified" return be made was all that was necessary. *Wilson v. State*, 10 Ark. App. 176, 662 S.W.2d 204 (1983).

Argument that there was no written verifi-



cation of the report of the execution of the warrant was held without merit where officer testified judge placed him under oath before receiving the information and so the requirements of subsection (b) of this rule were

adequately met. *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987).

**Cited:** *Gatlin v. State*, 262 Ark. 485, 559 S.W.2d 12 (1977); *Jackson v. State*, 291 Ark. 98, 722 S.W.2d 831 (1987).

### **Rule 13.5. Execution and return of warrants for documents.**

(a) If the warrant authorizes documentary seizure, the executing officer shall endeavor by all appropriate means to search for and identify the documents to be seized without examining the contents of documents not covered by the warrant.

(b) If the documents to be seized cannot be searched for or identified without examining the contents of other documents, or if they constitute items or entries in account books, diaries, or other documents containing matter not specified in the warrant, the executing officer shall not examine the documents but shall either impound them under appropriate protection where found, or seal and remove them for safekeeping.

(c) An executing officer who has impounded or removed documents pursuant to subsection (b) of this rule shall, as promptly as practicable, report the fact and circumstances of the impounding or removal to the issuing judicial officer. As soon thereafter as the interests of justice permit, and upon due and reasonable notice to all interested persons, a hearing shall be held before the issuing judicial officer or a judicial officer contemplated by Rule 13.4 (d), at which the person from whose possession or control the documents were taken, and any other person asserting any right or interest in the documents, may appear, in person or by counsel, and move either for the return of the documents or for specification of such conditions and limitations on the further search for the documents to be seized as may be appropriate to prevent unnecessary or unreasonable invasion of privacy. If the motion for the return of the documents is granted, in whole or in part, the documents covered by the granting order shall forthwith be returned or released from impoundment. If the motion is not granted, the search shall proceed under such conditions and limitations as the order shall prescribe, and at the conclusion of the search all documents other than those covered by the warrant, or otherwise subject to seizure, shall be returned or released from impoundment.

(d) Documents seized shall thereafter be handled and disposed of in accordance with the other provisions of this rule and Rules 15 and 16 hereof. No statements or testimony given in support of a motion made pursuant to this rule shall thereafter be received in evidence against the witness in any subsequent proceeding, other than for purposes of impeachment or in a prosecution for perjury or contempt in the giving of such statements or testimony.

### **Rule 13.6. Issuance and execution of warrants for illegally possessed pictures and literature.**

If a warrant issued under this rule shall provide for the seizure of tangible instruments of expression, including but not limited to moving or still pictures, recordings, books, or other literature, the warrant shall authorize the seizure only of such instruments or copies thereof as are reasonably necessary for evidentiary use in a proceeding to determine whether the content of such instruments is constitutionally protected. If the effect of

seizing such instruments or copies thereof is to stop or substantially impede their showing or distribution, the warrant shall provide that the possessor of such instruments be given a reasonable opportunity to furnish duplicate copies for seizure, or that he may retain possession of them and must display them during an adversary proceeding or at such times and places, including trial, as the court having jurisdiction over the matter may direct.

## RULE 14. VEHICULAR, EMERGENCY AND OTHER SEARCHES AND SEIZURES

### Rule 14.1. Vehicular searches.

(a) An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is:

- (i) on a public way or waters or other area open to the public;
- (ii) in a private area unlawfully entered by the vehicle; or
- (iii) in a private area lawfully entered by the vehicle, provided that exigent circumstances require immediate detention, search, and seizure to prevent destruction or removal of the things subject to seizure.

(b) If the officer does not find the things subject to seizure by his search of the vehicle, and if:

- (i) the things subject to seizure are of such a size and nature that they could be concealed on the person; and
- (ii) the officer has reason to suspect that one (1) or more of the occupants of the vehicle may have the things subject to seizure so concealed; the officer may search the suspected occupants; provided that this subsection shall not apply to individuals traveling as passengers in a vehicle operating as a common carrier.

(c) This rule shall not be construed to limit the authority of an officer under Rules 2 and 3 hereof.

### 1987 Unofficial Supplementary Commentary to Rule 14.1

#### Reasonable Cause for Search.

In *Tillman v. State*, 275 Ark. 275, 630 S.W.2d 5 (1982), cert. denied, 459 U.S. 1201, 75 L.Ed.2d 432 (1983), the Court decided that a seizure of evidence made pursuant to a warrantless search of a vehicle detained on a public road was invalid under Rule 14.1(a), the officer making the stop having seen the car stopped on the highway in front of a house reported burglarized shortly thereafter over the police radio by another officer. The Court found that when the police officer learned that the residence had been burglarized he had reasonable cause to believe that the vehicle in front of him contained evidence of a crime, so a vehicular search was supportable under Rule 14.1(a). Apparently in order to avoid having to resolve the question whether the officer had reasonable cause to arrest the occupants of the car without a warrant, the Court assumed that no arrest was made until after the property was seized. But, as pointed

out by the dissent, the Court was thus constrained to hold by implication that a person handcuffed at gunpoint and placed in a police car after being patted down had not been arrested.

In the trunk of the automobile were two garment bags. The police officer conducting the search testified at trial that one bag was open, disclosing fruits of the burglary. Upon seeing it, the officer searched both bags. The Court upheld admission of the evidence on the theory that one of the bags was opened and its contents clearly visible to the officer. It is difficult to distinguish this case in principle from *Scisney v. State*, 270 Ark. 610, 605 S.W.2d 451 (1980), where it was held that the discovery of marijuana cigarettes in the passenger compartment did not justify opening a suitcase in the locked trunk of the car. The Court in *Tillman* pointed out that not all closed bags receive constitutional protection, quoting a footnote from *Arkansas v. Sanders*,



442 U.S. 753, 61 L.Ed.2d 235 (1979) to the effect that containers such as burglar tool kits and gun cases cannot support any reasonable expectation of privacy because their contents "can be inferred by their outward appearance." N. 13, *id.* at 764, 61 L.Ed.2d at 245. It is difficult to understand how the officer could infer that the garment bag in question contained the fruits of a burglary simply from observing its outward appearance, unless one is entitled to assume this because the bag beside it was said to be open with its contents in plain view.

In an earlier case involving another defendant named Charles Tillman, the Arkansas Supreme Court upheld the search of the trunk of a gold Cadillac driven by appellant, a black male, where the searching officer had arrested appellant before, clearing 23 burglary charges, and had received recent reports, the most recent having come in 20 to 25 minutes previously, that a black male driving a gold Cadillac was seen near a burglarized home. *Tillman v. State*, 271 Ark. 552, 609 S.W.2d 340 (1980).

The *Tillman* cases appear to demonstrate that the showing of reasonable cause required by the Arkansas Supreme Court varies inversely with the mobility of the place to be searched. Since mobility is the *sine qua non* of an automobile, the Court can be expected to find diminished expectations of privacy and exigent circumstances in warrantless automobile search cases.

Rule 10.1(i) defines searches in terms of intrusions upon an individual's property or privacy, and the Arkansas Supreme Court has correctly read this definition to impose a heavy burden on the prosecution in warrantless search cases. See, *Haynes v. State*, 269 Ark. 506, 602 S.W.2d 599, *cert. denied*, 449 U.S. 1066 (1980), where the Court refused to countenance securing an apartment until the arrival of a search warrant. The burden is at its lightest in automobile cases. Perhaps on the theory that it would be anomalous to permit an automobile to be immobilized pending the securing of a warrant, while not according authority to search the car based upon the same probable cause supporting its immobilization, in cases such as *Tillman v. State*, 271 Ark. 552, 609 S.W.2d 340 (1980) the Court has apparently adopted the United States Supreme Court's thinking on this issue:

On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone

until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained.

*Chambers v. Maroney*, 399 U.S. 42, 52, 26 L.Ed.2d 419, 428-29 (1970).

In *Lipovich v. State*, 265 Ark. 55, 576 S.W.2d 720 (1979) appellant was convicted of theft by receiving upon evidence disclosed in a warrantless search of a U-Haul truck police thought had been abandoned on a public highway. Appellant contended that Rule 14.1 did not permit the search because police officers did not have reasonable cause to believe that the vehicle contained stolen articles. The Court upheld the search, not by reference to Rule 14.1, but by adverting to the "community caretaking functions" recognized by the United States Supreme Court in *South Dakota v. Opperman*, 428 U.S. 364, 49 L.Ed.2d 1000 (1976). Both appellant and the Court were correct: Rule 14.1 does not authorize warrantless inventory searches. Rule 12.6 does, however, as do *Opperman* and other United States Supreme Court decisions. See supplementary commentary to Rule 12.6.

#### **Search of Occupants of Vehicle Under Rule 14.1(b).**

Questions raised in the original commentary about the continuing validity of *United States v. Di Re*, 332 U.S. 581, 92 L.Ed. 210 (1948) remain unanswered, though recent decisions of the circuit courts of appeal have reiterated the *Di Re* Court's assumption that "a person, by mere presence in a suspected car, [does not] lose immunities of search of his person to which he would otherwise be entitled." *United States v. Rodriguez*, 525 F.2d 1313, 1317 (10th Cir. 1975), quoting *Di Re*, 332 U.S. at 587, 92 L.Ed. at 216.

In *Di Re*, appellant was a passenger in a car when a police informant purchased counterfeit gasoline ration coupons from the driver. Evidence seized in a search of *Di Re* at the police station shortly thereafter was suppressed by the Supreme Court.

In *Rodriguez*, police were given a tip that a U-Haul trailer containing marijuana was being towed by a commercially operated bus carrying twelve ticketed passengers. The police stopped the bus and searched the trailer. When they found marijuana, they ordered the passengers to get off the bus and open their luggage. *Rodriguez* was convicted of possession of heroin found in his luggage. The court of appeals overturned the conviction on grounds that *Rodriguez* was not subject to arrest upon discovery of the marijuana in the trailer, and there were simply no grounds to make a lawful search of his person, the search of the suitcase being considered a search of the person for the purposes of this case. No evidence was introduced to connect *Rodriguez*

to the marijuana in the trailer or to the operator of the bus. See, also, *United States v. Arrellano-Rios*, 799 F.2d 520 (9th Cir. 1986).

## CASE NOTES

### ANALYSIS

In general.

"Area open to public."

In custody.

Interrogation.

"Moving or readily movable."

Privacy rights.

Probable cause.

Reasonable cause.

Reasonableness.

Search incidental to arrest.

Search of vehicle.

Unforeseeable circumstances.

Validity of search.

Warrantless search.

### In General.

Warrantless automobile searches are justified in circumstances in which a warrantless search in other contexts would be unreasonable either because of the inherent mobility of an automobile or because of the diminished expectation of privacy. *Horton v. State*, 262 Ark. 211, 555 S.W.2d 226 (1977).

### "Area Open to Public."

A motel parking lot is an "area open to the public" as used in subdivision (a)(i) of this rule. *Reyes v. State*, 329 Ark. 539, 954 S.W.2d 199 (1997).

### In Custody.

Persons temporarily detained pursuant to a routine traffic stop are not "in custody" for the purposes of *Miranda* because the stop is presumptively temporary and brief, it is in public, and the atmosphere surrounding an ordinary traffic stop is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda*. *Lopez v. State*, 29 Ark. App. 145, 778 S.W.2d 641 (1989).

A motorist detained pursuant to a traffic stop is entitled to a recitation of his rights only when he is "subjected to treatment that renders him 'in custody'" for practical purposes. *Lopez v. State*, 29 Ark. App. 145, 778 S.W.2d 641 (1989).

### Interrogation.

The officer may ask the detained a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *Lopez v. State*, 29 Ark. App. 145, 778 S.W.2d 641 (1989).

### "Moving or Readily Movable."

A car is readily movable, even if the owner and his keys are in police custody, if the threat

exists that the car would be removed by a third party. *Reyes v. State*, 329 Ark. 539, 954 S.W.2d 199 (1997).

Exigent circumstances justified a warrantless search of defendant's truck, notwithstanding that the defendant had been arrested, where the defendant's friend, who had driven the truck to the detention center, was not under arrest, and the truck was thus readily movable. *Vega v. State*, 56 Ark. App. 145, 939 S.W.2d 322 (1997).

### Privacy Rights.

Defendant, who was a suspect in a hit-and-run accident, had no right to privacy in the exterior of his van, which was parked in a public area; and, since probable cause existed, the search and seizure of the paint scrapings and auto parts by police officers, while the van was in the public area, was not unreasonable under the Fourth Amendment. *Tackett v. State*, 307 Ark. 520, 822 S.W.2d 834 (1992).

### Probable Cause.

Evidence established probable (reasonable) cause to search vehicle. *Tillman v. State*, 271 Ark. 552, 609 S.W.2d 340 (1980); *Tillman v. State*, 275 Ark. 275, 630 S.W.2d 5 (1982), cert. denied 459 U.S. 1201, 103 S. Ct. 1185, 75 L. Ed 2d 432 (1983); *Munguia v. State*, 22 Ark. App. 187, 737 S.W.2d 658 (1987).

The right of police officers to stop a vehicle on the public highway for the purpose of searching it exists when there is probable cause for that action, i.e., when the facts within the knowledge of the officers, or of which they have had reasonably trustworthy information, when they intercept the vehicle, amounts to more than a mere suspicion that it contains something subject to seizure. *Tillman v. State*, 271 Ark. 552, 609 S.W.2d 340 (1980).

Reasonable cause exists when the facts and circumstances within the officer's knowledge, or of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Munguia v. State*, 22 Ark. App. 187, 737 S.W.2d 658 (1987).

Reasonable cause as required by this rule exists when the officers have reasonably trustworthy information, which rises to more than mere suspicion, that the stopped vehicle contains evidence subject to seizure and a person of reasonable caution could be justified in believing an offense has been committed or is being committed. *Willett v. State*, 298 Ark.



588, 769 S.W.2d 744 (1989); *Bohanan v. State*, 324 Ark. 158, 919 S.W.2d 198 (1996).

Reasonable cause may be based upon a combination of verified information furnished by anonymous callers and evidence gathered by the police in furtherance of an investigation of the subject matter. *Willett v. State*, 298 Ark. 588, 769 S.W.2d 744 (1989).

Although anonymous tips standing alone do not constitute reasonable or probable cause, information verified as a result of such tips may support reasonable cause and may be acted upon as though the tips had never been received. *Willett v. State*, 298 Ark. 588, 769 S.W.2d 744 (1989).

The odor of marijuana is sufficient to arouse suspicion and provide probable cause for the search of a vehicle. *Lopez v. State*, 29 Ark. App. 145, 778 S.W.2d 641 (1989).

Where co-defendant informed officers that both he and defendant were in the car before and after the homicide, it had been less than forty-eight hours since the crime occurred, and the officers had more than a mere suspicion that the alleged assailants were in the vehicle before and after the crime, there was reasonable cause to believe the car contained items subject to seizure. *Bohanan v. State*, 324 Ark. 158, 919 S.W.2d 198 (1996).

Reasonable cause to search a vehicle without a warrant was supported by the following facts: (1) the car was found parked near the motel room to be searched; (2) a large amount of contraband was found in the motel room as were the defendants and the car keys; (3) one defendant was linked to the car by a confidential informant and by a NCIC search and had marked bills from a controlled contraband sale on his person; and (4) a police detective asserted that in his experience it was common to find items of contraband in the car of a dealer when the dealer is captured in possession of controlled substances at another location. *Reyes v. State*, 329 Ark. 539, 954 S.W.2d 199 (1997).

#### **Reasonable Cause.**

The same standards govern reasonable (that is to say, probable) cause determinations, whether the question is the validity of an arrest or the validity of a search and seizure. *Hudson v. State*, 316 Ark. 360, 872 S.W.2d 68 (1994).

Reasonable cause to search a vehicle without a warrant was supported by the following facts: (1) the car was found parked near the motel room to be searched; (2) a large amount of contraband was found in the motel room as were the defendants and the car keys; (3) one defendant was linked to the car by a confidential informant and by a NCIC search and had marked bills from a controlled contraband sale on his person; and (4) a police detective asserted that in his experience it was common to find items of contraband in the car of a

dealer when the dealer is captured in possession of controlled substances at another location. *Reyes v. State*, 329 Ark. 539, 954 S.W.2d 199 (1997).

The initial stop of the defendant's car was not reasonable where (1) police officers went to the defendant's house to execute a warrant to search the house, but the defendant was not at home, (2) the officers decided not to search the house at that time and, instead, to look for the defendant's car based on their suspicion that he might have drugs on him, and (3) the officers located the defendant's car and stopped the car, although the defendant was not speeding or committing any traffic violation. *Colbert v. State*, 340 Ark. 657, 13 S.W.3d 162 (2000).

Police officer had reasonable cause to believe that a pickup truck with a false compartment and nervous occupants contained contraband before the driver withdrew the driver's prior consent to a search of the truck during a traffic stop; thus, 120 pounds of marijuana found in the false compartment after consent was revoked was admissible. *Espinoza v. State*, 2009 Ark. App. 636, — S.W.3d —, 2009 Ark. App. LEXIS 800 (2009).

Denial of defendant's motion to suppress was not clearly against the preponderance of the evidence. Law enforcement officers had reasonable cause to believe that a car belonging to defendant was involved in a purported drug deal. *Jones v. State*, 2011 Ark. App. 683, — S.W.3d —, 2011 Ark. App. LEXIS 724 (Nov. 9, 2011).

#### **Reasonableness.**

Warrantless searches of automobiles may be reasonable when, under the same circumstances, a search of a home, store or other fixed piece of property would not be, and the difference is based not only upon the mobility of the automobile, but upon the diminished expectation of privacy in an automobile. *Tillman v. State*, 271 Ark. 552, 609 S.W.2d 340 (1980).

#### **Search Incidental to Arrest.**

Where there was probable cause for an arrest independent of the search, and the arrest and search were substantially contemporaneous, exigent circumstances would justify the warrantless search of a defendant about whom police had received reliable information that he had heroin in the automobile which he occupied, either under the "automobile exception" or as incidental to a lawful arrest. *Horton v. State*, 262 Ark. 211, 555 S.W.2d 226 (1977).

Where the officer had information that a crime was in progress, that the criminals had been observed rolling a large tire from the scene of the crime to a parking lot, and the hour was late at night, and where upon observing that the vehicle appeared to contain a

heavy load as it seemed to be “sitting low in the rear,” and was occupied by two suspects meeting the description of the information furnished him by radio, the officer stopped the vehicle, for the officer to have gone in quest of a search warrant at that hour of the night under the circumstances would have been impractical; thus a warrantless search incident to the arrest was not only reasonable but it would have rendered the officer subject to criticism had he not searched the automobile. *Jackson v. State*, 266 Ark. 754, 585 S.W.2d 367 (1979), cert. denied 444 U.S. 1017, 100 S. Ct. 670, 62 L. Ed. 2d 647 (1980).

Defendant's motion to suppress should have been granted where the officers lacked probable cause to arrest him for driving under a suspended or revoked driver's license and were consequently precluded from inventorying his impounded vehicle in which 60 kilograms (130 pounds) of cocaine were discovered. *Mounts v. State*, 48 Ark. App. 1, 888 S.W.2d 321 (1994).

#### **Search of Vehicle.**

Where police found apparently abandoned U-Haul truck on road side and notified the U-Haul dealer who identified the truck and opened it for inspection by the police to determine if it contained anything hazardous to motorists, the search, which uncovered two stolen organs and a piano, was reasonable and valid. *Lipovich v. State*, 265 Ark. 55, 576 S.W.2d 720 (1979).

The defendant was entitled to suppression of marijuana found in his truck since a constable who pulled the defendant's vehicle over for a traffic violation had no suspicion that the truck contained contraband until after he “stuck [his] head” into the truck and smelled marijuana where (1) the defendant got out of his truck after being pulled over, (2) the constable testified that he could smell alcohol on the defendant's breath, but a breathalyzer test indicated a 0.0 level of blood alcohol, (3) a patdown for weapons revealed nothing, and (4) the constable then looked into the defendant's truck. *Davis v. State*, 68 Ark. App. 346, 8 S.W.3d 36 (1999).

After defendant's arrest for driving without a valid driver's licence, an officer saw marijuana seeds under the driver's seat, detected a faint odor of marijuana in the vehicle, and noticed the gas tank exhibited signs of tampering, typical of drug-smuggling; the officer gleaned probable cause to search the vehicle under this rule for narcotics as he waited for the wrecker to tow the vehicle to impound. *Lopez v. State*, 2009 Ark. App. 750, — S.W.3d —, 2009 Ark. App. LEXIS 958 (2009).

State trooper who found a speaker box in the trunk of defendant's rental car with some loose screws lying around and heard something sliding inside the box had probable cause to believe there was contraband in the

box, establishing an exception to the warrant requirement under subsection (a) of this rule, although defendant then withdrew his consent to the search by scuffling with the trooper. *Rockward v. State*, 2010 Ark. App. 110, — S.W.3d —, 2010 Ark. App. LEXIS 98 (Feb. 3, 2010).

#### **Unforeseeable Circumstances.**

When the circumstances furnishing probable cause to search a particular automobile are unforeseeable, so that, if an effective search is to be made, it must be made immediately and without a warrant or the car must be seized and held without a warrant for whatever period is necessary to obtain a search warrant, either course is reasonable. *Tillman v. State*, 271 Ark. 552, 609 S.W.2d 340 (1980).

#### **Validity of Search.**

Search and seizure was in full compliance with the rule. *Cook v. State*, 293 Ark. 103, 732 S.W.2d 462 (1987).

If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. *Lopez v. State*, 29 Ark. App. 145, 778 S.W.2d 641 (1989).

Warrantless search of defendant's car is authorized when defendant is still at large; it does not matter whether the search is conducted at the scene or after the vehicle has been seized and removed to another location. *Bohanan v. State*, 324 Ark. 158, 919 S.W.2d 198 (1996).

On becoming lawfully aware that a pickup driven by the defendant contained beer, whiskey, and a pistol, an officer was permitted, without a search warrant, to search the truck and seize those things discovered in the course of such search. *Wright v. State*, 327 Ark. 558, 940 S.W.2d 432 (1997).

Stop of defendant was lawful and complied with Ark. R. Crim. P. 2.1, 2.2(a), and this rule as an officer arrived on the scene within 30 seconds of a police broadcast; defendant's was the only vehicle in the area; and the stop was brief, non-aggressive, and a minimal intrusion compared to the state's interest in investigating the crime. *Penister v. State*, 2011 Ark. App. 405, — S.W.3d —, 2011 Ark. App. LEXIS 430 (June 1, 2011).

#### **Warrantless Search.**

An immediate search of an automobile stopped on a public highway is constitutionally permissible when the occupant has been alerted and the car's contents may never be found again if a warrant must be obtained and, given probable cause to search, there is no difference between, on the one hand, seizing and holding a car before presenting the probable cause issue to a magistrate and, on the other hand, carrying out an immediate



search without a warrant. *Tillman v. State*, 271 Ark. 552, 609 S.W.2d 340 (1980).

**Cited:** *Willett v. State*, 18 Ark. App. 125, 712 S.W.2d 925 (1986); *Bond v. State*, 45 Ark. App. 177, 873 S.W.2d 569 (1994); *Brunson v.*

*State*, 327 Ark. 567, 940 S.W.2d 440 (1997), cert. denied 522 U.S. 898, 118 S. Ct. 244, 139 L. Ed. 2d 173 (1997); *Willoughby v. State*, 76 Ark. App. 329, 65 S.W.3d 453 (2002).

## Rule 14.2. Search of open lands.

An officer may, without a search warrant, search open lands and seize things which he reasonably believes subject to seizure.

### 1987 Unofficial Supplementary Commentary to Rule 14.2

This Rule merely recognizes the common law doctrine that a search of open land without a warrant is permissible. *Hester v. United States*, 265 U.S. 57, 68 L.Ed. 898 (1924). Wooded lands are open land, *Bedell v. State*, 257 Ark. 895, 521 S.W.2d 200 (1975), even when the land is owned by the target of the search. *Wyss v. State*, 262 Ark. 502, 558 S.W.2d 141 (1977).

The curtilage surrounding a residence may not be the object of a search without a warrant or pursuant to other legal means. The Arkansas Supreme Court has accepted the following definition of a curtilage:

"The curtilage of a dwelling-house is a space, necessary and convenient and habitually used for the family purposes and the carrying on of domestic employments. It includes the garden, if there be one, and it need not be separated from other lands by a fence."

*Sanders v. State*, 264 Ark. 433, 436, 572 S.W.2d 397, 398 (1978), quoting from *Black's Law Dictionary* (4th Ed.).

In *Sanders*, the Court went on to find that a warrant was necessary for a search of a garden located between 100 and 200 yards behind appellant's home and separated from his home by a fence. The garden was found to be part of the curtilage. Three judges dissented, primarily on grounds that appellant had no garden, the evidence showing that he grew one row of corn and a few vegetables among ten rows of marijuana, some of which were 100 yards in length. Later, in *Gustafson v. State*, 267 Ark. 830, 593 S.W.2d 187 (Ark. App. 1979), the court of appeals upheld admission into evidence of stolen property seized from a hiding place in the woods behind appellant's apartment after a police officer watching the apartment saw him run from the apartment with an armload of what turned out to be stolen property and dump it in the woods. The court's holding turned on the finding that appellant had no expectation of privacy in the wooded area behind his apartment, since this was not within the curtilage.

The *Gustafson* decision should be compared with *Gaylord v. State*, 1 Ark. App. 106, 613 S.W.2d 409 (1981), in which a marijuana field

50 yards behind appellant's house was found not to be part of the curtilage because of lack of evidence of any family use or domestic employment.

*Gaylord* reiterated the caveat in the original commentary that the court's ruling in *Hester v. United States* may have been modified *sub silentio* in *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576 (1967), where the Court said:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

*Katz* at 351-52, 19 L.Ed.2d at 582 (citations omitted).

The United States Supreme Court has recently established a quadripartite test for examining curtilage questions in Fourth Amendment cases:

[W]e believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation from people passing by.

*United States v. Dunn*, 480 U.S. 294, 300-301, 94 L.Ed.2d 326, 334-35 (1987).

The Court examined these factors and held that a barn fifty yards from a house was outside the curtilage. Addressing an alternative argument about open field searches, the Court reiterated its previously expressed rejections of arguments that the erection of fences in open fields creates a constitutionally protected private interest. The Court went on to reaffirm that an open field for the purposes of the *Hester* rule need not literally be "open" or a "field" as those terms are used in ordinary parlance. *Dunn* stands for the proposition that, without infringing upon any reasonable expectation of privacy, law enforcement offi-

cers can cross fences and position themselves in places on private property that are inaccessible to the public in order to obtain a view of the interior of a building (here a barn) for the purpose of obtaining information on which to base the issuance of a search warrant.

Contraband seized in what would otherwise be an open field is inadmissible if police officers are led to it by evidence found pursuant to a warrantless and otherwise impermissible entry into the curtilage of the target's home. *Dever v. State*, 14 Ark. App. 107, 685 S.W.2d 518 (1985). While investigating an incident in which appellant had received a gunshot wound, law enforcement officers noticed a small amount of marijuana around appellant's cabin. Two days later officers returned to the cabin, found a path leading into the woods from the curtilage, and followed it to a marijuana field. It is not clear from the court's opinion that the officers ever physically set foot on appellant's curtilage during the second visit at which the marijuana was seized. In addition, it should be noted that the court did not find that the marijuana was located in a protected area. The court emphasized that the officers had ample time to obtain a search warrant, but did not go on to speculate whether probable cause existed to

search a place other than appellant's curtilage or whether marijuana seized by officers in the woods pursuant to a search warrant authorizing only a search of appellant's home and curtilage would have been admissible. Compare, *Dunn*.

#### Observations From Aircraft.

The Fourth Amendment of the Constitution of the United States is not violated by a naked-eye, warrantless, aerial observation of an individual's fenced-in back yard by officers in an aircraft operating in a public air space, even if the observation is not made as part of a routine patrol but is particularly directed at identifying marijuana plants in the yard. *California v. Ciraolo*, 476 U.S. 207, 90 L.Ed.2d 210 (1986). Four justices dissented, arguing that the Court had ignored Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576 (1967) that any decision to construe the Fourth Amendment as proscribing only physical intrusions by police onto private property "is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion." 476 U.S. at 215, 90 L.Ed.2d at 218, quoting from *Katz* at 362, 19 L.Ed.2d at 588.

### CASE NOTES

#### ANALYSIS

Scope of search.  
Wooded area.

#### Scope of Search.

A party has no reasonable expectation of privacy in the wooded area behind his apartment, and this area is not within the purview of one's "curtilage" so as to be considered free from governmental intrusion. *Gustafson v. State*, 267 Ark. 830, 593 S.W.2d 187 (Ct. App. 1979).

#### Wooded Area.

A wooded area a mile away from defendant's father's house, even though it belonged

to the father, cannot be regarded as appurtenant to his house or curtilage and may be searched without a warrant. *Wyss v. State*, 262 Ark. 502, 558 S.W.2d 141 (1977).

Where a police officer had seen the defendant run out of his apartment and dump some CB equipment in a wooded area behind his garden, a warrantless seizure of the stolen CB equipment was permissible because wooded areas are open land. *Gustafson v. State*, 267 Ark. 830, 593 S.W.2d 187 (Ct. App. 1979).

### Rule 14.3. Emergency searches.

An officer who has reasonable cause to believe that premises or a vehicle contain:

- (a) individuals in imminent danger of death or serious bodily harm; or
  - (b) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or
  - (c) things subject to seizure which will cause or be used to cause death or serious bodily harm if their seizure is delayed;
- may, without a search warrant, enter and search such premises and vehicles, and the persons therein, to the extent reasonably necessary for the prevention of such death, bodily harm, or destruction.



## 1987 Unofficial Supplementary Commentary to Rule 14.3

*Haynes v. State*, 269 Ark. 506, 602 S.W.2d 599, cert. denied, 449 U.S. 1066, 66 L.Ed.2d 611 (1980) is a case that should have been decided under Rule 12.5. Police officers arranged for a "controlled purchase" of drugs by an informant who met them nearby immediately afterward and notified them that appellant, who lived in room 114, had sold him drugs in room 116. As one policeman went to get a search warrant others descended upon the motel, securing room 114 by removing appellant and his father to a nearby room. After three and one-half hours a search warrant arrived, and officers searched the room, seizing drugs. The Arkansas Supreme Court ordered the evidence suppressed in an opinion that found that the intrusion into claimant's room constituted an unreasonable search. A four judge majority held that no exigent circumstances existed to support a search under Rule 14.3 governing warrantless emergency searches. Chief Justice Fogleman, joined by Justices Smith and Stroud, dissented in an opinion pointing out that the testimony showed that appellant had been arrested at the time of the search and arguing that exigent circumstances existed and justified the search, since the officers had reasonable grounds for believing that narcotics were being dispensed and would either be sold or destroyed before a search warrant could be obtained and executed. It appeared that the search warrant was obtained as soon as possible under the circumstances.

As frequently happens in search and seizure cases, the facts became the focal point of the dispute between members of the majority and dissenters. Though the majority presumably would not gainsay that LSD can cause "serious bodily harm" and that further drug sales might have taken place had appellant not been arrested, it concluded without much explanation that the circumstances did not disclose grounds for an emergency search. The dissent, without adverting to Rule 14.3, concluded that manifest exigent circumstances justified the officers, remaining on the premises for three hours until a search warrant could be procured. The dissenting opinion argued that the search was "reasonable," but this argument does not meet the thrust of the majority's opinion, the question being whether a three hour "seizure" of an entire room prior to a search under warrant was constitutionally permissible. Though the United States Supreme Court has approved the "seizure" of an automobile pending the issuance of a search warrant to search its interior, *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed.2d 419 (1970), the Arkansas Supreme

Court may have decided that a dwelling place, not being mobile, cannot be quarantined, so to speak.

The majority opinion also relied on *Payton v. New York*, 455 U.S. 573, 63 L.Ed.2d 639 (1980) and *Riddick v. New York*, 445 U.S. 573, 63 L.Ed.2d 639 (1980), but, as is pointed out in the *Haynes* dissent, *Riddick* and *Payton* were cases in which the United States Supreme Court was concerned with police authority to make warrantless arrests where no exigent circumstances exist. The Supreme Court in *Payton* and *Riddick* simply held that police cannot make warrantless and nonconsensual entries into suspects' homes in order to make routine felony arrests and that evidence seized incident to such illegal arrests was inadmissible. In neither case was it argued by appellant that no exigent circumstances justified the warrantless arrests, since in each case the trial court made the assumption that the arrests were lawful under state statutes. There being no evidence in the record on appeal in regard to exigent circumstances, the Supreme Court declined to make a finding on exigency, noting that it had "no occasion to consider the sort of emergency or dangerous situation described in our cases as 'exigent circumstances', that would justify a warrantless entry into a home for the purpose of either arrest or search." *Payton* at 583, 63 L.Ed.2d at 648-49.

Even if it is assumed that emergency circumstances as defined by Rule 14.3 were not present in *Haynes*, the circumstances justifying an emergency search under Rule 14.3 may not in all cases be equatable with "exigent circumstances." In deciding *Haynes*, the Arkansas Supreme Court could have found the warrantless intrusion into the hotel room to make an arrest justifiable on grounds of exigent circumstances which prevented an arrest warrant or a search warrant from being issued. In *Moore v. State*, 261 Ark. 274, 551 S.W.2d 185 (1977), decided before *Payton*, the Arkansas Supreme Court decided that "there [was] no reason one of the officers could not have obtained a search warrant while the other officers remained at the scene [i.e., the defendant's house]." 261 Ark. at 277, 551 S.W.2d at 187. The Arkansas Supreme Court evidently thought that the United States Supreme Court's guidelines in *Payton* invalidated the *Moore* option of securing the premises by the time the *Haynes* case came on to be decided. As pointed out above, the *Payton* decision does not explicitly invalidate securing premises under all circumstances and does not appear to preclude this remedy even by implication in cases where exigent circumstances do indeed justify warrantless intrusions into places of residence for the purpose

of making an arrest. So, the *Haynes* Court could have avoided reversing the trial court by making findings that exigent circumstances existed and that police conduct in securing the premises was permissible as congruous with a procedure approved in dicta in *Moore*.

Perhaps more in point in the *Haynes* type of case is *Warden v. Hayden*, 387 U.S. 294, 18 L.Ed.2d 782 (1967), where the Court upheld the admissibility of evidence seized in the warrantless search of a robbery suspect's home contemporaneous with his warrantless arrest shortly after an armed robbery. Though the Court in *Warden v. Hayden* based its finding of exigent circumstances on the need for officers to seize weapons that had been used in a robbery or might be used against them, the exigent circumstance rationale might be broad enough to cover situations where officers are attempting to interdict the sale of dangerous drugs under Rule 14.3.

*Haynes* would perhaps have been a less difficult case had it been treated as presenting

Rule 12.5 issues, though these might also have proved intractable since the arrest in question may have taken place immediately outside the apartment, thereby requiring that the Court balance restrictions imposed on searches incident to arrest under *Chimel v. California*, 395 U.S. 752, 23 L.Ed.2d 685 (1969) against expanded authority to search conferred by exigent circumstances under *Warden*. *Warden* has not, of course, gone unnoticed by the Arkansas Supreme Court and was relied upon in *Combs v. State*, 270 Ark. 496, 606 S.W.2d 61 (1980) to uphold the warrantless seizure of a weapon from appellant in a motel room after police entered the room through an open door upon hearing a woman say, "Let me go." See, also, *Gaylor v. State*, 284 Ark. 215, 681 S.W.2d 348 (1984), in which the Court upheld a warrantless arrest and a "substantially contemporaneous" search of the home — officers walked through and found items in plain view — shortly after an armed robbery. *Id.* at 219, 681 S.W.2d at 350.

## CASE NOTES

### ANALYSIS

Constitutional protection.  
Danger of bodily harm.  
Danger of death.  
Search improper.  
Search proper.

### Constitutional Protection.

Absent exigent circumstances, an intrusion into an individual's place of abode without a warrant is a violation of that individual's rights under the Constitutions of the United States and the State of Arkansas. *Haynes v. State*, 269 Ark. 506, 602 S.W.2d 599, cert. denied 449 U.S. 1066, 101 S. Ct. 795, 66 L. Ed. 2d 611 (1980).

### Danger of Bodily Harm.

Where police officers were responding to a call that a woman was being held at a motel by a man with a gun, it was clearly reasonable for the officers at the time they entered the motel room without a warrant to believe that there was a great risk of serious bodily harm to someone in that room. *Combs v. State*, 270 Ark. 496, 606 S.W.2d 61 (1980).

Police had no probable cause to search residence without a search warrant where an informant indicated victim had been dead for some time, so there was no risk of bodily harm. *Mitchell v. State*, 294 Ark. 264, 742 S.W.2d 895 (1988).

Police chief's warrantless search of defendant's garage was supported by exigent circumstances where the chief entered the garage only after he saw a large puddle of blood in the gravel outside the garage, with what he

called a "drag mark" of blood going into the garage; clearly, given these circumstances, the chief had reasonable cause to believe someone else might be injured inside the garage. *Baird v. State*, 357 Ark. 508, 182 S.W.3d 136 (2004).

In defendant's drug case, the court properly denied defendant's motion to suppress evidence as officer's properly entered the home where (1) based on what the officers saw and smelled when defendant opened the door, they believed that methamphetamine was being manufactured, which, based upon their knowledge of drug labs, posed a threat of immediate serious bodily harm to anyone in the residence, and (2) the officers also had reason to believe that there were other persons in the residence based upon the footsteps that they heard when they first arrived and the fact that there was a female sitting at the table who said that she thought there was a female in the back of the house. *Loy v. State*, 88 Ark. App. 91, 195 S.W.3d 370 (2004).

### Danger of Death.

Although officer without a warrant entered homicide defendant's bedroom in search of the victim despite a bystander's statement that he believed the victim was already dead, this aspect of the search was consistent with subsection (a) of this rule because a bystander's assessment of the child's condition could well have been incorrect, and, frequently, the report of a death proves inaccurate and a spark of life remains, sufficient to respond to emergency police aid; in short, the officer's entry into the bedroom was clearly related to the



objectives of the authorized intrusion into the residence. *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997).

A police officer was allowed to enter the defendant's home and seize that which was in plain view because of exigent circumstances where the victims (defendant's parents and his sister) had been missing for 3 days, the defendant informed the officer that the victims were in the home and were dead, he initially refused entry to the home, and he cryptically stated that he had not reported the victims' deaths because he was waiting to hear. *Hodge v. State*, 332 Ark. 377, 965 S.W.2d 766 (1998).

#### Search Improper.

Defendant's motions to suppress physical evidence recovered from his residence was improperly denied where, after getting defendant's name from the victim, officers went to his residence, entered without permission, and spoke to two other persons before finding and arresting him; based on the totality of the circumstances standard, the officers' claim of exigent circumstances was speculative at best where the officers had waited over an hour before going to the residence and had no information about other potential victims, and any blood seen at the residence would not have indicated that an attack, other than the known assault, had occurred. *Baird v. State*, 83 Ark. App. 392, 128 S.W.3d 459 (2003), rev'd 182 S.W.3d 136 (2004).

Warrantless nighttime intrusion into defen-

dants' home was improper as there were no exigent circumstances and the forced entry was not a tactic that comported with the Fourth Amendment or Ark. Const., Art. II, § 15; ample opportunity existed for the police to obtain a warrant. *Robbins v. State*, 94 Ark. App. 393, 231 S.W.3d 79 (2006).

#### Search Proper.

Probable cause existed under the Fourth Amendment and this rule for a deputy to enter defendants' resident without a warrant where a security alarm had been activated and a door to the house was open; it was reasonable for the deputy to believe that a crime might be in progress and for him to enter the residence and secure the premises. *Steinmetz v. State*, 366 Ark. 222, 234 S.W.3d 302 (2006).

Defendant's motion to suppress evidence found during a brief search of his home after defendant gave officers the keys to lock up as he left with them was properly denied because the officers had reason to check the apartment pursuant to this rule after noticing defendant's eagerness to leave, his admission that he had fought with his girlfriend, a bloodstain on the door, a foul odor in the apartment, and a photo showing defendant with young children. *Miller v. State*, 2010 Ark. 1, 362 S.W.3d 264 (2010).

**Cited:** *Willett v. State*, 18 Ark. App. 125, 712 S.W.2d 925 (1986); *Starks v. State*, 74 Ark. App. 366, 49 S.W.3d 122 (2001).

### Rule 14.4. Seizure independent of search.

An officer who, in the course of otherwise lawful activity, observes the nature and location of things which he reasonably believes to be subject to seizure, may seize such things.

#### 1987 Unofficial Supplementary Commentary to Rule 14.4

##### Seizure of Items in Plain View.

In *Gatlin v. State*, 262 Ark. 485, 559 S.W.2d 12 (1977), the Arkansas Supreme Court ordered suppressed several items, including a plastic bag containing \$807 seized by officers conducting a search under a warrant only authorizing seizure of controlled substances. The Court held that the money and other items forming the basis for a conviction of theft by receiving would have been admissible had the state shown at trial that their discovery was inadvertent and that their incriminating nature was "immediately apparent." *Id.* at 490, 559 S.W.2d at 15, relying on *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed.2d 564 (1971); *United States v. Johnson*, 541 F.2d 1311 (8th Cir. 1976). There was no evidence that the officers making the search knew that the items seized had been stolen, so

their incriminating nature could not have been immediately apparent. Neither was there any testimony that discovery of the goods was inadvertent. Therefore, the Court ruled, these items were not admissible under Rule 14.4.

The circumstances in *Gatlin* must be distinguished from those in cases such as *McQueen v. State*, 283 Ark. 232, 675 S.W.2d 358 (1984), where officers with a search warrant seized \$640 cash not listed on the warrant as well as enumerated items in a search of defendant's residence. The evidence was introduced at appellant's trial for aggravated robbery and theft of property. The Supreme Court upheld the seizure of the money on testimony that its discovery was inadvertent, the incriminating nature of the money being "immediately apparent," since officers knew

claimant had stolen a large sum of cash. See, also, *Heard v. State*, 272 Ark. 140, 612 S.W.2d 312 (1981), where officers executing a warrant seized a cash box that was subsequently introduced at appellant's burglary trial, inadvertence having been shown and the incriminating nature of the article being immediately apparent to the officers.

#### **"Inadvertent" Discovery Requirement.**

The Arkansas Supreme Court discussed the "plain view" doctrine, and, in particular, the requirement that the initial intrusion be inadvertent, in *Johnson v. State*, 291 Ark. 260, 724 S.W.2d 160 (1987), a case in which the Court upheld admissibility of marijuana seized as a result of a search stemming from police officers viewing appellant carrying marijuana plants in his field as the officers drove on a nearby public highway. Though the Court discussed inadvertence, the key to the decision appears to be that there was no cognizable "intrusion." Quoting *Kelley v. State*, 261 Ark. 31, 545 S.W.2d 919 (1977), the Court opined that "the basic test is whether the officer had a right to be in the position he was when the objects fell into his plain view." *Johnson* at 262-63, 724 S.W.2d at 162. The Court went on to say that the plain view doctrine "permits the admission of evidence seized only when (1) the initial intrusion was lawful, (2) the discovery of the evidence was inadvertent, and (3) the incriminating nature of the evidence was immediately apparent." *Id.* at 263, 724 S.W.2d at 162. About the meaning of the "inadvertent" prong of the standard the Court had the following to say:

The inadvertence requirement has gener-

ally been interpreted to mean that "immediately prior to the discovery, the police lacked sufficient information to establish probable cause to obtain a warrant to search for the object."... Inadvertence does not "encompass total surprise" or mean "unexpected."

*Johnson* at 263, 724 S.W.2d at 162. (Citations omitted.)

The most recent "plain view" case is *Ari-zona v. Hicks*, 480 U.S. 321, 94 L.Ed.2d 347 (1987). A man in his apartment was injured by a bullet fired through the floor of the apartment immediately above him. Police entered the upper apartment without a warrant and, upon noticing expensive stereo equipment incompatible with the other appointments, copied serial numbers of components, moving some of them in the process.

The Court affirmed the lower court's suppression of the stereo equipment, finding that the moving of the equipment was a search separate and apart from the search that was the lawful objective of entering the apartment and that the plain view doctrine did not protect the seizure because the officer inspecting the equipment concededly did not have reasonable cause to believe that the equipment was stolen.

Justice White, in his concurring opinion, pointed out that the "inadvertent discovery" prong of the plain view exception has never been accepted by a majority of the Court and that the dissent's assertions in reliance on this requirement were erroneous. 480 U.S. at 329, 94 L.Ed.2d at 357.

### **CASE NOTES**

#### **ANALYSIS**

In general.

Plain view doctrine.

Unlawful seizure.

#### **In General.**

The inadvertence requirement has generally been interpreted to mean that "immediately prior to the discovery, the police lacked sufficient information to establish probable cause to obtain a warrant to search for the object." *Johnson v. State*, 291 Ark. 260, 724 S.W.2d 160, cert. denied 484 U.S. 830, 108 S. Ct. 101, 98 L. Ed. 2d 61 (1987).

#### **Plain View Doctrine.**

The plain view doctrine permits the admission of seized evidence if: (1) the initial intrusion was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent. *McQueen v. State*, 283 Ark. 232, 675 S.W.2d 358 (1984); *Johnson v. State*, 291 Ark. 260, 724 S.W.2d 160, cert.

denied 484 U.S. 830, 108 S. Ct. 101, 98 L. Ed. 2d 61 (1987).

The observation of evidence in plain view is not a search, and therefore the resulting seizure is not the result of an unreasonable search. *Johnson v. State*, 291 Ark. 260, 724 S.W.2d 160, cert. denied 484 U.S. 830, 108 S. Ct. 101, 98 L. Ed. 2d 61 (1987).

Under the plain view doctrine, seized evidence is admissible when the initial intrusion was lawful; the discovery of the contraband was inadvertent; and when the incriminating nature of the evidence was immediately apparent. *Freeman v. State*, 37 Ark. App. 81, 824 S.W.2d 403 (1992).

Defendant's suppression motion was properly denied where her co-tenant gave police officers consent to search the common areas of her residence and the officers saw drug paraphernalia, from the living room, through an open door in plain view on defendant's bed. *Love v. State*, 355 Ark. 334, 138 S.W.3d 676



(2003), overruled, *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006).

While federal marshals were arresting defendant at his apartment for a violation of probation, the marshals discovered what they suspected to be cocaine in the bathroom and called the city police, who determined that the substance in the bathroom, which was in plain view, was cocaine; however, pursuant to ARCrP 12.5, the city police officers improperly searched a black bag in another room without defendant's consent and, if the evidence found in the illegal search of black bag motivated the officers to obtain a search warrant, the illegal search would preclude application of the independent-source doctrine and the evidence would be inadmissible. *Lauderdale v. State*, 82 Ark. App. 474, 120 S.W.3d 106 (2003).

#### Unlawful Seizure.

Where police officers who entered defendant's home pursuant to search warrant for

controlled substances seized certain items, including money, a television, and firearms, they claimed to have found in "plain view," such seizure was unlawful in the absence of any showing that the officers had knowledge of any particular stolen items at defendant's residence or that the discovery of the items was inadvertent. *Gatlin v. State*, 262 Ark. 485, 559 S.W.2d 12 (1977).

The observation of evidence in plain view is not a search, and therefore the resulting seizure is not the result of an unreasonable search. *Johnson v. State*, 291 Ark. 260, 724 S.W.2d 160, cert. denied 484 U.S. 830, 108 S. Ct. 101, 98 L. Ed. 2d 61 (1987).

The fact that the officers' initial intrusion was unlawful takes the evidence seized outside the plain view exception. *Evans v. State*, 33 Ark. App. 184, 804 S.W.2d 730 (1991).

**Cited:** *State v. McFadden*, 327 Ark. 16, 938 S.W.2d 797 (1997).

## RULE 15. DISPOSITION OF SEIZED THINGS

### Rule 15.1. Custody of seized things: retention by seizing officer.

In all cases of seizure the law enforcement officer making the seizure shall provide for the appropriate safekeeping of the things seized.

#### CASE NOTES

#### Destruction of Items.

The police violated this rule by destroying all the marijuana except that saved for testing without first obtaining a court order and making a full report of the circumstances of the seizure and a list of the items seized.

*Johnson v. State*, 291 Ark. 260, 724 S.W.2d 160, cert. denied 484 U.S. 830, 108 S. Ct. 101, 98 L. Ed. 2d 61 (1987).

**Cited:** *Mitchell v. State*, 321 Ark. 570, 906 S.W.2d 307 (1995).

### Rule 15.2. Motions for return or restoration of seized things.

(a) *Who May File.* Within thirty (30) days after notice of seizure, or at such later date as the court in its discretion may allow:

(i) the individual from whose person, property, or premises things have been seized may move the court to whom the warrant was returned, or the court having jurisdiction of the offense in question, as the case may be, to return things seized to the person or premises from which they were seized; and

(ii) any other person asserting a claim to rightful possession of the things seized may move the court having jurisdiction of the matter to restore the things seized to such person.

(b) *Grounds.* Motions for return or restoration of seized things shall be based on the ground that the moving party has a valid claim to rightful possession of things seized, because:

(i) the things had been stolen or otherwise converted, and the moving party is the owner or rightful possessor;

(ii) the things seized were not in fact subject to seizure;

(iii) the moving party, by license or otherwise, is lawfully entitled to possess things otherwise subject to seizure; or

(iv) although the things seized were subject to seizure, the moving party is or will be entitled to their return or restoration on the court's determination that they are no longer needed for evidentiary purposes.

(c) *Custody Order*. When a motion is made for the return or restoration of seized things, the court shall enter a custody order which shall provide for the safekeeping of the things seized, with conditions of appropriate privacy for documents and other records.

(d) *Postponement of Return*. In granting a motion for return or restoration of seized things, the court may postpone execution of the order for return or restoration, until such time as the things need no longer remain available for evidentiary use.

(e) *Appellate Review*. An order granting a motion for return or restoration of seized things shall be reviewable on appeal in regular course as a final order. An order denying such a motion, or entered under Rule 15.2 (f), shall be reviewable on appeal upon certification by the court having custody of such things that they are no longer needed for evidentiary purposes.

(f) *Disputed Possession Rights*. If, upon consideration of a motion or motions for return or restoration of seized things, it appears that the things should be returned or restored, but there is a substantial question whether they should be returned to the person from whose possession they were seized or to some other person, or a substantial question among several claimants as to rightful possession, the court hearing the matter may, in its discretion, return the things to the person from whose possession they were seized, or impound the things seized and remit the several claimants to appropriate civil process for determination of the claims.

(g) *Disposition of Contraband and Unclaimed Goods*. At such time as the court finds that there is no further need for custody of the seized things, and if no motion for return or restoration of the seized things has been made, the court shall order the things to be delivered to the officials charged with responsibility under the applicable laws for the sale, destruction, or other disposition of contraband and unclaimed goods in official custody.

## CASE NOTES

### ANALYSIS

Construction.

Application.

Exhaustion of administrative remedies.

### Construction.

There is no conflict between § 5-5-101 and subsection (f) of this rule; the latter is simply the procedural implementation of the former. *Wilburn v. Topeka Corp.*, 265 Ark. 141, 577 S.W.2d 406 (1979).

In conjunction with ARCrP 10.1, this rule permits the individual from whose person things are seized to move the court having jurisdiction over the offense in question to return things seized to the person from which they are seized. *Drug Task Force v. Hoffman*, 353 Ark. 182, 114 S.W.3d 213 (2003).

Where the \$2000 defendant paid an agent for drugs had remained in possession of the drug task force (DTF) without a court order as

evidence in a case which could not be filed, since the state failed to file timely criminal charges or a timely forfeiture action, the trial court properly held defendant's \$2,000 was the subject of seizure and forfeiture under § 5-64-505, and defendant was entitled to return of the money; moreover, no jury was needed as, under ARCP 39(a), the right to trial by jury was not absolute and there were no factual issues to be decided. *Drug Task Force v. Hoffman*, 353 Ark. 182, 114 S.W.3d 213 (2003).

### Application.

Where a towing company sold an arrestee's truck, the arrestee's due process claim survived summary judgment because, *inter alia*, (1) the towing company was acting under color of state law, and (2) this rule applied rather than the Arkansas Removal of Unattended or Abandoned Vehicles statute, § 27-



50-1201 et seq., since the truck was not “abandoned” or “unattended.” *Smith v. Insley’s, Inc.*, 499 F.3d 875 (8th Cir. 2007).

**Exhaustion of Administrative Remedies.**

Because defendant county animal control officer acted under a valid search warrant when she entered plaintiff dog owner’s property to seize the dogs, and the owner’s animal cruelty conviction plea agreement gave the officer authority to inspect the premises, there was no policy or custom to hold the county liable for alleged Fourth and Fifth Amendment violations, and further, the

owner failed to exhaust her remedy under this rule after the second seizure by not petitioning for the dogs’ return which provided for adequate state post-deprivation remedies that satisfied due process. *Crawford v. Van Buren County*, 678 F.3d 666 (8th Cir. 2012).

The issuance of a certification by a circuit court that items seized are no longer needed for evidentiary purposes is mandatory before a motion to return seized items may be made. *Slots, Inc. v. State*, 342 Ark. 609, 30 S.W.3d 105 (2000).

**Rule 15.3. Custody of seized things: freshly stolen goods; perishables.**

If the identity of a person having a rightful claim to possession of freshly stolen seized things can be promptly established beyond a reasonable doubt to the satisfaction of the seizing officer, the things may be promptly returned to the rightful possessor. Perishable things seized may be disposed of by the seizing officers as justice and the necessities of the case dictate. A full report of the facts and circumstances of any seizure and the disposition of the things seized pursuant to this rule shall be made to a judicial officer.

**Rule 15.4. Custody of seized things: report of seizure.**

(a) In all cases of seizure other than pursuant to a search warrant, the officer making the seizure shall, as soon thereafter as is reasonably possible, report in writing the fact and circumstances of the seizure, with a list of things to the court before which the defendant will be brought for first appearance, or, if no arrest is made to a court having jurisdiction to entertain proceedings respecting the offense disclosed by the seizure.

(b) A copy of the list shall be given to the defendant or his counsel and the list shall be given such public notice as may be directed by a court of competent jurisdiction.

**CASE NOTES**

**ANALYSIS**

Applicability.

Report of seizure.

**Applicability.**

This rule did not apply to a seizure of property by a humane society officer since no officer of the law conducted any search and no search warrant was required. *Norton v. State*, 307 Ark. 336, 820 S.W.2d 272 (1991).

**Report of Seizure.**

The failure of a sheriff to report the seizure of four expended .22 cartridge casings to the court as required by this rule was not a

substantial violation sufficient to warrant suppression of the evidence pursuant to Ark. R. Crim. P. 16.2 where there was consistent testimony by three law enforcement officials detailing the facts and circumstances of the search that led to the discovery of the casings, there was a receipt documenting the transfer of the evidence from the sheriff to the State Police Investigator that corroborated the date of the seizure and listed the items that were found, and there was testimony that a report was filed in the law enforcement file. *Dansby v. State*, 338 Ark. 697, 1 S.W.3d 403 (1999).

**Rule 15.5. Effect on civil remedies.**

Nothing in this Article shall be construed to abrogate any civil remedy otherwise available.

**RULE 16. EVIDENTIARY EXCLUSION****RESEARCH REFERENCES**

**Ark. L. Rev.** Casenote, *Hoay v. State*: A Look at the United States Supreme Court's and Arkansas's Misapplication of the Exclusionary Rule and Good Faith Exception, 57 Ark. L. Rev. 993.

**CASE NOTES**

**Cited:** *Dodson v. State*, 88 Ark. App. 380, 199 S.W.3d 115 (2004).

**Rule 16.1. Scope of rule.**

The provisions of Rule 16.220.4(a) and (b) shall not apply in criminal prosecutions where omnibus hearing procedure is utilized.

**Rule 16.2. Motions to suppress evidence.**

(a) Objection to the use of any evidence, on the grounds that it was illegally obtained, shall be made by a motion to suppress evidence. The phrase "objection to the use of any evidence, on the grounds that it was illegally obtained," shall include but is not limited to evidence which:

1. Consists of tangible property obtained by means of an unlawful search and seizure; or

2. Consists of a record of potential testimony reciting or describing declarations or conversations overheard or recorded by means of eavesdropping; or

3. Consists of a record or potential testimony reciting or describing a confession or admission of a defendant involuntarily made; or

4. Was obtained as a result of other evidence obtained in a manner described in subdivisions one, two, and three; or

5. Consists of the prospective in-court identification of the defendant based on an unlawful pre-trial confrontation.

The motion shall be made to the court which is to conduct the trial at which such evidence may be offered in evidence.

(b) The motion to suppress shall be timely filed but not later than ten (10) days before the date set for the trial of the case, except that the court for good cause shown may entertain a motion to suppress at a later time.

(c) Renewal of a motion to suppress which has been denied may be allowed on the ground of newly discovered evidence or as the interests of justice require.

(d) An order granting a motion to suppress prior to trial shall be reviewable on appeal pursuant to Rule of Appellate Procedure — Criminal 3.

(e) Determination. A motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this state. In determining whether a violation is substantial the court shall consider all the circumstances, including:

(i) the importance of the particular interest violated;

(ii) the extent of deviation from lawful conduct;



- (iii) the extent to which the violation was willful;
- (iv) the extent to which privacy was invaded;
- (v) the extent to which exclusion will tend to prevent violations of these rules;
- (vi) whether, but for the violation, such evidence would have been discovered; and
- (vii) the extent to which the violation prejudiced moving party's ability to support his motion, or to defend himself in the proceedings in which such evidence is sought to be offered in evidence against him. (Amended June 6, 1981, effective September 1, 1981; amended February 24, 2005.)

#### Comment I to Rule 16.2

##### **Determination of Motion to Suppress Evidence.**

(a) *Grounds.* A motion to suppress evidence may be based upon a violation of any of the provisions of these rules, including that:

- (i) the things seized were not subject to seizure;
- (ii) in the case of a seizure based on the authority of a search warrant:
  - (A) the issuing judicial officer was not authorized to issue warrants; or
  - (B) on the record before the issuing judicial officer, there was no reasonable cause to believe that the search would discover the individuals or things specified in the application; or
- (C) the warrant was invalid for failure to describe with sufficient particularity the place to be searched, or the persons or things to be seized; or
- (D) the warrant was executed at a time not authorized therein; or
- (E) the scope of the search by which the things seized were discovered exceeded that authorized by the warrant; or
- (iii) in the case of a seizure based on the authority of an arrest:
  - (A) the arrest was invalid; or
  - (B) the search by which the things seized were discovered, or the seizure, was not authorized;

(iv) in the case of a seizure based on consent,

- (A) the consent was not voluntary; or
- (B) the consent was not given by any person authorized to give consent; or
- (C) a warning required was not given; or
- (D) the scope of the search by which the things seized were discovered exceeded the scope of the consent; or

(v) in the case of a seizure resulting from a search of a movable vehicle, or an emergency search, the requirements of Rules 14.1 or 14.3, as the case may be, were not met; or

(vi) in the case of a seizure resulting from a search of open lands, or made independently of a search, the requirements of Rules 14.2 or 14.4, as the case may be, were not met; or

(vii) in the case of a seizure resulting from a search for dangerous weapons of a person stopped pursuant to Rules 2 and 3, such search or the stop was not authorized by or did not comply with Rules 2 and 3.

(b) No motion to suppress shall be granted upon any of the grounds enumerated in subsections (a) and (b) of this Comment if the search or seizure in question is authorized upon any basis, notwithstanding that the search or seizure was not authorized upon the basis on which it was purportedly undertaken.

#### Comment II to Rule 16.2

Rule 16.2 (d) is intended to make interlocutory review available to the prosecution under the circumstances described.

#### 1987 Unofficial Supplementary Commentary to Rule 16.2

##### **Other Commentary.**

Suppression of evidence is dealt with primarily in discussions of cases interpreting the rules governing searches, particularly Rules 10.1 through 14.4.

##### **Amendments.**

As originally proposed, Rule 16.2(e) read as

follows:

"An order denying a motion to suppress shall be reviewable on appeal on behalf of a defendant thereafter convicted of the offense to which the evidence involved in the motion relates, irrespective of whatever plea the defendant entered in response to the charge."

This subpart was struck by the Supreme Court in favor of the language now appearing as subpart (e). The next to the last paragraph in the original commentary to Rule 16 should be disregarded.

Subpart 16.2(a) was amended in 1981 by the Court to describe the kinds of evidence subject to suppression under the Rule. *In Re: Amendments to Rule 16.2*, 273 Ark. 550, 616 S.W.2d 493 (1981). Conforming amendments were made to subparts 16.2(a)(vi) and (vii).

#### **Interlocutory Appeals by State.**

Interlocutory appeals of criminal cases cannot be taken after jeopardy attaches — i.e., when the jury is sworn in a jury trial or, in a trial to the court, when the testimony begins. Interlocutory appeals may be taken by the state from *pre-trial* orders suppressing evidence, but after jeopardy attaches an appeal is no longer interlocutory. *State v. Glenn*, 267 Ark. 501, 592 S.W.2d 116 (1980). *State v. Russell*, 271 Ark. 817, 611 S.W.2d 518 (1981) makes it clear that not every exclusion of evidence by the trial court constitutes “suppression” of evidence permitting an interlocutory appeal.

#### **Abandonment of Premises.**

In *State v. Tucker*, 268 Ark. 427, 597 S.W.2d 584 (1980), the Arkansas Supreme Court reversed the trial court’s granting of a motion to suppress evidence seized during the warrantless search of an apartment shared by appellant and his alleged murder victim. The evidence showed that appellant had left the apartment in question, moved to Dallas, rented another apartment, and secured employment in Dallas before being arrested 23 days after leaving Arkansas. He argued that he never intended to abandon the first apartment and the personal belongings he left there. The court found that abandonment “implies a renunciation of any reasonable expectation of privacy,” *United States v. Alden*, 576 F.2d 772, 777 (8th Cir. 1978), and concluded that claimant’s conduct indicated that he did not intend to return to the site of the search.

#### **Standard of Review.**

The standard of review on appeal of a trial court ruling on a motion to suppress is now well established:

“On appeal [the appellate court will] make an independent determination, based on the totality of the circumstances, as to whether evidence obtained by means of a warrantless search, as here, should be suppressed, and the trial court’s finding will not be set aside unless it is clearly against the preponderance of the evidence or clearly erroneous.”

*State v. Tucker*, 268 Ark. 427, 428-29, 597 S.W.2d 584, 585 (1980).

#### **Movant’s Burden of Proof.**

It is now well established that “a motion to suppress evidence should only be granted under Rule 16.2(e) if the court finds that a substantial violation of our rules has occurred, or if the federal or state constitutions otherwise require suppression.” *Lipovich v. State*, 265 Ark. 55, 57, 576 S.W.2d 720, 721 (1979). The Arkansas rule was formulated before the United States Supreme Court’s decision in *United States v. Leon*, 468 U.S. 897, 82 L.Ed.2d 677 (1984), where the Court emphasized that the exclusionary rule was a judicial remedy to enforce the Fourth Amendment to the Constitution of the United States, but was not itself required by the Constitution. While it has evidently been held that the federal constitution does not mandate suppression, though it may require a “judicial remedy,” it remains to be seen whether the Arkansas Supreme Court will interpret the state constitution in like fashion or whether it will continue to find, pursuant to Rule 16.2(e), that the state constitution requires suppression to enforce Article 2, Section 15 of the state constitution. In this connection it should be noted that Comment I(a)(ii) to Rule 16.2 imposes a higher standard than does *Leon*; it permits suppression upon a showing of lack of reasonable cause, something that no longer requires suppression under *Leon*.

The good faith exception to the exclusionary rule enunciated by the United States Supreme Court in *Leon* has been summarized by the Arkansas Supreme Court as follows:

In *Leon*, the Supreme Court not only announced the good faith exception to the exclusionary rule it also delineated four errors which an officer’s objective good faith cannot cure. These occur (1) when the magistrate is misled by information the affiant knew was false; (2) if the magistrate wholly abandons his detached and neutral judicial role; (3) when the affidavit is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable”, quoting *Brown v. Illinois*, 422 U.S. 590, 610-11, 95 S.Ct. 2254, 2265, 45 L.Ed.2d 416 (1975); and (4) when a warrant is so facially deficient “that the executing officers cannot reasonably presume it to be valid”, *Leon*, supra, 104 S.Ct. at pp. 3421-22. In its discussion of the third exception, the Court explained, “sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others,” quoting *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

*Herrington v. State*, 287 Ark. 228, 232-33, 697 S.W.2d 899, 901 (1985).



The Arkansas Supreme Court has most recently reviewed its post-*Leon* cases in *Jackson v. State*, 291 Ark. 98, 722 S.W.2d 831 (1987). In *Jackson* a search warrant was supported by oral testimony under oath by a deputy sheriff and an informant before a magistrate and by a sworn affidavit. The prosecution refused to divulge the testimony taken under oath, so the Arkansas Supreme Court did not consider it. The Court found that the affidavit was insufficient because it merely stated in conclusory fashion that the informant was "reliable" without giving facts to support this statement. It then opined that "in determining whether to apply the *Leon* rationale, we must be guided by our own ARCP Rule 16.2(e)." 291 Ark. at 101, 722 S.W.2d 831. It went on to point out that it had found "substantial" violations under Rule 16.2(e) in *Anderson*, *Herrington*, and in *Stewart v. State*, 289 Ark. 272, 711 S.W.2d 787 (1986). Technical violations not requiring reversal were found in *McFarland*, *Lincoln*, and in *Toland*. *State v. Anderson* was distinguished because in *Anderson* there was no affidavit or recorded testimony. The Court concluded that because the officer executed the warrant in good faith it would apply the *Leon* good faith exception. *Jackson* at 102, 722 S.W.2d at 834.

Significantly, the Court went on to overrule *Anderson* to the extent that it indicated that compliance with Rule 13.1 is a "threshold requirement before [the Court] will consider the question of good faith on the part of the police." *Jackson* at 102, 722 S.W.2d at 834. Justice Purtle dissented, arguing that the "majority opinion effectively emasculates ARCrP Rule 13.1(b) without any warning." *Id.* at 105, 722 S.W.2d at 835.

Cases such as *Hendricks v. State*, 15 Ark. App. 378, 695 S.W.2d 843 (1985) (failure to provide affidavit or recorded testimony to the

magistrate issuing the warrant is such a deviation from normal procedure that the Court will not consider it a defect falling within the scope of "good faith error" rule) are now of doubtful precedential value, though the Court might reach the same result by holding the Arkansas Constitution was violated by failure to provide an affidavit. See *Herrington v. State*, 287 Ark. 228, 697 S.W.2d 899 (1985).

Thus, the continued viability of Rule 13.1(b), at least where a warrant is executed by an officer acting in good faith, is questionable.

### Arkansas Constitution as Basis for Ruling.

Though most search cases are deemed governed by the federal constitution, the Arkansas Supreme Court has relied upon the Arkansas Constitution in some decisions. For example, in *Harris v. State*, 262 Ark. 506, 558 S.W.2d 143 (1977), the Arkansas Supreme Court found that evidence seized pursuant to a warrant executed at night but not supported by an affidavit showing exigent circumstances justifying a nighttime search need not be suppressed. The Court found that this was not a "substantial violation of appellant's rights" under Rule 16.2 or Article 2, Section 15 of the Arkansas Constitution. 262 Ark. at 509, 558 S.W.2d at 145.

### Delivery and Return Requirements.

In several pre-*Leon* decisions the Arkansas Supreme Court held that insignificant violations of the Rule 14.4(b) return requirement and the warrant delivery requirement of Rule 13.3(b) are not sufficiently substantial to require suppression of evidence. *Shackleford v. State*, 261 Ark. 721, 551 S.W.2d 205 (1977) (return); *Baxter v. State*, 262 Ark. 303, 556 S.W.2d 428 (1977) (delivery).

## RESEARCH REFERENCES

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Arkansas' Search and Seizure Law After *United States v. Leon*: In Search of a Standard, 40 Ark. L. Rev. 125.

Casenote, *Hoay v. State*: A Look at the United States Supreme Court's and Arkansas's Misapplication of the Exclusionary Rule and Good Faith Exception, 57 Ark. L. Rev. 993.

**U. Ark. Little Rock L.J.** Derden, Survey of Arkansas Law: Criminal Procedure, 2 U. Ark. Little Rock L.J. 203.

Stockburger, Survey of Arkansas Law: Criminal Procedure, 2 U. Ark. Little Rock L.J. 217.

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## CASE NOTES

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**In General.**

Subsection (b) of this rule is reasonable and should be complied with in the absence of good cause, since it facilitates the orderly procedure of the trial court, and gives the court and the parties an opportunity to study preliminary issues before the trial proper and perhaps dispenses with the necessity for a trial. *Dodson v. State*, 4 Ark. App. 1, 626 S.W.2d 624, cert. denied 457 U.S. 1136, 102 S. Ct. 2966, 73 L. Ed 2d 1355 (1982); *Rideout v. State*, 22 Ark. App. 209, 737 S.W.2d 667 (1987).

**Applicability.**

Where defendant's motion did not pertain to the suppression of evidence legally obtained, it was not governed by the 10-day limitation set forth in subsection (b) of this rule. *Hudgens v. State*, 324 Ark. 169, 919 S.W.2d 939 (1996).

Because the breathalyzer test was not illegally obtained, this rule did not apply, and as no argument was made that a conflict existed between the rules and § 5-65-204, defendant's motion to prohibit the introduction of the breathalyzer test into evidence was not a motion to suppress and the trial court erred in admitting the breathalyzer results over the objection of defendant where the form used to advise defendant failed to meet the statutory requirements, because the rights form had been found defective. *Mhoon v. State*, 369 Ark. 134, 251 S.W.3d 244 (2007).

**Appeal by State.**

The Rules of Crim. Proc. permit an interlocutory appeal by the state only with respect to a pretrial order suppressing evidence since the rules are intended to permit the state to obtain a review of a ruling upon the admissibility of evidence essential to the prosecution's case. *State v. Glenn*, 267 Ark. 501, 592 S.W.2d 116 (1980).

Where the trial court, after a pretrial hearing, granted the defendants' motions to suppress the evidence, the state could not be granted an interlocutory appeal from that ruling once the taking of evidence began, since that appeal procedure was no longer available after the trial proceeded to the merits. *State v. Glenn*, 267 Ark. 501, 592 S.W.2d 116 (1980).

Where defendant's motion to suppress was granted by the trial court and the state argued that the trial court misapplied the holding of Arkansas precedent related to exigent circumstances to the facts before it, the record showed the resolution of the issues turned on the facts unique to the case and, thus, the matter was not appealable by the state under Ark. R. App. P. Crim. 3. *State v. Nichols*, 364 Ark. 1, 216 S.W.3d 114 (2005).

In a search and seizure case, the State was permitted to appeal the granting of a motion to suppress evidence because the issue presented was the interpretation of Arkansas' criminal case law regarding canine sniffs. The issue was not whether the circuit court applied the law incorrectly to a particular set of facts, but whether the circuit court misinterpreted the law and then applied a flawed interpretation of the law to suppress the seized drugs in this case; therefore, the correct and uniform administration of the criminal law was implicated. *State v. Harris*, 372 Ark. 492, 277 S.W.3d 568 (2008).

**Confessions.**

No single factor, but the totality of the circumstances is significant in determining voluntariness. *Leach v. State*, 311 Ark. 485, 845 S.W.2d 11 (1993).

A threat is not more odious per se than a promise; the real issue concerning incriminating statements made through hope or fear is based on broader considerations of voluntariness in light of the particular inducement, whatever its nature. *Leach v. State*, 311 Ark. 485, 845 S.W.2d 11 (1993).

The court will examine all of the circumstances to determine whether a statement was voluntary, and if a promise or threat was made, the court will look first to the police conduct and then to the vulnerability of the defendant. *Leach v. State*, 311 Ark. 485, 845 S.W.2d 11 (1993).

Where an officer was called to a disturbance at defendant's home, the officer's general question to defendant, who had been hiding in the woods, of "What's up?" was a general term of salutation, was not designed to elicit an incriminating response, and defendant's incriminating statements regarding incest made in reply to the responding officer's sal-



utation were admissible. *Arnett v. State*, 353 Ark. 165, 122 S.W.3d 484 (2003).

Because defendant's confession was not introduced into evidence at trial, defendant could not demonstrate that he was prejudiced by the trial court's denial of his motion to suppress. As such, even if the trial court erred in denying defendant's motion to suppress, such error did not warrant a reversal of defendant's conviction. *Ray v. State*, 2009 Ark. 521, 357 S.W.3d 872 (2009).

### Consent to Search.

Where at a hearing on the defendant's motion to suppress, the arresting officer's undisputed testimony showed that the defendant had been given his *Miranda* warning upon his arrest for aggravated robbery, but he was not informed of his right to refuse consent to a search of his vehicle, and in answer to the officer's request to search the vehicle the defendant replied "I don't care. Go ahead," the defendant's consent to the warrantless search was freely and voluntarily given and the trial court properly overruled his motion to suppress. *Scroggins v. State*, 268 Ark. 261, 595 S.W.2d 219 (1980).

Three officers' uncontradicted statements met the state's burden of proving by clear and positive testimony that the consent to search was freely and voluntarily given without actual or implied duress or coercion. *Garrison v. State*, 13 Ark. App. 245, 682 S.W.2d 772 (1985).

Trial court's denial of motion to suppress evidence and ruling that consent was given voluntarily was not against the preponderance of the evidence, where the police officers testified that the defendant consented to their search of his car, trunk, and toolbox and additionally, the defendant was not a complete stranger to criminal proceedings. *Duncan v. State*, 304 Ark. 311, 802 S.W.2d 917 (1991).

Motion to suppress evidence was properly denied in a drug case where the evidence showed that a search based on a pretextual stop was valid; the officer had probable cause for the stop since the vehicle was speeding, consent to search was given by the registered owner, and the consent was not limited to exclude containers found inside the vehicle. *Flores v. State*, 87 Ark. App. 327, 194 S.W.3d 207 (2004).

Trial court properly denied defendant's motion to suppress a crack pipe that was found in a vehicle in which he was a passenger because the officer's initial approach of the vehicle was valid under Ark. R. Crim. P. 2.2 as the vehicle was sitting in a parking lot early in the morning; although defendant might have been illegally seized when the officer ordered him out of the vehicle, the driver of the vehicle gave consent to the vehicle search independent of any violation of defendant's

rights, thus, defendant lacked standing to challenge the vehicle search. *Swan v. State*, 94 Ark. App. 115, 226 S.W.3d 6 (2006).

### Denial of Motion.

Where the defendant, who was charged with first degree murder, had not been at the apartment he shared with the deceased for almost a month preceding a warrantless search of the apartment, and he had taken a bus to another state where he established his residence and took a job, he had effectively abandoned the apartment so that the warrantless search did not violate his constitutional rights, and the trial court should not have granted the defendant's motion to suppress the evidence seized during that search. *State v. Tucker*, 268 Ark. 427, 597 S.W.2d 584 (1980).

Where the judicial officer who issued the warrant could have reasonably believed that the occurrence of daytime sales of drugs were so difficult to predict that the warrant could be successfully executed only at nighttime when many sales take place and when supplies were likely to be present in the back room of defendant's residence, evidence seized would not be suppressed because taken in nighttime search. *Lewis v. State*, 7 Ark. App. 38, 644 S.W.2d 303 (1982).

Where the judicial officer had directed the prosecutor to file them with the circuit court and the failure to return the warrants was not willful and caused the defendant no prejudice, the motion to suppress evidence was properly denied. *McFarland v. State*, 284 Ark. 533, 684 S.W.2d 233 (1985).

Where the magistrate administered an oath to the officer who prepared the affidavit for a search warrant and attached an addendum that stated with particularity the items to be seized, the trial court's decision to deny the defendant's motion to suppress was not against the preponderance of the evidence. *Hill v. State*, 64 Ark. App. 31, 977 S.W.2d 234 (1998).

Because an ambiguous police statement that they would "help" defendant if defendant explained why he had "messed up" did not amount to a false promise of leniency, the trial court did not err in denying defendant's motion to suppress his statement to police and physical evidence gathered afterwards. *Roberts v. State*, 352 Ark. 489, 102 S.W.3d 482 (2003).

Trial court properly denied defense counsel's motion to suppress defendant's handwritten statement based on the claim that defendant was suffering from mental incompetency at the time; a physician testified that defendant was competent to stand trial, and defense counsel did not provide the trial court with any evidence that defendant might have been suffering from a mental illness at the

time of making the statement. *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003).

Trial court did not err in denying defendant's motion to suppress; although defendant claimed that he confessed because an investigator promised leniency, the investigator disputed this, and defendant was given the proper warnings, which defendant understood and waived, before he voluntarily signed the statement. *Winston v. State*, 355 Ark. 11, 131 S.W.3d 333 (2003).

Defendant's conviction and sentence for capital murder were affirmed and the trial court properly denied defendant's motion to suppress statements made while in police custody as the statements in question were voluntary and were not coerced. *Pilcher v. State*, 355 Ark. 369, 136 S.W.3d 766 (2003).

Defendant's motion to suppress his custodial statement was properly denied, even though defendant was only 16 years old at the time he was charged with capital murder, where defendant admitted at the interrogation that he could read and write, had come voluntarily to be questioned, was advised by officers of his rights before each of the two stages of the interrogation, and had signed a form stating that he understood his rights. *Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004).

Trial court did not err in denying defendant's motion to suppress where affidavits had cited anonymous tips and indicated that a police canine alerted numerous times on defendant's storage unit; further, there was information known to one of the executing officers that bolstered the reliability of the canine. *Blevins v. State*, 95 Ark. App. 218, 235 S.W.3d 921 (2006).

Because the getaway car used in a robbery was owned by the father of defendant's accomplice and because defendant had never been granted permission to drive the vehicle, defendant had neither a property interest in the vehicle nor a possessory interest in the vehicle; as such, he lacked standing to challenge a search of that vehicle, and his motion to suppress evidence discovered during the search was properly denied. *Ray v. State*, 2009 Ark. 521, 357 S.W.3d 872 (2009).

Trial court properly denied defendant's motion to suppress evidence of his photo identification by a witness because, although the witness knew one of the men in the photographic lineup because he had been a high school classmate, the witness lineup was not unfairly prejudicial for suggesting who should not be identified. The proper inquiry was whether the suggestive nature of the identification procedure made it all but inevitable that the victim would identify only defendant as the perpetrator, and the fact that a witness recognized one person out of the six-person lineup did not make it inevitable that she

would identify defendant as the perpetrator. *Ray v. State*, 2009 Ark. 521, 357 S.W.3d 872 (2009).

Court properly denied defendant's motion to suppress defendant's confession that defendant sold marijuana out of defendant's residence; the detective testified that defendant voluntarily waived defendant's Miranda rights while defendant was sober and defendant's answers were coherent, and there was no evidence that defendant was threatened in any way during the fifteen-minute interview. *Wright v. State*, 2010 Ark. App. 425, — S.W.3d —, 2010 Ark. App. LEXIS 432 (May 12, 2010).

Because a police officer had probable cause to stop defendant's vehicle based on an apparent invalid license tag, defendant's weaving and low-speed driving, and the officer's training, the stop was justified under Ark. R. Crim. P. 3.1; therefore, defendant's motion to suppress was properly denied. *Murrell v. State*, 2011 Ark. App. 311, — S.W.3d —, 2011 Ark. App. LEXIS 344 (Apr. 27, 2011).

#### **Expectation of Privacy.**

A child, either dependent or emancipated (having reached his majority) does not have the same constitutional right or expectation of privacy in the family home that he might have in a rented hotel room. *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979).

Where the defendants had placed their personal belongings in the trunk of a car and, because of a joint agreement to share driving, were to be lawfully in joint possession of the car for an interstate trip, they had a reasonable expectation of privacy in the trunk of the car to challenge the search of it on Fourth Amendment grounds. *State v. Villines*, 304 Ark. 128, 801 S.W.2d 29 (1990).

#### **Grounds.**

A motion to suppress evidence should only be granted under subsection (e) of this rule if the court finds that a substantial violation of the rules has occurred or if the federal or state constitutions otherwise require suppression. *Lipovich v. State*, 265 Ark. 55, 576 S.W.2d 720 (1979).

A motion to exclude evidence of a breathalyzer test, on the grounds that the officer had failed to advise appellant of his right to an additional test and to assist him in obtaining such a test as required by § 5-65-204(e), is not a motion to suppress evidence under this rule. *Kay v. State*, 46 Ark. App. 82, 877 S.W.2d 957 (1994).

#### **Motion Improperly Granted.**

Motion to suppress evidence was improperly granted because, where police had known an informant to give reliable information in the past, and accurate information was received from the informant about defendant and his vehicle, officers had specific, particularized, and articulable reasons for thinking



that defendant was involved in criminal activity, which justified a stop under Ark. R. Crim. P. 3.1. Because the officers had reasonable suspicion to stop and detain the vehicle, any pretext on the part of the officers was irrelevant; moreover, the officers did not need any additional reasonable suspicion to justify a canine sniff, which was not a search under the Fourth Amendment. *State v. Harris*, 372 Ark. 492, 277 S.W.3d 568 (2008).

#### **Power to Consent.**

The power to consent to a search rests upon mutual use of the property by persons generally having joint access or control for most purposes; the pertinent question is whether the one giving consent possesses common authority or other sufficient relationship to the premises. *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979).

For the purposes of consenting to a search, the status of one in loco parentis and a natural parent should be the same; therefore, the fact defendant was a foster child made no difference. *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979).

Since it is clear that foster father, in addition to being the owner of the premises which constituted and were maintained as a single family dwelling, was the head of the single family household and had not surrendered or relinquished exclusive control of the defendant's bedroom or the ability to designate what use could be made of it, by lease or otherwise, he maintained the right to access and control over the entire premises, and had authority to consent to a search of the bedroom. *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979).

#### **Preponderance of Evidence.**

Despite the fact that there was no limitation as to time, area, or items to be seized in a "consent to search" form signed by defendant's foster father, that the form failed to warn him that his consent could be withdrawn or limited at any time, that several police officers bearing weapons were present, that the request for consent was made at 3:30 a.m., shortly after the defendant had been arrested without warrant, that the foster father was scared when he signed the form, and that it would have been easy to have obtained a search warrant, where the search was limited to the kitchen and defendant's room, where the foster father who admitted he had, in fact, signed the form, had been told that the only search was to be for a gun and the search was so limited, where no warning was required that consent could be withdrawn, and where there were practical difficulties in obtaining a search warrant at 3:30 a.m., the finding by the trial court that the consent was voluntary was not clearly against the preponderance of

the evidence. *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979).

Where a defendant's communication was not made to a clergyman in his professional character as a spiritual adviser, denial of defendant's motion to suppress was not against the preponderance of the evidence. *Magar v. State*, 308 Ark. 380, 826 S.W.2d 221 (1992).

#### **Probable Cause.**

The presence of cigarette butts or marijuana seeds, without more, is just as consistent with having only that small amount for personal use as it is with having a cache of marijuana; there is simply no articulable fact to indicate a cache is located in the trunk, thus, under such circumstances there is no probable cause to search a car's trunk. *State v. Villines*, 304 Ark. 128, 801 S.W.2d 29 (1990).

#### **Review.**

In reviewing a trial court's ruling on a motion to suppress, the Supreme Court makes an independent determination based on the totality of the circumstances and reverses only if the trial court's ruling was clearly against the preponderance of the evidence. *Magar v. State*, 308 Ark. 380, 826 S.W.2d 221 (1992); *Ward v. State*, 308 Ark. 415, 827 S.W.2d 110, cert. denied 506 U.S. 841, 113 S. Ct. 124, 121 L. Ed. 2d 79 (1992); *Brown v. State*, 38 Ark. App. 18, 827 S.W.2d 174 (1992).

Remand of a criminal case was necessary to conduct defendant's motion to suppress evidence on the record because an appellate court was unable to conduct a de novo review without the complete record. *George v. State*, 356 Ark. 345, 151 S.W.3d 770 (2004).

Trial court did not err in denying defendant's motion to suppress marijuana seized after a search of his vehicle as the officer developed a reasonable suspicion that defendant was committing a felony, authorizing his continued detention of defendant; further, the officer detected a strong odor of fabric sheets, as opposed to air freshener, which the officer testified were often used to mask the odor of illegal controlled substances. *Ayala v. State*, 90 Ark. App. 13, 203 S.W.3d 659 (2005).

Where a state trooper discovered two kilograms of cocaine in duct-taped packages found in a car during a traffic stop, defendants gave incriminating statements; at trial, they made no pretrial motion to suppress the evidence or the statements under this rule. Defendants' motion for a directed verdict, which was labeled as a motion to dismiss, was not an adequate attempt to suppress the evidence; therefore, any issue concerning the admission of the evidence or defendants' statements was not preserved for review. *Camacho-Mendoza v. State*, 2009 Ark. App. 597, 330 S.W.3d 46 (2009).

Defendant's conviction for third-offense driving while intoxicated was proper because, although defendant specifically complained about his statements that he had been convicted of two previous DWI's, defendant did not timely file to suppress the statements as required by this rule. The failure to object at the first opportunity waived any right to raise that point on appeal. *Heathman v. State*, 2009 Ark. App. 601, — S.W.3d —, 2009 Ark. App. LEXIS 1062 (Sept. 23, 2009).

### **Substantial Violation.**

A motion to suppress was properly denied where the itemization on the back of a returned search warrant listed only three grams of heroin, one and one-half ounces of marihuana and three credit cards, even though cocaine was also found in the course of the search, since the claimed irregularity resulted in no prejudice to the defendant's rights. *Shackleford v. State*, 261 Ark. 721, 551 S.W.2d 205 (1977).

The failure to give a copy of a search warrant to the defendants was not a substantial violation requiring suppression of the fruits of the search where one of the defendants was present at the search and was allowed to read the warrant and where a copy was furnished to the defendant's attorney. *Baxter v. State*, 262 Ark. 303, 556 S.W.2d 428 (1977).

Where there was no return date on a search warrant but the warrant was returned on the same day as issued and there was no showing of any prejudice to the defendants, the violation was not substantial and did not require suppression of the fruits of the search. *Baxter v. State*, 262 Ark. 303, 556 S.W.2d 428 (1977).

The absence of the recitations required by the ARCrP 13.2, did not substantially prejudice defendant where the search warrant was executed and the return made within a few hours after the warrant was issued, the officer offered a sworn statement that evidence of the crimes might be disposed of by morning, and the magistrate's actual issuance of the search warrant established his finding of probable cause even more positively than the insertion of a conclusory finding to that effect would have. *Harris v. State*, 262 Ark. 506, 558 S.W.2d 143 (1977).

A motion to suppress shall be granted only if the court finds that a violation is substantial or contrary to the federal Fourth Amendment or Ark. Const, Art. 2, § 15, of the state constitution. *State v. Broadway*, 269 Ark. 215, 599 S.W.2d 721 (1980).

The execution of a search warrant at 8:10 p.m. was not a substantial violation of ARCrP 13.2(c), where the defendants refused the police officers' request for a consensual search of their home at 5:30 p.m., where the defendants allowed several officers to remain in their home until the warrant could be obtained, where the defendants' attorney was

present at the house from 7:00 p.m. on, and where the search warrant was signed by the issuing judicial officer at 7:55 p.m.; therefore, the search was valid. *United States v. Koller*, 559 F. Supp. 539 (E.D. Ark. 1983).

To exclude evidence because of a violation of the rules, the violation must be "substantial" under subsection (e) of this rule. *Johnson v. State*, 291 Ark. 260, 724 S.W.2d 160, cert. denied 484 U.S. 830, 108 S. Ct. 101, 98 L. Ed. 2d 61 (1987).

Execution of an erroneously issued nighttime search warrant at private home between 1:00 a.m. and 3:00 a.m. was a substantial violation and motion to suppress was granted. *Hall v. State*, 302 Ark. 341, 789 S.W.2d 456 (1990).

Where warrant was immediately executed and the return filed, but return was not signed until after suppression hearing, the failure of the return to be signed immediately was merely an insignificant technicality, not a fatal defect. *Sossamon v. State*, 31 Ark. App. 131, 789 S.W.2d 738 (1990).

The failure to establish reasonable cause with sufficient facts on the affidavit was a substantial violation, so as to warrant suppression of the evidence obtained. *Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991).

Defendant had no standing to argue suppression of a knife which was obtained by police, after his arrest, in an inventory search of the tractor trailer he was driving, as there was no showing that he had a proprietary interest in the truck, and before conducting the inventory search of the impounded vehicle the officer obtained permission from the owners. *Keaton v. State*, 307 Ark. 389, 821 S.W.2d 11 (1991).

Where evidence was insufficient to constitute the reasonable suspicion necessary to justify an investigatory stop, the evidence from the investigatory stop should have been suppressed. *Lambert v. State*, 34 Ark. App. 227, 808 S.W.2d 788 (1991).

Where the search warrant was executed somewhere between 10:15 and 10:30 p.m. at defendant's home, and there were no facts set out justifying that any facts had been met justifying a night-time search, a substantial violation occurred requiring reversal. *Ramey v. State*, 42 Ark. App. 242, 857 S.W.2d 828 (1993).

It is well established that the nighttime intrusion into a private home upon a warrant issued in violation of ARCrP 13.2(c) constitutes a substantial violation as prohibited by subsection (c) of this rule. *Zeiler v. State*, 46 Ark. App. 182, 878 S.W.2d 417 (1994).

The failure of a sheriff to report the seizure of four expended .22 cartridge casings to the court as required by Ark. R. Crim. P. 15.4 was not a substantial violation sufficient to warrant suppression of the evidence pursuant to



this rule. This despite: consistent testimony by three law enforcement officials detailing the facts and circumstances of the search that led to the discovery of the casings, there was a receipt documenting the transfer of the evidence from the sheriff to the State Police Investigator that corroborated the date of the seizure and listed the items that were found, and there was testimony that a report was filed in the law enforcement file. *Dansby v. State*, 338 Ark. 697, 1 S.W.3d 403 (1999).

#### **Technical Violation.**

Technical violation on warrant, which contained a time frame of 6:00 a.m. through 8:00 a.m. instead of 6:00 a.m. through 8:00 p.m., held not a substantial violation requiring suppression of the evidence obtained with the warrant. *Brown v. State*, 55 Ark. App. 107, 932 S.W.2d 777 (1996).

#### **Timeliness.**

While the right to object to an unlawful search is a constitutional right, even constitutional rights must be asserted in the manner specified by valid procedural requirements so that a motion to suppress evidence seized during a search of defendant's home which was not filed until a day or two before the date set for trial with no cause for delay asserted was correctly denied. *Parham v. State*, 262 Ark. 241, 555 S.W.2d 943 (1977).

The fact that the trial court permitted defense attorney to question the sheriff and other witnesses regarding the search warrant and affidavit did not mean the court approved the untimely filing of the motion to suppress and the motion was properly denied. *Burnett v. State*, 263 Ark. 225, 564 S.W.2d 211, cert. denied 439 U.S. 929, 99 S. Ct. 316, 58 L. Ed. 2 322 (1978).

Filing of motion to suppress evidence held untimely. *Jackson v. State*, 266 Ark. 754, 585 S.W.2d 367 (1979), cert. denied 444 U.S. 1017, 100 S. Ct. 670, 62 L. Ed. 2d 647 (1980); *Speed v. City of Jonesboro*, 267 Ark. 1087, 594 S.W.2d 44 (1980); *Dodson v. State*, 4 Ark. App. 1, 626 S.W.2d 624, cert. denied 457 U.S. 1136, 102 S. Ct. 2966, 73 L. Ed. 2d 1355 (1982); *Fisk v. State*, 5 Ark. App. 5, 631 S.W.2d 626 (1982); *Garrison v. State*, 13 Ark. App. 245, 682 S.W.2d 772 (1985); *Rideout v. State*, 22 Ark. App. 209, 737 S.W.2d 667 (1987).

No good cause shown which would have warranted court in entertaining untimely motion to suppress. *Jackson v. State*, 266 Ark. 754, 585 S.W.2d 367 (1979), cert. denied 444 U.S. 1017, 100 S. Ct. 670, 62 L. Ed. 2d 647 (1980); *Speed v. City of Jonesboro*, 267 Ark. 1087, 594 S.W.2d 44 (1980); *Dodson v. State*, 4 Ark. App. 1, 626 S.W.2d 624, cert. denied 457 U.S. 1136, 102 S. Ct. 2966, 73 L. Ed. 2d 1355 (1982); *Garrison v. State*, 13 Ark. App. 245, 682 S.W.2d 772 (1985); *Gillie v. State*, 305 Ark. 296, 808 S.W.2d 320 (1991).

This rule does not mandate the denial of every motion which is untimely. *Vega v. State*, 26 Ark. App. 172, 762 S.W.2d 1 (1988).

Where untimely motion to suppress was filed, court conducted a hearing on it, the state made no objection of the hearing that the motion was untimely, and state presented all of the evidence it had in opposition to the motion, court was not required to conclude that the motion to suppress was not properly before it or that the court's ruling on the motion was not properly preserved for review. *Vega v. State*, 26 Ark. App. 172, 762 S.W.2d 1 (1988).

#### **Untimely Motion.**

This rule does not mandate the denial of every motion which is untimely, and in the absence of a timely objection, the motion to suppress was properly before the trial court, and its ruling was properly preserved for review. *Butler v. State*, 309 Ark. 211, 829 S.W.2d 412, cert. denied 506 U.S. 998, 113 S. Ct. 597, 121 L. Ed. 2d 534 (1992).

This rule does not mandate the denial of every motion which is untimely, and in the absence of a timely objection by the State during trial, the appellate court cannot conclude that the motion to suppress was not properly before the trial court or that the trial court's ruling on it was not properly preserved for review. *Kimble v. State*, 331 Ark. 155, 959 S.W.2d 43 (1998).

Although defendant's failure to follow subsection (b) of this rule, which required the filing of a pre-trial motion to suppress, would have justified an outright denial of his at-trial motion, a circuit court exercised its discretion and decided the motion on the merits. Therefore, an appellate court also considered the merits. *Lee v. State*, 102 Ark. App. 23, 279 S.W.3d 496 (2008).

#### **When Interlocutory Appeal Inapplicable.**

Where state, in first-degree murder prosecution, was denied the right to enter a videotaped deposition of a deceased witness into evidence, such denial was not subject to interlocutory appeal under former ARCrP 36.10, since an interlocutory appeal can only be taken with respect to an order prior to commencement of a trial granting a motion to suppress evidence alleged to be illegally seized, as provided for under this rule. *State v. Russell*, 271 Ark. 817, 611 S.W.2d 518 (1981).

**Cited:** *State v. Cashion*, 260 Ark. 148, 539 S.W.2d 423 (1976); *Brothers v. State*, 261 Ark. 64, 546 S.W.2d 715 (1977); *State v. Lechner*, 262 Ark. 401, 557 S.W.2d 195 (1977); *Pridgeon v. State*, 262 Ark. 428, 559 S.W.2d 4 (1977); *State v. Osborn*, 263 Ark. 554, 566 S.W.2d 139 (1978); *Mize v. State*, 267 Ark. 743, 590 S.W.2d 75 (Ct. App. 1979); *Philmon v. State*, 267 Ark. 1121, 593 S.W.2d 504 (Ct. App.

1980), questioned *Hall v. State*, 11 Ark. App. 53, 666 S.W.2d 408 (1984); *Price v. State*, 267 Ark. 1172, 599 S.W.2d 394 (Ct. App. 1980); *State v. Storey*, 272 Ark. 191, 613 S.W.2d 382 (1981); *Spillers v. Housewright*, 692 F.2d 524 (8th Cir. 1982); *Ellis v. State*, 4 Ark. App. 201, 628 S.W.2d 871 (1982); *Profit v. State*, 6 Ark. App. 51, 637 S.W.2d 620 (1982); *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), cert. denied 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984), cert. denied sub nom. 512 U.S. 1272, 115 S. Ct. 17, 129 L. Ed. 2d 916 (1994); *Hall v. Lockhart*, 806 F.2d 165 (8th Cir. 1986); *Jackson v. State*, 291 Ark. 98, 722 S.W.2d 831 (1987); *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987); *Oglesby v. State*, 299 Ark. 403, 773 S.W.2d 443 (1989); *Jenkins v. State*, 301 Ark. 20, 781 S.W.2d 461 (1989);

*Guinn v. State*, 27 Ark. App. 260, 771 S.W.2d 290 (1989); *Flowers v. State*, 30 Ark. App. 204, 785 S.W.2d 242 (1990); *State v. Stuart*, 306 Ark. 24, 810 S.W.2d 939 (1991); *Mays v. State*, 308 Ark. 39, 822 S.W.2d 846 (1992); *State v. Jones*, 310 Ark. 585, 839 S.W.2d 184 (1992); *Washington v. State*, 42 Ark. App. 188, 856 S.W.2d 631 (1993); *State v. Spencer*, 319 Ark. 454, 892 S.W.2d 484 (1995); *Bernal v. State*, 48 Ark. App. 175, 892 S.W.2d 537 (1995); *Norman v. State*, 326 Ark. 210, 931 S.W.2d 96 (1996); *Miller v. State*, 69 Ark. App. 264, 13 S.W.3d 588 (2000), aff'd 27 S.W.3d 427 (2000); *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002); *Young v. State*, 370 Ark. 147, 257 S.W.3d 870 (2007); *Allen v. State*, 2010 Ark. App. 424, — S.W.3d —, 2010 Ark. App. LEXIS 426 (May 12, 2010).

## ARTICLE V. PRETRIAL PROCEDURES: DISCOVERY

### RULE 17. DISCLOSURE TO DEFENDANT

#### Commentary to Article V

The rules which follow trace the contours of a comprehensive discovery scheme characterized by broad reciprocal pretrial disclosure aimed at expediting the criminal justice process.

Broad pretrial disclosure would seem to be not only desirable but also necessary. By encouraging guilty pleas, reducing delays during trial, and in general lending more finality to the disposition of criminal cases, disclosure alleviates docket congestion and permits a more economical use of resources.

The need for expanded pretrial disclosure requirements has been accorded recognition recently by the Arkansas General Assembly which, in 1971, enacted Act 381. This legislation, now codified as Ark. Stat. Ann. § 43-2011.1 *et seq.* (Supp. 1973), represents a desirable first step toward reform of the law in this area. The Commission has sought to follow the lead of the legislature, while, at the same time, setting out specific guidelines and requirements, and relaxing the formalistic aspects of the discovery process by eliminating, where feasible, written motion practice.

Article V is divided into four rules. The initial rule, Rule 17, addresses itself to required and discretionary disclosures by the prosecution. The scope of disclosure and the manner in which it may be accomplished are set out with particularity.

Rule 17.1 spells out the prosecutor's obligations respecting disclosure. The provisions of 17.1 are innovative not only in scope and design, but also in that they require certain information to be made available to a defendant upon request. A written motion ad-

dressed to the trial court's discretion is no longer an essential prerequisite. This, of course, is not to say that the rule divests the trial court of authority to exercise an appropriate degree of control over the discovery process. Neither does Article V mandate unlimited discovery. Rule 17.5 imposes limitations on required prosecutorial disclosure to protect the prosecutor's work product, the identity of an informant where his identity is not relevant or material to the issues at hand, and material the disclosure of which would involve a substantial risk of grave prejudice to national security. Additionally, under Rule 19.4, the trial court is specifically vested with authority to order disclosures restricted or deferred.

The prosecuting attorney's obligations under this rule extend to material and information within the knowledge, possession, or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and regularly report, or with reference to the particular case, have reported to his office.

Rule 17.1(a)(i) is congruent with existing authority insofar as it requires disclosure of names of witnesses.

Rule 17.1(a)(ii) is also consonant with present law to the extent that it provides for discovery of written or recorded statements of a defendant. *See*, § 43-2011.2 (Supp. 1973). Insofar as discovery extends to the substance of oral statements by the defendant and written, recorded, and oral statements of codefendants, this provision is innovative.

Prior to the enactment of Act 381, a defen-



dant apparently could not, as a matter of right, compel production prior to trial of a copy of a written confession, at least where the confession would not itself furnish evidence that it was involuntarily given. *Howell v. State*, 220 Ark. 278, 247 S.W.2d 952 (1952). Neither could he force the disclosure of relevant statements made by witnesses against him, unless a "fair trial" was impossible without such disclosure. *Johnson v. State*, 250 Ark. 132, 464 S.W.2d 611 (1971). See, also, *Bates v. State*, 210 Ark. 1014, 198 S.W.2d 850 (1947). Subsequent to the enactment of Act 381, it has been held error to require a defendant to cross-examine a witness without making available the witness' pretrial statement; however, such error will not be found to require reversal absent a showing of resulting prejudice. *Rush v. State*, 252 Ark. 814, 481 S.W.2d 696 (1972).

The rationale justifying discovery of statements of codefendants is aptly put by the commentary to *Standards, Discovery* § 2.1:

The requirement that the defendant be allowed to inspect statements made by a codefendant rests on ... grounds which make it ... imperative that there be pretrial disclosure. In *Bruton v. United States*, 391 U.S. 123, [88 S. Ct. 1620, 20 L. Ed. 2d 476] (1968), the Supreme Court held that it was constitutional error to try one defendant under conditions where a codefendant's statement implicating the first defendant was before the jury, even under careful instructions that the statement was only admissible against the codefendant. If an adequate motion for severance is to be made or if the question of whether the codefendant's statement can be altered to remove the prejudice is to be decided at the appropriate time, it is clear that defense counsel must be able to examine it before trial. *Id.* at 61.

The effect of Rule 17.1(a)(iv) is primarily to confer as a matter of right a latitude for discovery now obtainable at the discretion of the trial court. The language of the proposed rule provides for somewhat greater disclosure than does that of its counterpart, § 43-2011.2(a) (Supp. 1973); discovery is not limited to results and reports of "physical or mental examinations" but extends to "any reports or statements of experts made in connection with the particular case" [emphasis supplied].

Adoption of this rule demonstrates the Commission's agreement with the *Standards Reporters* that nowhere is there greater need for pretrial disclosure or less risk of misuse of evidence than in this area. Unless adequate opportunity to examine this type of evidence is afforded, the chances for effective rebuttal are virtually foreclosed. On the other hand, disclosure in advance does not create any

hazard, because distortion or improper use of the evidence is well nigh impossible. See commentary to *Standards, Discovery* at 66-68.

Rule 17.1(a)(v) contemplates slightly broader discovery than existing authority found at §§ 43-2010 (Repl. 1964), and 43-2011.2 (b) (Supp. 1973). The proposed rule provides not only for disclosures of documents, etc., to be used at trial but also of material obtained from the possession of a defendant. There is no requirement for a showing of materiality.

The last subpart of 17.1(a) is concerned with discovery of criminal records of state witness, a topic on which Arkansas statutory law speaks only briefly and restrictively. See, Ark. Stat. Ann. § 5-833 (Supp. 1973) [now § 5-1102].

The prosecuting attorney's obligations under subpart (b) of Rule 17.1, as under subpart (a), accrue only when a request is made by the defendant.

Rule 17.1(b)(i) again exposes to scrutiny evidence presented to a grand jury. The proposed rule requires that the prosecutor disclose the substance of any relevant testimony before the grand jury and, consequently, makes for economy in discovering information supplemental to that forthcoming via Rule 17.1(a)(iii).

Rule 17.1(b)(ii) fills a void in existing law by providing for discovery of the use of electronic surveillance. While the prosecutor is required by the rule to inform the defendant of the fact of such surveillance, the rule does not oblige the prosecuting attorney to make complete revelation of all relevant information at the outset. The prosecutor retains control of the disclosure process; the flexibility built into the discovery process allows him to seek a protective order or an *in camera* showing if a defendant presses for information more specific than the prosecutor is inclined to provide. (Rules 19.4-19.6).

The focus of Rule 17.1(b)(iii) is on the relationship to the prosecuting authority of persons the prosecuting attorney anticipates calling as witnesses. This rule, like the other provisions of Rule 17.1(a) and (b), is drawn from *Standards, Discovery*. As the commentary to *Standards, Discovery* § 2.3 points out, this section deals with

... the relationship, if any, of persons to the prosecuting authority, information which may well have to be disclosed with respect to searches and seizures and to the taking of statements if, in fact, the relationship is such that the person may be regarded as a police or other law enforcement agent. This item has been stated separately, however, because it may also be the basis for a valid claim of entrapment, an issue, like the others, which should be decided prior to conviction [*sic*]. See, e.g., Sherman

v. United States, 356 U.S. 369, [78 S. Ct. 819, 2 L. Ed. 2d 848] (1958). *Id.* at 82.

The term “prosecuting authority” is intended to encompass any governmental entity lending assistance to the prosecutor actually conducting the prosecution of the case; accordingly, agencies of this or another state or of the political subdivisions of either or of the federal government may all be so categorized under appropriate circumstances.

Rule 17.1(c) advert to the circumstances surrounding searches and seizures and acquisition of statements from the defendant. It requires disclosure of material or information which might not be revealed by the prosecutor’s response to a request under Rule 17.1(a) but which might raise and dispose of certain constitutional, or other issues. *See*, commentary to *Standards, Discovery* at 82.

Rule 17.1(d) incorporates the due process requirement that evidence favorable to a defendant on issues of guilt or punishment be disclosed by the prosecutor. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Giles v. Maryland*, 386 U.S. 66, 87 S. Ct. 793, 17 L. Ed. 2d 737 (1967); *Smith v. Urban*, 245 Ark. 781, 434 S.W. 2d 283 (1968); and *Murchison v. State*, 249 Ark. 861, 462 S.W.2d 853 (1971). *See, also*, *Code of Professional Responsibility*, EC 7-13, DR 7-103 B.

In so far as the rule requires pretrial disclosure, it represents an extension of the mandate of *Brady*, *supra*, although that decision clearly requires that disclosure be timed so as to allow intelligent appraisal of the import of the matter disclosed. By obliging the prosecution to divulge information as part of a systematic process of pretrial discovery, the rule advances “the procedural objectives of permitting adequate preparation for, and minimizing interruptions of, a trial and providing for informed pleas . . . .” Commentary to *Standards, Discovery* at 73.

Rule 17.2 deals generally with the time for and manner of making discovery. Prosecutorial responsibility is defined chiefly in terms of the existence and availability of information. Under the rule, the prosecutor must perform the obligations detailed by Rules 17.1(a)-(c) “as soon as practicable.” Rule 17.2(b) provides a mechanism by which informal agreement as to disclosure may be reached.

The prosecuting attorney shall ensure that a flow of information is maintained between his office and his investigative personnel sufficient to place within his possession, control, or knowledge all material and information relevant to the defendant and the offense with which he is charged.

Rule 17.2(c) is drawn from Rule 15.1(c) of the Arizona Rules of Criminal Procedure and affords protection against mishaps and the rare instance of sharp dealing.

Rule 17.2(d) obliges the prosecutor to en-

sure that an adequate flow of information is maintained between investigative personnel and his office. It adopts the position taken by the *Standards* Advisory Committee that the problems in this area are more satisfactorily addressed by dealing in terms of what the prosecutor should do, not with what knowledge he should be charged. Arkansas law is silent in this area. *See, Standards, Discovery* at 81.

Rule 17.3 imposes a responsibility of a different sort on the prosecutor: on request of a defendant, the prosecuting attorney is required to make a “diligent good faith” effort to secure and convey to the defendant discoverable material in the hands of other governmental personnel. It should be observed that request and specification of material or information by the defendant are necessary to invoke the rule’s requirements. Subject to the requirements of Rule 17.1(e), the prosecutor need not as a routine discovery procedure instigate a broad scale search for material relating to every defendant. It does not appear that there is any existing statutory or decisional law definitely providing solutions to problems in this area.

Rule 17.4 confers authority on the trial court to require disclosure of material or information not discoverable under the preceding provisions. The court’s authority under this rule is considerable, being limited only by the requirement that discovery be restricted to “relevant” matter. In this regard, both the proposed rule and *Standards, Discovery* § 2.5 from which it is drawn contrast with present authority, which specifically delineates circumstances under which discovery is permissible. *See*, §§ 43-2011 (Repl. 1964); 43-2011.1 *et seq.* (Supp. 1973).

Rule 17.5 is concerned with matters not subject to compulsory disclosures except under circumstances where nondisclosure would operate as an infringement upon a constitutional right. Existing law on this subject is found at § 43-2011.2 (Supp. 1973) and precludes discovery of reports, memoranda, or other “internal state documents made by state agents.” As is the case with the parallel *Standards, Discovery* provisions, the reports or statements of experts would remain discoverable pursuant to Rule 17.1(a)(iv).

Rule 17.5(b) speaks in language identical to that of *Standards, Discovery* § 2.6. The subject of the rule — informant identity — is perceived to require special treatment. In fact, “[t]he value of informants to effective law enforcement is so highly regarded that encouragement of their use, through protection of their identity, has resulted in the development of one of the few privileges accorded to the prosecution.” *Standards, Discovery* at 91, 92. As a consequence, the identity of an informant is not discoverable absent an irreconcil-



able clash between a defendant's constitutional rights and the law enforcement interests sought to be protected. Both the majority and concurring opinions in the recent decision in *Bennett v. State*, 252 Ark. 128, 477 S.W.2d 497 (1972) dwell on the problem of disclosure of informant identity. See, also, *McCray v. Illinois*, 386 U.S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967).

Rule 17.5(c) provides for nondisclosure in cases presenting a "substantial risk of grave prejudice to national security." Under this subpart, "... when national security information is only tangential to the prosecution of the case and the maintenance of secrecy is clearly of importance paramount to the advantages of disclosure to the criminal justice system, it was thought appropriate to indicate that disclosures should not be required." *Standards, Discovery* at 93.

Rule 18 treats permissible and required disclosures by the defendant. Rule 18.1 permits a judicial officer, subject to constitutional limitations, to compel a defendant to submit to a variety of examinations and procedures for the purpose of identification. The disclosures involved are nontestimonial ones not presently within the ambit of the constitutional right against self-incrimination. No Arkansas statutory law is addressed to this topic. The proposed rule is taken from *Standards, Discovery* § 3.1. See, commentary to *Standards, Discovery* at 94-97. Pertinent recent decisions of the United States Supreme Court are *United States v. Dionisio*, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973) (voice exemplars); *United States v. Mara*, 410 U.S. 19, 93 S. Ct. 774, 35 L. Ed. 2d 99 (1973) (handwriting exemplars); *Cupp v. Murphy*, 412 U.S. 291, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973) (fingernail scrapings).

Rule 18.2 is drawn from *Standards, Discovery* § 3.2 which in turn was adopted from Fed. R. Crim. P. 16(c). It represents a departure from Arkansas law in that it does not condition disclosure by a defendant upon his prior successful discovery efforts. See, § 43-2011.2(c) (Supp. 1973).

Rule 18.3, governing discovery of proposed defenses, might be said to have a very narrow counterpart in § 43-1304 (Supp. 1973) which construably imposes a "disclosure" requirement with respect to an insanity defense. This subpart is fashioned after the model provided by *Standards, Discovery* § 3.3 and is harmonious with the requirements of *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970); and *Wardius v. Oregon*, 412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973). As presently conceived the rule goes one step further than the *Standards* version by removing the matter from the court's discretion.

Rule 19 ensures that the discovery establishes procedures restricting the scope of discovery where extraordinary circumstances exist.

Rule 19.1 is drawn from *Standards, Discovery* § 4.1 and is without counterpart in present Arkansas law, which treats only the most egregious conduct involving threats and bribes. See, Ark. Stat. Ann. § 41-2804 (Repl. 1964); *Davis v. State*, 242 Ark. 43, 411 S.W.2d 531 (1967).

Rule 19.2 is consonant with present law. See, § 43-2011.2(g) (Supp. 1973). The language of the *Standards, Discovery* model, § 4.2, has been refined to make it clear that material discovered subsequent to a request seeking proper disclosure need be disclosed only if covered by that previous request.

Rule 19.3 imposes custody and use restrictions on discovered materials. It is substantially in accord with suggested methods of controlling records of electronic surveillance. *Alderman v. United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176, rehearing denied *sub nom.*, *Ivanov v. United States*, 394 U.S. 939, 89 S. Ct. 1177, 22 L. Ed. 2d 475 (1969).

Rule 19.4, fashioned after *Standards, Discovery* § 4.4 and Fed. R. Crim. P. 16(e) permits "application by the party concerned to the court for a protective order which can be tailored to the particular circumstances of the case." *Standards, Discovery* at 101. The rule is accordant with Ark. Stat. Ann. §§ 43-2011.2, 43-2011.3 (Supp. 1973).

Rule 19.5 is concerned with excision of nondiscoverable portions of documents. Patterned after *Standards, Discovery* § 4.5, the rule is similar in substance to existing statutory authority. See, § 43-2011.3(c) (Supp. 1973).

Rule 19.6, providing for *in camera* proceedings, ensures preservation of the confidentiality of material sought to be made the subject of a protective order. The rule is cast so as to allow *in camera* proceedings upon the request of any interested person; present restrictive authority is rejected in favor of the *Standards, Discovery* formulation. Compare §§ 43-2011.2(e), 43-2011.3(c) (Supp. 1973) with *Standards, Discovery* § 4.6.

The last subpart of Rule 19 provides sanctions for willful violations of discovery rules. Decisions as to what sanctions to apply and when to apply them have been left to the discretion of trial courts.

Rule 20 sets out omnibus hearing procedure prior to trial. No complementary authority is found in Arkansas statutory or decisional law.

Rule 20.1 acknowledges the existence of three more or less distinct pretrial stages: exploratory, omnibus, and trial planning. The first is characterized by lack of trial court

supervision; the second and third, by judicial guidance. The rule further makes clear that the discovery process is a flexible one, and, accordingly, all stages need not be given the same treatment in every case. They may be "telescoped." For example, no need for a trial planning stage exists where it is anticipated that the defendant will enter a guilty plea. *See, Standards, Discovery* at 110.

Rule 20.2 provides a framework within which the omnibus hearing should be scheduled.

The nature and scope of the actual hearing are taken up by Rule 20.3. The hearing, and the second stage generally, function to ensure that discovery has been properly conducted and that issues are simply and efficiently raised. *Standards, Discovery* at 115. In other words, following the first stage, which is characterized by the absence of court supervision, there is need for court intervention to ensure that what has been done has been correctly done, and that what needs to be done will be done properly and without unnecessary delay. *Standards, Discovery* at 115.

Rule 20.3 is virtually a verbatim rendition of *Discovery* § 5.3, the commentary to which elucidates its scope and purposes as follows:

The omnibus hearing is designed to serve the cases destined for guilty plea disposition as well as the cases destined for trial, the former category including the bulk of criminal cases. ... In either event, it is essential that the accused be well informed as to the issues in the case ... ; and there would seem to be no reason why a trial should be required in order for him to have an opportunity to evaluate the evidence against him. In either event, he must have an opportunity to raise procedural and constitutional issues, collateral to guilt or innocence. On one hand, the considerable expenditures of judicial resources required for a trial should not be made so long as the trial is subject to being invalidated on account of undecided constitutional or procedural issues. On the other hand, if the only issues an accused wishes to urge are such collateral ones, the need for the trial may be obviated by treating the issues during the proceedings prior to trial. ... Thus, the Omnibus Hearing is designed to serve pretrial needs regardless of whether the given case is expected to go to trial. This is not to say, of course, that an Omnibus Hearing will be needed in every case. ... However, unlike the Pretrial Conference, which is designed for the unusual case ... , the processing of most cases covered by this report ... should include an Omnibus Hearing, both as a matter of fair and expeditious processing and to record the disposition of issues which might affect the validity of a conviction.

Four features distinguish the Omnibus Hearing from existing practices and procedures prior to trial: (1) its attempt to bring together at one court appearance as much as possible of the court actions required prior to trial [Rule 20.3 (a)(iv) and (b)], thus saving all persons concerned time, energy and other resources; (2) its requirement of routine trial court exploration of the claims customarily available to the accused, utilizing a check-list to ensure in so far as is possible that none remain unexposed, unnecessarily subjecting the proceedings to subsequent invalidation; (3) its requirement that these customary claims be raised and considered in so far as is possible without the preparation and filing of papers which so frequently perform no useful function in the proceedings [Rule 20.3(b)]; and (4) its requirement that claims which are available for assertion at this time be waived if not asserted [Rule 20.3(c)]. There are a number of other features essential to a properly conducted Omnibus Hearing which are set forth in the provisions of [Rule 20.3]. But it is this combination of these four provisions which renders it unique. *Standards, Discovery* at 116-117.

The focus of the omnibus hearing is initially on whether the rules respecting representation by counsel have been complied with (20.3(a)(i)).

The next item for consideration is whether discovery has been completely effectuated (20.3(a)(ii) and (iii)). Issues turning on questions related to excisions, protective orders, etc., should be resolved at this point, or at least a date should be set for hearing and determination.

Pursuant to Rule 20.3(a)(iv), the court should then rule on all pending motions.

Rule 20.3(a)(v), (vi) and (vii) deal respectively with identifying and resolving constitutional issues, setting a time for pretrial conference, and permitting a defendant to change his plea.

Rule 20.3(c) provides for waiver, a concept essential to the orderly disposition of issues and finality of proceedings.

Rules 20.3(d) and (e) deal with stipulations and the making of a verbatim record and require no elucidation here.

The provisions of Rule 20.4 are addressed with some particularity to the scope of the pretrial conference, a procedural stage treated as a discrete entity to be distinguished from the omnibus hearing proper.

It is anticipated that a pretrial conference will be useful only in the exceptionally complex case. This fact, considered in light of experience showing that only a small number of cases actually go to trial, indicates that the need for the conference will arise only infrequently.



For an extended discussion of the pretrial conference and a collection of the authority on the subject, see, *Standards, Discovery* at 124-131.

### **Rule 17.1. Prosecuting attorney's obligations.**

(a) Subject to the provisions of Rules 17.5 and 19.4, the prosecuting attorney shall disclose to defense counsel, upon timely request, the following material and information which is or may come within the possession, control, or knowledge of the prosecuting attorney:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant or a codefendant;

(iii) those portions of grand jury minutes containing testimony of the defendant;

(iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations, scientific tests, experiments or comparisons;

(v) any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in any hearing or at trial or which were obtained from or belong to the defendant; and

(vi) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial, if the prosecuting attorney has such information.

(b) The prosecuting attorney shall, upon timely request, inform defense counsel of:

(i) the substance of any relevant grand jury testimony;

(ii) whether, in connection with the particular case, there has been any electronic surveillance of the defendant's premises or of conversations to which he was a party;

(iii) the relationship to the prosecuting authority of persons whom the prosecuting attorney intends to call as witnesses.

(c) The prosecuting attorney shall, upon timely request, disclose and permit inspection, testing, copying, and photocopying of any relevant material regarding:

(i) any specific searches and seizures;

(ii) the acquisition of specified statements from the defendant.

(d) Subject to the provisions of Rule 19.4, the prosecuting attorney shall, promptly upon discovering the matter, disclose to defense counsel any material or information within his knowledge, possession, or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor.

#### **1987 Unofficial Supplementary Commentary to Rule 17.1**

##### **Sanctions for Non-Compliance.**

Imposing sanctions for non-compliance with a discovery rule is left to the discretion of the trial court under Rule 19.7. The movant must show prejudice. *Renton v. State*, 274 Ark. 87, 622 S.W.2d 171 (1981); *Limber v. State*, 264 Ark. 479, 572 S.W.2d 402 (1978).

In *Masingill v. State*, 7 Ark. App. 90, 644

S.W.2d 614 (1983), the Arkansas Court of Appeals held that reversal of a conviction was required because the state withheld details of a crime by failing to supply defense counsel with the name of an uncharged participant in the offense. A witness called by the state at trial implicated appellant and a city councilman in the commission of the crime. When

appellant attempted to call the councilman to deny the allegations, the state objected on grounds that he was not listed as a defense witness, and the court sustained the objection. The court of appeals reversed, finding that "the State withheld details of the crime to which appellant was entitled and in doing so clearly served to frustrate his defense preparation." 7 Ark. App. 90, 92, 644 S.W.2d 614, 615 (1983).

In a later decision, *Speer v. State*, 18 Ark. App. 1, 708 S.W.2d 94 (1986), the court refused to reverse the trial court's overruling of appellant's contention that judgment should not be entered because the state did not respond in writing to his motion for a bill of particulars. The court distinguished *Masingill* by observing that in *Masingill* the prosecution not only failed to comply properly with appellant's discovery motion but, in addition, "improperly withheld details of the alleged crime which should have been set out in the state's bill of particulars." *Id.* at 6, 708 S.W.2d 94, 96 (1986). Because the details not revealed in *Masingill* were that appellant and another party had been implicated in the offense, these two cases suggest that in response to a Rule 17.1 motion the prosecutor should disclose any other persons involved in a crime.

Not all failures to file complete responses to Rule 17.1 discovery motions will result in reversal. See, e.g., *Limber v. State*, 264 Ark. 479, 572 S.W.2d 402 (1978).

The trial court need not impose sanctions under Rule 19.1 in the absence of prejudice. *Smith v. State*, 10 Ark. App. 390, 664 S.W.2d 505 (1984). And even where a defendant is sentenced to life without parole, reversal will not be found necessary absent prejudice where the prosecutor's failure to disclose information in response to a Rule 17.1 motion is attributable to oversight. *Lasley v. State*, 274 Ark. 352, 625 S.W.2d 466 (1981); *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, *cert. denied*, 464 U.S. 835, 78 L.Ed.2d 119 (1983). Though knowledge of the police that a defendant has made a statement is imputed to the prosecutor who fails to disclose the statement, *Williams v. State*, 267 Ark. 527, 593 S.W.2d 8 (1979), where the state and defense *actually* find out about the statement at the same time, the trial court is not required to impose sanctions. *Henry v. State*.

The commentary language used as a basis for the court's decision in *Williams* has a novel history. The April 1974 proposed official draft of the Rules of Criminal Procedure set out the following proposed Rule 17.1(e):

The prosecuting attorney's obligations under this rule extend to material and information within the knowledge, possession, or control of members of his staff and of any others who have participated in the

investigation or evaluation of the case and regularly report, or with reference to the particular case, have reported to his office.

In its December 22, 1975 per curiam order adopting the rules, *In Re: The Arkansas Criminal Code Revision Commission, Ex Parte*, 259 Ark. 863, 866, 530 S.W.2d 672, 674 (1975), the Supreme Court amended the Rule as follows:

10. Rule 17.1(e) appearing on Lines 43-47 of Page 47 is eliminated from the Rule but is reclassified as part of the commentary on Rule 17.1.

In *Williams*, the court stated: "There is no doubt, then, that the police officer knew of these statements. That knowledge is imputed to the prosecuting attorney. See Arkansas Rules of Criminal Procedure, Rule 17.1. See also commentary to Article V." 267 Ark. 537, 531, 593 S.W.2d 8, 10 (1980). The Court's decision, in other words, turned on language excised from the rule and placed in the commentary by the Court.

#### Time of Disclosure.

In *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981) the defendant moved under Rule 17.1 for production of all written and oral statements made by him. The prosecutor permitted defense counsel to review his file. Thereafter, defendant testified at trial that he had never admitted guilt, whereupon he was impeached on cross-examination by inquiries about a previously undisclosed statement to a sheriff. The Arkansas Supreme Court opined as follows:

There is no doubt about the timeliness of the request for the information, about the State's obligation to furnish the information, or about the prejudice resulting to defendant from use of such information in cross-examination, in rebuttal, and again in closing argument. If our discovery rules are to be meaningful, they must be complied with where, as here, a timely request is made, there is no finding of compliance by the State, and there is resulting prejudice to the defense.

272 Ark. at 13, 612 S.W.2d at 102.

Even though Ark. Stat. Ann. § 43-2011.3 (Repl. 1977) only requires that the prosecution furnish a witness statement after the witness has testified on direct examination, the Arkansas Supreme Court, in reliance upon Rule 17.1, has held that the state must make such disclosures "in sufficient time to permit [defense] counsel to make beneficial use thereof." *Williamson v. State*, 263 Ark. 401, 405, 565 S.W.2d 415, 418 (1978). Compare, *Blakemore v. State*, 268 Ark. 145, 594 S.W.2d 231 (1980); *Nelson v. State*, 262 Ark. 391, 557 S.W.2d 191 (1977).

In *Williamson*, after a sheriff had testified, his notes were reviewed by appellant's counsel, who discovered that they disclosed a statement made by the prosecuting witness



about her assailant's appearance. The prosecuting witness had previously testified and denied making any such statement. The Court reversed appellant's conviction. The decision did not explicitly strike down any portion of § 43-2011.3 but speaks broadly. In any event, it appears clear that the prosecutor cannot postpone delivering to the defense counsel a copy of an exculpatory statement of a witness until that witness has testified and cross-examination is about to begin. See Rule 17.1(d). And not only is counsel for defendant entitled to copies of statements, he is also entitled to copies of the tapes from which transcripts have been prepared so he can confirm the accuracy of the transcripts. *Williamson*, *supra*.

In *Heffernan v. State*, 278 Ark. 325, 645 S.W.2d 666 (1983), the Supreme Court found that the trial court did not err when it denied appellant's motion for a continuance on grounds that the prosecuting attorney failed to supply copies of lab reports until the day of the trial. The Court found that the prosecutor did not receive the reports himself until the same day. It would appear that the surprise and prejudice to appellant would, however, be the same, regardless of when the prosecuting attorney received the report in question and irrespective of whose fault it was that it was unavailable until the day of trial. The same may be said of the Court's reasoning in *Henry* as well.

#### **Failure to Comply; Trial Court to Rule on Prejudicial Effect.**

Failure of the trial court to ascertain whether a failure to comply with Rule 17.1 has had prejudicial effect is itself prejudicial. *Nelson v. State*, 274 Ark. 113, 622 S.W.2d 188 (1981).

#### **Knowledge of Co-Defendant's Counsel Not Imputed to Defendant's Counsel.**

In *Thrasher v. State*, 270 Ark. 322, 604 S.W.2d 931 (1980) the Arkansas Supreme Court overturned a conviction after finding that the trial court erred in overruling appellant's motion in limine based upon the prosecutor's failure to provide him with a copy of material requested pursuant to Rule 17.1, even though the prosecutor had supplied such information to counsel for appellant's co-defendant and assumed that he would make this material available to counsel for appellant.

#### **Reciprocal Duty of Disclosure by Defendant.**

The sanctions for failure to make required disclosures have also been applied to defendants. See *Roleson v. State*, 277 Ark. 148, 640 S.W.2d 113 (1982), where the trial court was upheld in refusing to permit a witness to testify to exculpatory matters that appellant had already testified about upon a showing

that the witness' identity had not been disclosed to the prosecution.

Also, see *Tubbs v. State*, 19 Ark. App. 306, 720 S.W.2d 331 (1986), where the Arkansas Court of Appeals upheld a trial court ruling that a defense witness should not be permitted to testify about the bias of a prosecution witness toward appellant. The statement giving rise to the claim of bias did not come to the attention of counsel for appellant until the morning of trial, although it occurred over a week before the trial date. The record did not disclose how notice of the statement was transmitted to appellant's counsel or why it was not received sooner. The Court of Appeals found that, had the statement been communicated to the prosecuting attorney sooner, he would have had the opportunity to investigate the statement.

#### **Police Investigative Reports.**

In regard to discovery of police investigative reports, compare *Brown v. State*, 261 Ark. 683, 250 S.W.2d 776 (1977) with *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978). Rule 17.1(a)(v), requiring disclosure of "any ... documents ... which the prosecuting attorney intends to use in any hearing or at trial" (emphasis added) is ambiguous. If a police investigator testifies from recently made notes summarizing the contents of previously made reports, are the reports being "used"? In *Goodwin* the Arkansas Supreme Court said no. In *Brown* the Court did require the prosecution to divulge reports filed by an undercover agent detailing his activities, apparently on grounds that the reports might negate guilt and therefore be discoverable under Rule 17.1(d). Under the authority of *Williamson v. State*, 263 Ark. 401, 565 S.W.2d 415 (1978), perhaps reports from which notes are made should be discoverable for the same reason that tapes from which transcripts are typed are discoverable. There appears to be no other means for defense counsel, the trial court, or the appellate court to ascertain whether the notes accurately reflect the substance of the reports on which they are based.

#### **Witness Statements.**

Production of witness statements is governed by Ark. Stat. Ann. § 43-2011.3 (Repl. 1977). Where statements of state witnesses are exculpatory, Rule 17.1(d) also requires disclosure. Moreover, upon timely motion, exculpatory statements should be made available to defense counsel as soon as practicable. The prosecutor may not wait until the witness has given testimony under direct examination and cross-examination is about to begin. *Williamson v. State*, 263 Ark. 401, 565 S.W.2d 415 (1978). Compare *Blakemore v. State*, 268 Ark. 145, 594 S.W.2d 231 (1980), where the Arkansas Supreme Court reversed the trial court's denial of a motion by defense counsel at the

beginning of cross-examination for production of a typewritten statement. The trial court ruled that the case had been pending over a year and that the motion was untimely. The Supreme Court disagreed:

The court's rulings were wrong. Criminal Procedure Rule 17.1(b), governing discovery, merely requires the State to disclose the names and addresses of the State's witnesses. It is provided by statute, however, that after a witness called by the State has testified on direct examination, the court "shall," on motion of the defendant, order the State to produce any relevant statement of the witness in its possession. Ark. Stat. Ann. § 43-2011.3(b) (Repl. 1977). Thus the requests for the statements were timely.

*Blakemore* at 146-47, 594 S.W.2d at 232-33.

Ordinarily, written statements by witnesses given before trial are not discoverable until the witness has testified on direct examination, unless the statements are exculpatory. The inculpatory statement of any witness can be obtained after his testimony and before cross-examination. *Blakemore*; *Nelson v. State*, 262 Ark. 391, 557 S.W.2d 191 (1977). Exculpatory statements given by witnesses should be divulged promptly, regardless of whether a motion to disclose is made by defense counsel under Rule 17.1(d).

In *Lewis v. State*, 267 Ark. 933, 591 S.W.2d 687 (Ct. App. 1979), appellant contended that he was prejudiced by the state's failure to disclose to him after timely motion that original versions of statements by state witnesses existed, though he had been provided verbatim typewritten statements prior to trial. The court of appeals held that "no prejudice to the defendant could have occurred under the circumstances" and that appellant's argument that "what happened constituted a violation of Rule 17.1 ... is without merit." 267 at 935, 591 S.W.2d at 688.

Two judges dissented, arguing that the statements should have been disclosed because they might have led appellant to discover information about the investigation conducted by the officer taking the statement, and that information could be exculpatory under Rule 17.1(d).

#### **What Constitutes Showing of Prejudice.**

What constitutes a showing of prejudice by appellant is uncertain. Compare *Renton v. State*, 274 Ark. 87, 622 S.W.2d 171 (1981) (no prejudice found where arresting officer permitted to testify to statement made by appellant at time of arrest, even though statement was not disclosed to appellant pursuant to Rule 17.1 motion) with *Nelson v. State*, 274 Ark. 113, 622 S.W.2d 188 (1981) (trial court erred by receiving testimony of state witness whose identity was not disclosed to appellant prior to trial). In *Nelson*, prejudice was pre-

sumed under circumstances similar to those in *Renton*, where the court summarily dismissed such a claim. See, also, *Vasquez v. State*, 287 Ark. 468, 472, 701 S.W.2d 357, 360 (1985): "We do not grant a reversal for error which is unaccompanied by a showing of prejudice." And, see *Berna v. State*, 282 Ark. 563, 670 S.W.2d 435 (1984).

#### **Rebuttal Testimony.**

Difficulties presented when, without prior identification under Rule 17.1, the state calls witnesses as "rebuttal witnesses" are dealt with in *Vasquez v. State*, 287 Ark. 468, 701 S.W.2d 357 (1985). In *Vasquez* the trial court permitted the state to call a witness not previously disclosed to rebut answers given by appellant during cross-examination. The purpose of the testimony was to show that appellant had placed decedent in fear during a telephone conversation before his death, presumably to show purpose and premeditation. The Supreme Court held that the state should have presented all evidence as to premeditation in its case in chief but, in effect, found that if the evidence was admitted to prove premeditation it was harmless error, since the record contained enough other evidence of premeditation to support the verdict of guilt of first degree murder.

Not all testimony offered to impeach a defendant's response to questions on cross-examination may be characterized as rebuttal testimony. In *Birchett v. State*, 289 Ark. 16, 708 S.W.2d 625 (1986), the Arkansas Supreme Court reversed the conviction of a defendant found guilty after the state was permitted to call a theretofore undisclosed witness to rebut appellant's cross-examination testimony that he had not spoken to his girlfriend about committing the robbery in question. The Arkansas Supreme Court, relying on *State v. Manus*, 93 N.M. 95, 597 P.2d 280 (1979), found that the state intentionally withheld the witness' testimony until after posing questions to appellant on cross-examination "clearly designed to manufacture a rebuttal situation." 289 Ark. at 19, 708 S.W.2d at 627. The Court in *Manus* placed emphasis on the fact that genuine rebuttal evidence is that offered in reply to new matters. For the purposes of disclosure under Rule 17.1 it may now be necessary in Arkansas to show that testimony sought to be offered as rebuttal testimony is in response to new matters raised by evidence offered after the sponsor of the rebuttal witness has rested.

In addition, see *Garcia v. State*, 18 Ark. App. 110, 711 S.W.2d 176 (1986), where the court apparently held that a party knowing that a witness called by the opposing party will testify against him must attack his credibility at that time. Defendant Garcia sought to call as rebuttal witnesses at the end of the defense case the prosecutor and counsel for



one Wells, a witness to the aggravated robbery, in order to rebut Wells's testimony for the state that he had not been promised leniency if he would testify against Garcia. The court held that Wells's identity had been disclosed under Rule 17.1 and noted that at a pretrial suppression hearing counsel for Garcia had cross-examined an officer who investigated the robbery and who at that time had testified that Wells had given a statement implicating Garcia. The court stated:

"In sum, the record clearly reflects appellant was aware that Wells would be called as a witness and his credibility would be in issue. Nonetheless, appellant waited until the end of his case to call the prosecutor and Wells's attorney in appellant's efforts to impeach Wells's story."

18 Ark. App. at 113, 711 S.W.2d at 178.

The court of appeals upheld the trial court's ruling that the request was untimely. The court does not indicate when and how Garcia should have impeached Wells's testimony if not during Garcia's case.

In *Parker v. State*, 268 Ark. 441, 597 S.W.2d 586 (1980), the Arkansas Supreme Court held that Rule 17.1(a) does not require the prosecuting attorney to disclose names of rebuttal witnesses. A psychologist and a psychiatrist testified that appellant was sane after the defense presented testimony to the contrary. The court went on to point out that the defense had the burden of proving insanity. Under the *State v. Manus* test discussed above, the state's witnesses were not rebuttal witnesses.

### Knowledge of Police Imputed to Prosecutor.

Information within the knowledge of the police is imputed to the prosecutor. *Dupree v. State*, 271 Ark. 50, 607 S.W.2d 356 (1980); *Browning v. State*, 274 Ark. 13, 621 S.W.2d 688 (1981).

### Reports or Statements of Experts.

In *Dumond v. State*, 290 Ark. 595, 721 S.W.2d 663 (1986), the Arkansas Supreme Court held that a defendant is entitled to the opportunity, apart from his own investigations, to challenge conclusions drawn from tests performed by witnesses for the state. Fingerprints taken from an automobile were not made available to counsel for defendant, since the prints were indistinct and did not prove or exclude the possibility of guilt. The Arkansas Supreme Court held that the state should have furnished information about the tests to counsel for defendant. The court also held, however, that defendant waited too long to ask for a mistrial and waived his objection.

### Statement of Witnesses Taken Pursuant to Prosecutor's Subpoena.

Statements of witnesses taken pursuant to a prosecutor's subpoena are not subject to the Rule 17.1(b)(i) requirement that the substance of any relevant grand jury testimony be divulged. *Alford v. State*, 291 Ark. 243, 724 S.W.2d 151 (1987).

## RESEARCH REFERENCES

**ALR.** Failure of State Prosecutor to Disclose Exculpatory Physical Evidence as Violating Due Process — Weapons. 53 ALR 6th 81.

Failure of State Prosecutor to Disclose Exculpatory Physical Evidence as Violating Due Process — The Personal Items Other Than Weapons. 55 ALR 6th 391.

Absolute Immunity for Failing to Disclose Exculpatory Evidence Under 42 U.S.C.S. § 1983 Following *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). 63 ALR 6th 255.

**U. Ark. Little Rock L.J.** Stockburger, Survey of Arkansas Law: Criminal Procedure, 2 U. Ark. Little Rock L.J. 217.

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### **In General.**

A defendant in a criminal case cannot rely upon discovery as a total substitute for his own investigation. *Heffernan v. State*, 278 Ark. 325, 645 S.W.2d 666 (1983); *David v. State*, 295 Ark. 131, 748 S.W.2d 117 (1988).

The duty of disclosure requires that the defendant have the opportunity to discover the state's evidence prior to trial. *Clark v. State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989).

If a prosecutor's office intends to fulfill its discovery obligations by relying upon an open-file policy, it must make every practicable effort to ensure that the information and records contained in the file are complete and that the documents employed at trial are identical to the material available to the defense in the open file. *Robinson v. State*, 317 Ark. 512, 879 S.W.2d 419 (1994).

### **Purpose.**

Purpose of rule is to reduce delays during trial. *Williamson v. State*, 263 Ark. 401, 565 S.W.2d 415 (1978).

The purpose of subdivision (a)(i) of this rule is to give the defendant adequate notice of the witnesses to be called against him or her in the state's efforts to present its case. *Birchett v. State*, 289 Ark. 16, 708 S.W.2d 625 (1986).

### **Applicability.**

Sections 16-97-101 and 16-97-102 do not prevent the rules of discovery from applying to the sentencing phase of a bifurcated trial. *Phillips v. State*, 321 Ark. 160, 900 S.W.2d 526 (1995).

The disclosure rule in subsection (d) of this rule applies to exculpatory and impeachment evidence. *Smith v. State*, 326 Ark. 520, 932 S.W.2d 753 (1996).

### **Appellate Review.**

Where defendant argued that state witness should not have been permitted to testify because her name was not included on state's witness list, defendant's failure to abstract parts of the record relating to his discovery requests precluded the appellate court from considering the issues. *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996).

Where prosecution used undisclosed documents during cross-examination, but objection thereto was made only during the rebuttal phase of the trial, the objection was untimely and failed to preserve the discovery-based objection for appellate review. *Bayless v. State*, 326 Ark. 869, 935 S.W.2d 534 (1996).

### **Bill of Particulars.**

In the absence of prejudice, there is no error in failing to supply a bill of particulars when complete discovery has been granted. *Limber v. State*, 264 Ark. 479, 572 S.W.2d 402 (1978).

### **Burden of Proof.**

When testimony has not been properly disclosed by the prosecution, the burden is on the defendant to establish that the omission was sufficient to undermine confidence in the outcome of the trial. *Nicholson v. State*, 319 Ark. 566, 892 S.W.2d 507 (1995).

### **Change in Counsel.**

The right of discovery is the right of the defendant, not the personal right of his attorney, and where substituted counsel failed to show circumstances that required a repetition of disclosures made to defendant's original attorney, the trial court did not abuse its discretion in refusing to grant a continuance because the prosecuting attorney did not repeat the disclosures. *Rowland v. State*, 263 Ark. 77, 562 S.W.2d 590 (1978).

### **Defendant's Letter to Judge.**

Applying the plain language of the Rules of Criminal Procedure, including this rule and Ark. R. Crim. P. 17.2 and 19.2, it seemed at first glance that the state's conduct amounted to a violation of the discovery rules, but the Arkansas Supreme Court had interpreted the discovery rules to focus on prejudice to a defendant; appellant wrote the letter to the judge and knew of its existence, and he was unable to show that he was prejudiced by the state's failure to disclose the letter until the state cross-examined him, and in the absence of demonstrable prejudice, the court had to affirm. *Smith v. State*, 2012 Ark. App. 130, — S.W.3d —, 2012 Ark. App. LEXIS 221 (Feb. 8, 2012).

### **Discretion of Court.**

There is no abuse of discretion in a trial court's failure to grant a continuance where there is sufficient time allowed the defense to make beneficial use of evidence. *Clark v.*



State, 26 Ark. App. 268, 764 S.W.2d 458 (1989).

The circuit court lacked the authority to direct the prosecutor as to what scientific tests to perform in its investigation and trial preparation; a circuit court may not perform the duties of the prosecuting attorney. *State v. Pulaski County Circuit Court*, 316 Ark. 514, 872 S.W.2d 414 (1994).

#### **Due Process.**

Subsection (d) of this rule incorporates the due process requirement that evidence favorable to a defendant on issues of guilt or punishment be disclosed by the prosecutor. *Yates v. State*, 303 Ark. 79, 794 S.W.2d 133 (1990).

#### **Effect of Noncompliance.**

Where the prosecutor failed to comply properly with defendant's discovery motion requesting names of all state witnesses and also improperly withheld details of the alleged crime which should have been set out in the state's bill of particulars, defendant's conviction for tampering with evidence was reversed. *Masingill v. State*, 7 Ark. App. 90, 644 S.W.2d 614 (1983).

When the state is charged with knowledge of the existence of a material witness and fails in response to a discovery order to disclose that information, it should not be assumed that in every case a cursory opportunity to interview the witness will cure the omission because there are instances where the demands of a fair trial require the granting of a continuance. *Lewis v. State*, 286 Ark. 372, 691 S.W.2d 864 (1985).

The Supreme Court did not grant sanctions against the state for withholding the confession of another person, even though the confession, even with its inconsistencies, was clearly exculpatory of the defendant, and the arguments for withholding it were not impressive. *State v. Scott*, 289 Ark. 234, 710 S.W.2d 212 (1986).

Failure to disclose substance of statements by co-defendant did not warrant mistrial in view of nature of discovery violation, nature of testimony, and availability of other sanctions. *Shamlin v. State*, 23 Ark. App. 39, 743 S.W.2d 1, cert. denied 488 U.S. 863, 109 S. Ct. 163, 102 L. Ed. 2d 133 (1988).

Where the petitioner did not establish that had evidence been disclosed to him the result probably would have been different, the petitioner was not entitled to relief under this rule. *Snell v. Lockhart*, 791 F. Supp. 1367 (E.D. Ark. 1992), cert. denied 490 U.S. 1075, 109 S. Ct. 2090, 104 L. Ed. 2d 653 (1989), aff'd in part and rev'd in part 14 F.3d 1289 (8th Cir. 1994).

When the state violates this rule, the court has four options under Rule 19.7: (1) the evidence may be excluded; (2) discovery or

inspection may be ordered; (3) a continuance can be granted; and (4) an appropriate order may be entered depending on the circumstances; it is within the trial court's discretion which sanction to employ. *Reed v. State*, 312 Ark. 82, 847 S.W.2d 34 (1993).

A continuance may be sufficient to cure the state's failure to comply with this rule. *Reed v. State*, 312 Ark. 82, 847 S.W.2d 34 (1993).

The key in determining if a reversible discovery violation exists is whether the defendant was prejudiced by the prosecutor's failure to disclose. *Scroggins v. State*, 312 Ark. 106, 848 S.W.2d 400 (1993).

Defendant's motion for a continuance denied where the evidence from the state's alleged discovery violation was at most cumulative and no prejudice to defendant resulted. *McNeese v. State*, 326 Ark. 787, 935 S.W.2d 246 (1996).

#### **Exclusion of Evidence Not Disclosed.**

This rule requires that the prosecuting attorney disclose to defense counsel, upon timely request, any material and information the prosecutor intends to use in any hearing or at trial but the exclusion of evidence not so disclosed is not mandatory unless there is a likelihood that prejudice will result. *Smith v. State*, 10 Ark. App. 390, 664 S.W.2d 505 (1984).

#### **Exculpatory Evidence Withheld.**

Where the defendant claimed that information was withheld in violation of subsection (d) of this rule tending to negate his guilt, and the trial judge pronounced the statement free of exculpatory information, the record on appeal was supplemented to include the information. *Snell v. State*, 290 Ark. 184, 717 S.W.2d 818 (1986).

Under subsection (d) of this rule, the prosecuting attorney is obliged to disclose to defense counsel any material information within the prosecutor's knowledge, possession, or control that tends to negate the guilt of the defendant as to the offense charged or would tend to reduce any resulting punishment, but where defendant, not the state, called a witness, and there was no indication that defendant had been in any way prejudiced by defendant's failure to have received the witness' prior statement, the court would not reverse for nonprejudicial error. *Alford v. State*, 291 Ark. 243, 724 S.W.2d 151 (1987).

Where error consists of the withholding of significant evidence which denies defendant a fair trial, the case will be reversed and remanded for a new trial. *Strobbe v. State*, 296 Ark. 74, 752 S.W.2d 29 (1988).

Where state withheld laboratory report on marijuana until three days before trial and did not reveal exculpatory fingerprint until

trial, case was reversed and remanded for new trial. *Henry v. State*, 29 Ark. App. 5, 775 S.W.2d 911 (1989).

Where the state concealed the fact that the officer who identified the defendant had filed a false police report in an unrelated incident prior to trial, the defense strategy depended on bringing the officer's credibility into question, and the evidence of defendant's guilt was not otherwise overwhelming, the defendant was prejudiced by this failure to disclose. *Farmer v. State*, 54 Ark. App. 66, 923 S.W.2d 876 (1996).

The trial court did not abuse its discretion by denying a motion for mistrial or continuance on the basis of nondisclosure of exculpatory evidence since the defendant failed to show prosecutorial misconduct and since defense counsel already knew the identity of all potential witnesses and could have chosen to interview them himself. *Rychtarik v. State*, 334 Ark. 492, 976 S.W.2d 374 (1998).

#### **Expert Evidence.**

State had a duty in accordance with subdivision (a)(iv) of this rule to provide for the discovery of fingerprint report. *Dumond v. State*, 294 Ark. 379, 743 S.W.2d 779 (1988).

The prosecutor must provide reports of scientific tests and any information or materials concerning witnesses he or she intends to call. *Burton v. State*, 314 Ark. 317, 862 S.W.2d 252 (1993).

Because the state met its obligation to provide information to defense counsel, there was no discovery violation; the trial court did not err in denying defendant's motion for a continuance because defendant had the information six days prior to trial and defendant could have obtained the same information through defendant's own investigation. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003).

#### **—Scientific Tests.**

Hypnosis falls within the broad category of scientific tests, and disclosure is required of the fact that the memory of a prosecution witness was refreshed by hypnosis. *Orndorff v. Lockhart*, 707 F. Supp. 1062 (E.D. Ark. 1988), *aff'd* in part and vacated in part 906 F.2d 1230 (8th Cir. 1990).

Where defendant's request to test the seized marijuana was untimely, his failure to cross-examine the state chemist on the tests administered by the State Crime Lab suggested that he had no independent grounds to contest the legitimacy of the marijuana, and the absence of testing caused him no prejudice. *Lewis v. State*, 309 Ark. 392, 831 S.W.2d 145 (1992).

A defendant should have the opportunity to challenge conclusions drawn from tests undertaken by the state; a serious interest in scientific testing, however, must be voiced in timely fashion under subsection (c) of this

rule and before the eleventh hour. *Lukach v. State*, 310 Ark. 38, 834 S.W.2d 642 (1992).

A legitimate motive to test and challenge the state's results is best evidenced by (1) asking for independent testing sufficiently in advance of the trial, and (2) taking such steps as are necessary to arrange for the testing which would include obtaining an expert and making certain that the samples were available in sufficient time for the testing to occur. *Lukach v. State*, 310 Ark. 38, 834 S.W.2d 642 (1992).

Trial judge did not abuse his discretion in allowing state's expert witness to testify regarding "memory loss" test results which had not been made available to defendant prior to trial, where, instead of moving for a continuance, defendant's counsel studied the test results with the assistance of his expert witness, and when asked a short time later, told the judge that he was ready to proceed with the testimony of the state's expert witness. *Tisdale v. State*, 311 Ark. 220, 843 S.W.2d 803 (1992).

While a prosecuting attorney clearly has a duty to disclose all pertinent test on tangible items pursuant to this rule, the prosecutor is not required to make certain scientific tests on all materials seized. *State v. Pulaski County Circuit Court*, 316 Ark. 514, 872 S.W.2d 414 (1994).

#### **Failure to Disclose Prior Convictions.**

In a prosecution for capital murder and for four counts of first-degree battery, all stemming from shootings that took place at a nightclub, the failure of the prosecutor to disclose information about a victim's prior convictions did not require reversal since there was no prejudice where the victim testified at the trial while dressed in prison garb and was questioned on direct and cross-examination regarding his prior convictions. *Lee v. State*, 340 Ark. 504, 11 S.W.3d 553 (2000).

Circuit court did not abuse its discretion in denying defendant's motion for a new trial, as defendant was not prejudiced by the alleged lack of disclosure of a prosecution witness's alleged juvenile conviction; the witness's criminal record was made known to the jury and was used by the defense in an attempt to impeach him. *Harrison v. State*, 371 Ark. 652, 269 S.W.3d 321 (2007).

#### **Failure to Disclose Statement.**

Where state, in response to defendant's request to discover written, recorded or oral statements made by him with respect to the case, gave defendant's counsel access to the state's file, which defendant's attorney copied in its entirety, and did not reveal at Denno hearing that defendant had made inculpatory statement to the county sheriff, following his confession to other police officers, that he was glad to get it off his chest, the state had not



complied with this rule in supplying all statements of defendant, since that inculpatory statement had not appeared in the copied file and had not been testified to at the Denno hearing; thus it was error for the court to admit the county sheriff's testimony at trial. *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981).

Where defendant claimed continuance should have been granted because prosecutor failed to give defense counsel copies of certain lab reports until day of trial and allegedly failed to give defense copy of letter concerning defendant's companion in murder, but evidence showed the prosecutor did not receive report until day of trial and prosecutor claimed copy of letter had been furnished to defense, defendant failed to show that trial court abused its discretion in denying motion for continuance based on asserted failure of prosecutor to comply with court's discovery order. *Heffernan v. State*, 278 Ark. 325, 645 S.W.2d 666 (1983).

Trial court in capital murder prosecution did not err in admitting testimony by officer that when he first approached defendant at the scene of murder defendant stated: "Don't shoot, I give up," where although the statement was not provided in response to motion for discovery, the prosecutor contended the state itself did not know the statement had been made until revealed in the testimony at trial and there was no evidence that the state deliberately avoided obtaining this information in order to have it presented at the trial. *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, cert. denied 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983).

Though subdivision (b)(i) of this rule requires the prosecuting attorney to disclose to the defendant the "substance of any relevant grand jury testimony," where defendant argued statements taken of witnesses pursuant to a prosecutor's subpoena should be treated and disclosed in the same manner as grand jury testimony, it was held that this rule fails to require a prosecutor to disclose statements or information merely because it is gained as a result of a subpoena. *Alford v. State*, 291 Ark. 243, 724 S.W.2d 151 (1987).

When the state fails to disclose information, the burden is on the defendant to show prejudice; however, prejudice does not exist when the defendant already has access to the information that the state did not disclose. *Esmeyer v. State*, 325 Ark. 491, 930 S.W.2d 302 (1996).

Testimony introduced by the state, specifically, a victim's testimony that appellant stated "this is going to end tonight" was not improperly allowed because, even though the state was required to provide appellant with the evidence pursuant to this rule, but did not, appellant was not prejudiced by the in-

troduction of the statement. Appellant did not show that the statement was proof that he was guilty of any of the charges against him, and there was ample other evidence indicating his desire to cause harm. *Hill v. State*, 370 Ark. 102, 257 S.W.3d 534 (2007).

#### **Failure to Disclose Witness.**

The state was properly permitted to call a witness, notwithstanding the defendant's contention that the prosecutor failed to disclose the witness, where the state produced a copy of a fax to defense counsel summarizing the witness' statement and defense counsel admitted that his investigator had reviewed the state's file after the date of the fax. *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998).

There was no violation of this rule where the prosecutor did not decide to call an expert witness, who had been asked by the defendant to examine him, until after speaking with defense counsel the Wednesday before trial and after she was unable to obtain a report from the expert's office. *Newsome v. State*, 73 Ark. App. 216, 42 S.W.3d 575 (2001).

In a hearing on motions to transfer a case to juvenile court under § 9-27-318, to dismiss the case, and to declare the transfer statute unconstitutional, the circuit court abused its discretion by not excluding the testimony of two key witnesses because the state blatantly violated subsection (a) of this rule by refusing to offer these witnesses' names until late in the afternoon before the hearing and, as a result, the defense did not have time to interview the two witnesses. Although the hearing was not a trial or an adjudication, the state's dilatory behavior nevertheless occurred at a pivotal point in the proceedings when the circuit court was deciding the critical issue of whether the juvenile would be tried as a juvenile or as an adult. *N.D. v. State*, 2011 Ark. 282, — S.W.3d —, 2011 Ark. LEXIS 265 (June 23, 2011).

#### **Failure to Produce Evidence.**

Where the defendant's counsel discovered three days before trial that he had not received information requested from prosecutor under discovery order, his duty to come forward as soon as possible with a request to obtain the information was not as great as the duty of the prosecuting attorney to furnish the information as required by this rule and the court was not authorized to overrule the defendant's objection to the prosecuting attorney's complete failure to produce the evidence as required by the rule and the order of the court; under the circumstances it was improper to force the defendant into a joint trial without the benefit of any of the information which had been sought through discovery. *Thrasher v. State*, 270 Ark. 322, 604 S.W.2d 931 (1980).

Even though the prosecution had an open file policy, it did not fulfill its discovery obligation when defense counsel was required to himself examine all other files in the county maintained by law enforcement officials. *Dever v. State*, 14 Ark. App. 107, 685 S.W.2d 518 (1985).

Defendant's claim that the state's failure to provide information concerning the hospitalization, statements, and reports made in connection with contact with the alleged sexual assault victims constituted a violation of this rule was rejected because defendant failed to preserve his argument for appellate review by failing to object and apprise the circuit court of the alleged discovery violations at the first opportunity. Defendant's claim also lacked merit as the state fully met its discovery obligations under Rule 17, in that the state provided discovery to defendant relating to both cases and informed defendant that it maintained an "open-file policy" and urged defense counsel to review defendant's files in the prosecuting attorney's office. *Barrow v. State*, 2010 Ark. App. 589, — S.W.3d —, 2010 Ark. App. LEXIS 637 (Sept. 15, 2010).

In a terroristic threatening case, although the state committed a discovery violation by failing to disclose a 911 call under this rule, defendant was not prejudiced because a witness was identified as a victim in the charging document, thus, his existence was not unknown and his status as a witness was not a surprise to the defense. *Cornett v. State*, 2012 Ark. App. 106, — S.W.3d —, 2012 Ark. App. LEXIS 208 (Feb. 1, 2012).

#### **Failure to Provide Copies.**

Where the defendant was charged with being a felon in possession of a firearm, the very nature of the crime charged necessarily placed the defendant on notice that the state would be required to prove that he was a felon; therefore, the trial court did not abuse its discretion when it allowed the state to introduce into evidence documents concerning the defendant's prior felony convictions despite the state's failure to provide copies of the documents to the defendant prior to the trial as the defendant had requested, where the evidence showed that the state had made the documents available to the defendant for inspection and the defendant's attorney was aware of and had reviewed the documents with the prosecuting attorney. *Terry v. State*, 9 Ark. App. 38, 652 S.W.2d 634 (1983).

#### **Forged Checks.**

Defendant's argument in a forgery prosecution that he was denied a fair trial due to his inability to discover the names of persons, or to view additional checks, which were involved in other alleged line-ups had no merit since, if there were other checks not the subject of the instant charge which defendant

was supposed to have written, they were clearly unrelated with the case being tried and these alleged "other" check(s) were never referred to by the prosecution, but rather were called to the attention of the jury by the defense on cross-examination so that any resulting prejudice was invited, and could not be raised as an error on appeal. *Lewis v. State*, 267 Ark. 933, 591 S.W.2d 687 (Ct. App. 1979).

#### **Grounds for New Trial.**

This rule does not expand the grounds upon which a new trial may be granted pursuant to § 16-89-130. *Newberry v. State*, 262 Ark. 334, 557 S.W.2d 864 (1977).

#### **Imputation of Information.**

The knowledge of a police officer is imputed to the prosecuting attorney. *Williams v. State*, 267 Ark. 527, 593 S.W.2d 8 (1980).

Where police did not give defendant a clearly exculpatory statement by a witness to a fatal shooting, and prosecutor's file did not contain this statement when examined by defendant's attorney, the trial court was incorrect in denying defendant's motion for continuance which was made after the jury had begun deliberations because the witness had not appeared at trial after being subpoenaed by the state, since the police knowledge of the statement was imputed to the prosecutor and the prosecutor failed to timely disclose the statement under this rule; accordingly, defendant's conviction was reversed and the case remanded for new trial. *Lacy v. State*, 272 Ark. 333, 614 S.W.2d 235 (1981).

Knowledge of a codefendant's statement to a police officer implicating the defendant in a rape case is imputed to the prosecutor, with this rule and ARCrP 19.2 requiring disclosure to the defendant of the statement; accordingly, where the codefendant's statement was given five months before the rape trial, but the state's attorney only learned of it the day before the trial and mistakenly believed that the defendant's counsel was also aware of it, the trial court should not have permitted use of the undisclosed statement for any purpose. *Browning v. State*, 274 Ark. 13, 621 S.W.2d 688 (1981).

Information held by the police is imputed to the prosecution's office. *Lewis v. State*, 286 Ark. 372, 691 S.W.2d 864 (1985).

In determining whether the name of the witness should have been given to the defense as requested under subdivision (a)(i) of this rule, the knowledge by the police that the witness had material information about the crime was imputed to the prosecutor's office. *Birchett v. State*, 289 Ark. 16, 708 S.W.2d 625 (1986).

Where witness withheld information from the defense concerning his knowledge of activity by the defendants or his intent to tes-



tify, it was not the prosecutor who withheld information, and it was correct to allow the witness to testify. *Cox v. State*, 305 Ark. 244, 808 S.W.2d 306 (1991).

#### **Names of Witnesses.**

If a witness called in rebuttal is a genuine rebuttal witness, offering evidence to rebut that presented by the defense, not pertaining to evidence the state would be obligated to present in its case in chief, then the state is not required to furnish the name of such a witness. *Parker v. State*, 268 Ark. 441, 597 S.W.2d 586 (1980).

The prosecuting attorney is not required by subsection (a) of this rule to furnish the defense counsel the names of witnesses he calls in rebuttal to testimony offered by the defendant. *Parker v. State*, 268 Ark. 441, 597 S.W.2d 586 (1980).

Where the record reflected that defense counsel was informed that all codefendants were potential witnesses, the fact that the state did not notify defense counsel that a certain witness would be a witness until a few days before the trial did not violate this rule, where that witness had been a codefendant and had apparently entered into an agreement to plead guilty and to testify. *Thompson v. State*, 280 Ark. 265, 658 S.W.2d 350 (1983).

It is not error for the court to permit the state to present witnesses without giving the requested notice, if they were in the nature of rebuttal witnesses. *Vasquez v. State*, 287 Ark. 468, 701 S.W.2d 357 (1985).

Where the state's action in calling a witness without giving the requested notice as required by subdivision (a)(i) of this rule did not prejudice the defendant, his conviction would not be reversed. *Vasquez v. State*, 287 Ark. 468, 701 S.W.2d 357 (1985).

If a witness is proper for the state's case in chief, the prosecution is required to notify the defendant of the name and address of that witness upon timely request; if a witness is a genuine rebuttal witness there is no such requirement. *Birchett v. State*, 289 Ark. 16, 708 S.W.2d 625 (1986).

Where witness was not a true rebuttal witness as her testimony was not merely in response to evidence presented by the defense, the name of the witness should have been given to the defense under subdivision (a)(i) of this rule. *Birchett v. State*, 289 Ark. 16, 708 S.W.2d 625 (1986).

If a witness called in rebuttal by the state is a genuine rebuttal witness, offering evidence to rebut that presented by the defense, not pertaining to evidence the state would be obligated to present in its case in chief, then the state is not required to furnish the name of such witness. *Tubbs v. State*, 19 Ark. App. 306, 720 S.W.2d 331 (1986).

Though subdivision (a)(i) of this rule requires the state to provide the defense with

the name of witnesses it intends to call, the defense was not surprised when the defense had talked to the witness prior to the trial and the witness was called only after the defense asserted the need for an official to testify about certain reports; the state had met its burden before the witness was called, and there was no prejudicial error. *Marx v. State*, 291 Ark. 325, 724 S.W.2d 456 (1987).

This rule does not require the state to disclose the substance of a witness's testimony to a defendant, but requires only that the names and addresses of witnesses be disclosed by the prosecuting attorney. *Cox v. State*, 36 Ark. App. 173, 820 S.W.2d 471 (1991); *Holloway v. State*, 310 Ark. 473, 837 S.W.2d 464 (1992).

Where the trial court allowed defendant's attorney the time she requested to interview a previously unavailable witness before trial and she informed the trial court that further questioning of the witness would probably produce no more information, there was no abuse of discretion as a result of a denial of a continuance. *Robinson v. State*, 317 Ark. 407, 878 S.W.2d 405 (1994).

Where the trial court entered at least two discovery orders in which it directed the attorneys to file a list of witnesses, and where the state provided witness lists to defendant on two occasions, but neither list included witness's name, the state violated the discovery rules. *Mosley v. State*, 323 Ark. 244, 914 S.W.2d 731 (1996).

Subdivision (a)(i) of this rule requires the state to disclose the names and addresses of the witnesses it intends to call, but it does not require the state to disclose the substance of their expected testimony. *Donihoo v. State*, 325 Ark. 483, 931 S.W.2d 69 (1996).

Defendant could not rely on discovery as a substitute for defendant's own investigation where the state had given defendant the name of a confidential informant mentioned in an email and, when defendant expressed dissatisfaction with this response, defendant's request to admit the email into evidence was granted, and defendant had ample opportunity to interview a police officer who was the source of the information. *Bradley v. State*, 2009 Ark. App. 714, — S.W.3d —, 2009 Ark. App. LEXIS 885 (2009).

#### **—Criminal History.**

In a prosecution for capital murder and for four counts of first-degree battery, all stemming from shootings that took place at a nightclub, the failure of the prosecutor to fully disclose the prior criminal activities of the three state witnesses did not require reversal since there was no reasonable probability that the results of the trial would have been different even the testimony of those witnesses was excluded altogether. *Lee v. State*, 340 Ark. 504, 11 S.W.3d 553 (2000).

**—Informant.**

Question of whether or not informant's identity should be divulged calls for a balancing of the public interest in encouraging the flow of voluntary information against the defendant's right to prepare his defense. *McDaniel v. State*, 294 Ark. 416, 743 S.W.2d 795 (1988).

If an informant was present or participated in the crime with defendant, his testimony would be relevant and it would be prejudicial error for state not to reveal his identity. *McDaniel v. State*, 294 Ark. 416, 743 S.W.2d 795 (1988).

Where there was no showing that failure to identify informant was prejudicial to defendant's defense, it was not error for trial court to refuse to require identity to be revealed. *McDaniel v. State*, 294 Ark. 416, 743 S.W.2d 795 (1988).

**—Notice.**

Where prosecution witness' name was not on the witness list as required by this rule, but the defense had been given a copy of the witness' statement and was on notice that he was a potential witness, there was no prejudice to the defendant. *Davis v. State*, 318 Ark. 212, 885 S.W.2d 292 (1994).

Where defense was apprised of witnesses' identities, and that they would testify, six days before trial, there was sufficient prior notice and no attempt to conceal discoverable evidence from the defense. *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995), cert. denied 517 U.S. 1143, 116 S. Ct. 1436, 134 L. Ed. 2d 558 (1996).

Where defendant did not object to witness's testimony until witness had taken the stand and answered twenty-four questions, defendant did not object at the earliest opportunity, and his argument that witness should not have been permitted to testify because state failed to include her name on its witness list was meritless. *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996).

**No Duty to Test Physical Evidence.**

Where certain objects were seized at the scene of a murder and sent to the state crime lab for testing, but were never tested, and where there was disclosure by the prosecuting attorney of all material and information, including a copy of the state crime lab report, that were within the possession and control of members of his staff or others who had participated in the investigation or evaluation of the case and regularly reported to the prosecutor, there was no violation of the obligation to disclose under this rule, subject to ARCrP 19.4, since these rules do not impose a duty on the state to make tests on all materials seized and the defendant cannot rely upon discovery as a total substitution for his own investigation. *Thomerson v. State*, 274 Ark. 17, 621

S.W.2d 690 (1981), criticized *Mayfield v. State*, 293 Ark. 216, 736 S.W.2d 12 (1987).

**No Prejudice.**

Trial court did not err in denying defendant's motion for a continuance or for a mistrial, for purposes of Ark. R. Crim. P. 19.7; there was only one recording in question and it was simply in three different copies, and defendant declined the digital copy, which contained the same recording that was on a microcassette, and thus defendant was not prejudiced by any alleged failure to disclose under subdivision (a)(ii) of this rule and Ark. R. Crim. P. 19.2. *Travis v. State*, 371 Ark. 621, 269 S.W.3d 341 (2007).

Although defendant's probation officer was not disclosed as a state's witness before trial in compliance with subdivision (a)(i) of this rule, defendant failed to demonstrate prejudice from the admission of the officer's testimony. Thus, no reversible error occurred. *Populis v. State*, 2011 Ark. App. 334, — S.W.3d —, 2011 Ark. App. LEXIS 358 (May 4, 2011).

Defendant failed to show prejudice from an alleged discovery violation under subdivision (a)(ii) of this rule; the information, defendant's own statement, was not exculpatory in light of the fact that defendant admitted to shooting the victim. Defendant already had knowledge of the information because it was a statement defendant had made to an informant. *Wright v. State*, 2012 Ark. App. 289, — S.W.3d —, 2012 Ark. App. LEXIS 410 (Apr. 25, 2012).

**Open-File Policy.**

While the prosecution failed to turn over, pursuant to this rule, to defense counsel an audio recording of a telephone interview conducted by the sheriff's office involving another individual who had made statements implicating another individual in the death of the victim, defendant failed to show prejudice. *Lacy v. State*, 2010 Ark. 388, — S.W.3d —, 2010 Ark. LEXIS 484 (Oct. 21, 2010).

Prosecutor's reference to its "open-file" policy and list of witnesses was sufficient to satisfy defendant's discovery request. *Tatum v. State*, 2011 Ark. App. 80, — S.W.3d —, 2011 Ark. App. LEXIS 87 (Feb. 2, 2011).

**Photograph of Defendant.**

There was no reversible error arising from the state's failure to provide defendant with the photograph of defendant identified by witness and the names of state witnesses, where the record indicated that the state did provide the photograph after defense counsel requested it at the omnibus hearing before trial, and where, although the state did not disclose in advance of the trial the names of the two witnesses, one witness was listed by defendant as a defense witness and the other was interviewed by defense counsel in ad-



vance of his testimony after the court recessed explicitly for that purpose. *Martinez v. State*, 269 Ark. 231, 601 S.W.2d 576 (1980).

#### **Police Reports.**

Police reports which contained no exculpatory information, were not offered into evidence, and certainly did not belong to the defendant, were not wrongfully withheld from the defendant, and it was not an abuse of discretion to deny him access to them. *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978).

Where a change in a police officer's crime report was passed on to the prosecuting attorney immediately, but the prosecutor unintentionally failed to pass the information on to the defendant's attorney, it was not an abuse of discretion for the trial court to deny a mistrial, since the defendant was allowed to impeach the officer's testimony in regard to his prior inconsistent statement. *Lasley v. State*, 274 Ark. 352, 625 S.W.2d 466 (1981).

Where report of state trooper was received by defendant prior to trial and during discovery, and he testified to matters contained in that report, omission of trooper's name from witness list did no prejudice to defendant. *Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119 (1992).

#### **Polygraph Examinations.**

Upon proper request, prosecuting attorney is required to make pretrial disclosure of polygraph examination materials to defendant during discovery. *Yates v. State*, 303 Ark. 79, 794 S.W.2d 133 (1990).

#### **Prior Convictions.**

Accused is entitled to know before trial the number of previous convictions the state will attempt to introduce. *Malone v. State*, 292 Ark. 243, 729 S.W.2d 167 (1987).

Where defendant made a timely request for prior convictions or charges of intended witnesses, but the prosecuting attorney failed to disclose one witness was on probation for arson, a new trial was properly refused because the failure to disclose was not prejudicial since evidence against the defendant was overwhelming. *Hall v. State*, 306 Ark. 329, 812 S.W.2d 688 (1991).

Where defense counsel was afforded sufficient time at trial to review prosecution witnesses' criminal record, and witness admitted to prior convictions on the witness stand, defense failed to show how it was prejudiced by the prosecution's failure to timely disclose this information. *Nelson v. State*, 324 Ark. 404, 921 S.W.2d 593 (1996).

Evidence of planned use of eleven-year-old conviction disclosed in a timely manner where the information alleged defendant was an habitual offender and he was advised of the specific conviction early enough for him to file a motion in limine asking the trial court to

exclude proof of it. *Mosley v. State*, 325 Ark. 469, 929 S.W.2d 693 (1996).

#### **Privileged Matters.**

The psychotherapist-patient privilege preempts the need to discover all admissible evidence. *Johnson v. State*, 342 Ark. 186, 27 S.W.3d 405 (2000), cert. denied 532 U.S. 944, 121 S. Ct. 1408, 149 L. Ed 2d 350 (2001).

#### **Rebuttal Evidence.**

While the state is required, upon a timely request, to disclose to a defendant all statements made by the defendant of which the state has knowledge, the state is not required to disclose true rebuttal evidence. *Weaver v. State*, 56 Ark. App. 104, 939 S.W.2d 316 (1997).

#### **Recorded Transcript.**

In prosecution for robbery defendant was not only entitled to the written transcription prepared by the state from the recorded statements, but was entitled to discover the tapes not only because the tapes represented the best evidence, but without the tapes, defendant had no way of comparing the transcription in order to determine if the transcription was a correct reproduction of the recordings, for, the statement as well as the tapes would have been most helpful to defendant in his cross-examination of state's witnesses. *Williamson v. State*, 263 Ark. 401, 565 S.W.2d 415 (1978).

A tape recording should be kept available for a reasonable time after a statement has been transcribed, as its "unavailability" may not save a transcription from inadmissibility. *Mitchell v. State*, 295 Ark. 341, 750 S.W.2d 936 (1988), overruled on other grounds, *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998), criticized by Colbert v. State, 304 Ark. 250, 801 S.W.2d 643 (1990).

Where state was unable to provide the defendant with the recording of the confession for the purpose of comparing the recording with the transcript, trial court's denial of motion to suppress, allowing transcript of the confession to be read into evidence, was error. *Hamm v. State*, 296 Ark. 385, 757 S.W.2d 932 (1988).

#### **Reports or Statements of Experts.**

State did not violate subdivision (a)(iv) of this rule by failing to produce a counselor's records from when the child was 13. Subsection (a) applied only to statements or reports of experts, and the circuit court found that the counselor was not an expert. *Green v. State*, 2012 Ark. 19, — S.W.3d —, 2012 Ark. LEXIS 31 (Jan. 26, 2012).

#### **Request for Disclosure.**

Where there was no request for disclosure by defense counsel as contemplated in this rule, it could not be said that the rule was

violated by the admission of copy of prior conviction and criminal docket sheet, particularly since the prior felony conviction was an element of one of the offenses charged, and defendant was obviously put on notice that evidence of the conviction would be presented at trial; since both documents were properly certified, and the trial court sua sponte took judicial notice of the authenticity of the judgment of conviction and docket sheet there was no need to call a witness to introduce the document. *Plummer v. State*, 270 Ark. 11, 603 S.W.2d 402 (1980).

#### **Statements by Defendants.**

The plain language of subdivision (a)(ii) of this rule does not limit the discovery obligation of the state solely to statements made to the police or other authorities. To the contrary, it provides that upon timely request, the prosecution must disclose any written or recorded statement and the substance of any oral statement made by the defendant. *Bowden v. State*, 297 Ark. 160, 761 S.W.2d 148 (1988).

Subdivision (a)(ii) of this rule mandates that the prosecutor disclose statements made by the defendant; ARCrP 19.2 imposes a continuing duty on the prosecutor to disclose this information. *Rayford v. State*, 326 Ark. 656, 934 S.W.2d 496 (1996).

#### **Statements by Witnesses.**

Where during the discovery period the defense counsel was provided with copies of typewritten statements given by two witnesses to the police, the defendant was not prejudiced by the failure of the state to provide copies of the original handwritten statements given by the witnesses since the typewritten copies of the statements were identical to the handwritten originals except for the fact that in the original statement of one of the witnesses, some words were underlined by her, and this underlining was not shown on the typewritten version. *Lewis v. State*, 267 Ark. 933, 591 S.W.2d 687 (Ct. App. 1979).

Where in a prosecution for possession of heroin, an objection at the trial by the defendant came in the form of a statement by the defense counsel that he did not recall the statement of a particular witness as having been in the prosecutor's file, that objection was not intended as a proffer of evidence that the prosecution had not complied with this section, and therefore the trial judge did not err in overruling the defense counsel's motion to suppress the witness' statement. *Philmon v. State*, 267 Ark. 1121, 593 S.W.2d 504 (Ct. App. 1980), questioned *Hall v. State*, 11 Ark. App. 53, 666 S.W.2d 408 (1984).

Where in a prosecution for interference with a law enforcement officer, the defense counsel requested a copy of a witness' prior

written statements for purposes of cross-examination, it was error for the trial court to refuse such request as untimely even though the action had been pending for over a year, since the court was required to order the statements produced by the state on the defendant's motion under § 16-89-115. *Blakemore v. State*, 268 Ark. 145, 594 S.W.2d 231 (1980).

Where the state inadvertently failed to supply the name of a state's witness, and the trial court ruled, without inquiry as to actual surprise or prejudice, that the witness could testify because a subpoena had been issued 11 days before the trial, despite the defense attorney's statement that he was surprised and totally unprepared for her statement and despite the fact that the court made no inquiry as to whether the defense actually knew that the subpoena had been issued, this rule was violated and a new trial was ordered. *Nelson v. State*, 274 Ark. 113, 622 S.W.2d 188 (1981).

Neither subsection (a) of this rule nor § 16-89-115 requires the prosecutor to supply defendant with written statements from a witness before the trial. *Brown v. State*, 315 Ark. 466, 869 S.W.2d 9 (1994).

This rule does require the state to furnish defendant with a statement made by a non-expert witness. *Thompson v. State*, 322 Ark. 586, 910 S.W.2d 694 (1995).

It was immaterial that a police officer omitted her visual identification of the defendant from the report while including her voice identification; the fact that she could positively identify the defendant was the critical point, and that fact was disclosed. *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996).

Where the written statement not disclosed to the defense prior to trial was not different in any significant detail from the oral testimony of the victim, which was received without objection, the defendant was not prejudiced by its admission into evidence. *Weber v. State*, 326 Ark. 564, 933 S.W.2d 370 (1996).

This provision does not require the state to disclose the substance of the testimony of the witnesses it intends to call. *Travis v. State*, 328 Ark. 442, 944 S.W.2d 96 (1997).

In a sexual abuse case, the trial court did not abuse its discretion in denying defendant's motion for continuance and in excluding testimony concerning "slow dancing" incidents which occurred outside the family group; the state was under no obligation to disclose the substance of the testimony of the witnesses it intended to call. *Hathcock v. State*, 357 Ark. 563, 182 S.W.3d 152 (2004).

#### **Subpoena.**

Prosecuting attorney does not have to furnish defendant with statements taken pursuant to a subpoena. *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987).



Prosecutor's failure to disclose statement of defense expert taken pursuant to subpoena did not prejudice defendant and refusal of court to permit discovery of such statements was not error. *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987).

#### **Time of Disclosure.**

The information requested must be furnished in sufficient time to permit beneficial use of it by defense. *Williamson v. State*, 263 Ark. 401, 565 S.W.2d 415 (1978); *Lewis v. State*, 286 Ark. 372, 691 S.W.2d 864 (1985); *Malone v. State*, 292 Ark. 243, 729 S.W.2d 167 (1987); *Clark v. State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989).

The prosecution's delay in listing witness, the delay in affording defendant an interview with her, and the presence of FBI agents at the interview, did not violate the disclosure requirements of this rule since it only allows a criminal defendant the opportunity to discover the state's testimony prior to trial, but does not create a substitute for his own investigation. *Renton v. State*, 274 Ark. 87, 622 S.W.2d 171 (1981).

Where the prosecutor failed to disclose the identity of a material witness until the day of the trial, the prosecutor failed to comply with the rule, and the five minutes period granted to the defendant in order to interview the witness was insufficient to cure the prosecutor's noncompliance. *Lewis v. State*, 286 Ark. 372, 691 S.W.2d 864 (1985).

Where an evidentiary statement made by the defendant had not been disclosed by the prosecution because it did not know of the statement until ten o'clock the previous night, and where, under the plain language of subdivision (a)(ii) of this rule, this evidence should have been provided to defendant because the statement came within the knowledge of the prosecuting attorney after timely discovery requests had been made, the trial court's granting of a one-day continuance was an appropriate remedy. *Caldwell v. State*, 319 Ark. 243, 891 S.W.2d 42 (1995).

Testimony of witness was not excluded where the name of the state's witness came to the state's attention two days before trial, and was immediately disclosed to defendant. *Lovelady v. State*, 326 Ark. 196, 931 S.W.2d 430 (1996).

Defendant was not entitled to relief due to the state's alleged failure to timely provide exculpatory evidence as all such evidence was supplied within seven months of trial and defendant had every opportunity to conduct his own investigation regarding other suspects and other witnesses. *Howard v. State*, 348 Ark. 471, 79 S.W.3d 273 (2002), cert. denied 537 U.S. 1051, 123 S. Ct. 606, 154 L. Ed 2d 528 (2002).

#### **Untimely Request for Disclosure.**

Where defendant made the appropriate request under this rule and sought the basis of the results of a missing fingerprint report, pursuant to subdivision (a)(iv) of this rule, and the information testified to by the expert was neutral and nonprejudicial, the defendant was entitled to challenge the state's conclusion by having his own tests performed, but he had to timely object. The defendant could not wait to see the full strength of the state's case before bringing his mistrial request to the attention of the trial court. *Dumond v. State*, 290 Ark. 595, 721 S.W.2d 663 (1986).

Where the record clearly reflected that the defendant was aware from his pretrial discovery that a certain informant would be called as a witness and that his credibility would be in issue, but he waited until the end of his case to call the prosecutor and the informant's attorney in an effort to impeach the informant's story by showing that the informant had been promised leniency relating to his part in the crime, the defendant simply failed to make his proof request in a timely manner. *Garcia v. State*, 18 Ark. App. 110, 711 S.W.2d 176 (1986).

#### **Waiver.**

Discovery rights can be waived if the defense does not utilize them. *Malone v. State*, 292 Ark. 243, 729 S.W.2d 167 (1987).

Defendant's objection to the testimony of a police officer at trial based on the state's alleged failure to provide a statement in discovery was insufficient to preserve error for review because the objection was not made at the first opportunity. *George v. State*, 356 Ark. 345, 151 S.W.3d 770 (2004).

#### **Witness Lists.**

In defendant's stalking case, the court erred by allowing the state's expert to testify when he was not disclosed as a witness prior to trial because the state acknowledged that they had identified the expert as a witness well in advance of the trial, but chose not to disclose that to defendant, and defendant did not open the door to the use of the witness in the state's case-in-chief. *Lowry v. State*, 90 Ark. App. 333, 205 S.W.3d 830 (2005).

**Cited:** *Brown v. State*, 261 Ark. 683, 550 S.W.2d 776 (1977); *Russell v. State*, 262 Ark. 447, 559 S.W.2d 7 (1977); *Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978); *Brenneman v. State*, 264 Ark. 460, 573 S.W.2d 47 (1978), cert. denied 442 U.S. 931, 99 S. Ct. 2863, 61 L. Ed. 2d 299 (1979); *Hughes v. State*, 264 Ark. 723, 574 S.W.2d 888 (1978); *Price v. State*, 267 Ark. 1172, 599 S.W.2d 394 (Ct. App. 1980); *Robinson v. State*, 7 Ark. App. 209, 646 S.W.2d 714 (1983); *Walls v. State*, 8 Ark. App. 315, 652 S.W.2d 37 (1983), aff'd 280 Ark. 291, 658 S.W.2d 362 (1983); *Orsini v. State*, 281 Ark.

348, 665 S.W.2d 245 (1984), cert. denied 469 U.S. 847, 105 S. Ct. 162, 83 L. Ed. 2d 98 (1984); *Horne v. State*, 12 Ark. App. 301, 677 S.W.2d 856 (1984); *Woods v. State*, 287 Ark. 212, 697 S.W.2d 890 (1985); *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986), cert. denied 484 U.S. 872, 108 S. Ct. 202, 98 L. Ed. 2d 153 (1987); *Bussard v. State*, 295 Ark. 72, 747 S.W.2d 71 (1988); *Caldwell v. State*, 295 Ark. 149, 747 S.W.2d 99 (1988); *Bennett v. State*, 297 Ark. 115, 759 S.W.2d 799 (1988); *Terrell v. State*, 26 Ark. App. 8, 759 S.W.2d 46 (1988); *Logan v. State*, 299 Ark. 266, 773 S.W.2d 413 (1989); *Smith v. State*, 300 Ark. 330, 778 S.W.2d 947 (1989); *Ross v. State*, 300 Ark. 369, 779 S.W.2d 161 (1989); *Guinn v. State*, 27 Ark. App. 260, 771 S.W.2d 290 (1989); *Taylor v. State*, 299 Ark. 123, 771 S.W.2d 742 (1989); *Irvin v. State*, 28 Ark. App. 6, 771 S.W.2d 26 (1989); *Wainwright v. State*, 302 Ark. 371, 790 S.W.2d 420 (1990), cert. denied 499 U.S. 913, 111 S. Ct. 1123, 113 L. Ed. 2d 231 (1991); *Harrison v. State*, 303 Ark. 247, 796 S.W.2d 329 (1990); *Johnson v. State*, 303 Ark. 313, 796 S.W.2d 342 (1990); *Smith v. State*, 303 Ark. 524, 798 S.W.2d 94 (1990); *Wenzel v.*

*State*, 306 Ark. 527, 815 S.W.2d 938 (1991); *Shankle v. State*, 309 Ark. 40, 827 S.W.2d 642 (1992); *Whitaker v. State*, 37 Ark. App. 112, 825 S.W.2d 827 (1992); *Furlough v. State*, 314 Ark. 146, 861 S.W.2d 297 (1993); *Armstrong v. State*, 45 Ark. App. 72, 871 S.W.2d 420 (1994); *Bond v. State*, 45 Ark. App. 177, 873 S.W.2d 569 (1994); *Johninson v. State*, 317 Ark. 431, 878 S.W.2d 727 (1994); *Dansby v. State*, 319 Ark. 506, 893 S.W.2d 331 (1995); *Mills v. State*, 322 Ark. 647, 910 S.W.2d 682 (1995); *Woods v. State*, 323 Ark. 605, 916 S.W.2d 728 (1996); *Oliver v. State*, 323 Ark. 743, 918 S.W.2d 690 (1996); *Hinzman v. State*, 53 Ark. App. 256, 922 S.W.2d 725 (1996); *Johnson v. State*, 325 Ark. 197, 926 S.W.2d 837 (1996); *MacKintrush v. State*, 60 Ark. App. 42, 959 S.W.2d 404 (1997), aff'd 334 Ark. 390, 978 S.W.2d 293 (1998); *Tester v. State*, 342 Ark. 549, 30 S.W.3d 99 (2000); *Threadgill v. State*, 74 Ark. App. 301, 47 S.W.3d 304 (2001), aff'd 347 Ark. 986, 69 S.W.3d 423 (2002); *Perroni v. State*, 358 Ark. 17, 186 S.W.3d 206 (2004), cert. denied 543 U.S. 1150, 125 S. Ct. 1317, 161 L. Ed. 2d 112 (2005).

## Rule 17.2. Prosecuting attorney's performance of obligations.

(a) The prosecuting attorney shall perform his obligations under Rule 17.1 as soon as practicable.

(b) The prosecuting attorney may perform these obligations in any manner mutually agreeable to himself and defense counsel or by:

(i) notifying defense counsel that material and information, described in general terms, may be inspected, obtained, tested, copied, recorded or photographed, during specified reasonable times; or

(ii) making available to defense counsel at a time specified such material and information, and suitable facilities and arrangements for inspection, testing, copying, recording or photographing of such material and information.

(c) The prosecuting attorney may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, to protect physical evidence produced under this Article.

### 1987 Unofficial Supplementary Commentary to Rule 17.2

#### Open File Policy.

The open file policy of some prosecuting attorneys has received mixed reviews from the Arkansas Supreme Court. Compare *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981) with *Halfacre v. State*, 277 Ark. 168, 639 S.W.2d

734 (1982). See, also, *Dumond v. State*, 290 Ark. 595, 721 S.W.2d 663 (1986) (dissent of Purtle, J.). The state has been permitted to avoid filing written responses to discovery motions by adopting an open file policy. *Halfacre v. State*.

### RESEARCH REFERENCES

**ALR.** Failure of State Prosecutor to Disclose Exculpatory Physical Evidence as Violating Due Process — Weapons. 53 ALR 6th 81.

Failure of State Prosecutor to Disclose Exculpatory Physical Evidence as Violating Due Process — Personal Items Other Than Weapons. 55 ALR 6th 391.



## CASE NOTES

## ANALYSIS

Failure to fulfill obligation.

Harmless error.

Obligations met by prosecution.

Tests.

**Failure to Fulfill Obligation.**

Even though the prosecution had an open file policy, it had not fulfilled its discovery obligation when defense counsel was required to himself examine all other files in the county maintained by law enforcement officials. *Dever v. State*, 14 Ark. App. 107, 685 S.W.2d 518 (1985).

The court did not abuse its discretion in failing to find a discovery violation where there was no indication that defense counsel was unaware that the state relied on an open-file policy and there was no assurance given to the trial judge that defense counsel had checked the state's file within the last 60 days prior to trial. *Findley v. State*, 64 Ark. App. 291, 984 S.W.2d 454 (1998).

When prosecution failed to provide to defendant, before trial, an inculpatory statement, it was not abuse of discretion for the trial court to deny defendant's motion for a new trial; upon introduction to the inculpatory statement at trial, defendant should have asked for a continuance, and defendant failed to preserve any alleged error for review by failing to object contemporaneously. *Brooks v. State*, 76 Ark. App. 164, 61 S.W.3d 916 (2001).

**Harmless Error.**

Where the trial court gave the defense a continuance to interview the chief prosecuting witness, even if the prosecutor had failed to supply the requested name of the witness as soon as he might, the granting of such a continuance cured the error rendering it harmless. *Hughes v. State*, 264 Ark. 723, 574 S.W.2d 888 (1978).

**Obligations Met by Prosecution.**

Trial court did not err in denying defendant's motion to strike all of the state's witnesses; the state relied on the open-file policy under this rule and defendant made no objections to the state fulfilling its discovery obligations through the open-file policy until the day of trial. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003).

**Tests.**

While a prosecuting attorney clearly has a duty to disclose all pertinent tests on tangible items pursuant to ARCrP 17.1, the prosecutor is not required to make certain scientific tests on all materials seized. *State v. Pulaski County Circuit Court*, 316 Ark. 514, 872 S.W.2d 414 (1994).

Applying the plain language of the Rules of Criminal Procedure, including this rule, Ark. R. Crim. P. 17.1 and 19.2, it seemed at first glance that the state's conduct amounted to a violation of the discovery rules, but the Arkansas Supreme Court had interpreted the discovery rules to focus on prejudice to a defendant; appellant wrote the letter to the judge and knew of its existence, and he was unable to show that he was prejudiced by the state's failure to disclose the letter until the state cross-examined him, and in the absence of demonstrable prejudice, the court had to affirm. *Smith v. State*, 2012 Ark. App. 130, — S.W.3d —, 2012 Ark. App. LEXIS 221 (Feb. 8, 2012).

**Cited:** *Limber v. State*, 264 Ark. 479, 572 S.W.2d 402 (1978); *Cardwell v. State*, 264 Ark. 862, 575 S.W.2d 682 (1979); *Robinson v. State*, 7 Ark. App. 209, 646 S.W.2d 714 (1983); *Walls v. State*, 8 Ark. App. 315, 652 S.W.2d 37 (1983), *aff'd* 280 Ark. 291, 658 S.W.2d 362 (1983); *Irvin v. State*, 28 Ark. App. 6, 771 S.W.2d 26 (1989).

**Rule 17.3. Material held by other governmental personnel.**

(a) The prosecuting attorney shall use diligent, good faith efforts to obtain material in the possession of other governmental personnel which would be discoverable if in the possession or control of the prosecuting attorney, upon timely request and designation of material or information by defense counsel.

(b) If the prosecuting attorney's efforts are unsuccessful, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel where the material or other governmental personnel are subject to the jurisdiction of the court.

## CASE NOTES

## ANALYSIS

In general.  
 Failure to fulfill obligation.  
 Obligation fulfilled.  
 Preservation for review.

**In General.**

If a prosecutor's office intends to fulfill its discovery obligations by relying upon an open-file policy, it must make every practicable effort to ensure that the information and records contained in the file are complete and that the documents employed at trial are identical to the material available to the defense in the open file. *Robinson v. State*, 317 Ark. 512, 879 S.W.2d 419 (1994).

No discovery violation was found where: (1) there was no evidence, pursuant to subsection (b) of this rule, indicating that certain files defendant sought were in the hands of any state agency or were subject to the jurisdiction of the court, (2) it was impossible to tell from the record precisely what information defendant had sought, and (3) there was no indication that material evidence existed that was required to be turned over to defendant based on due process considerations. *Jimenez v. State*, 83 Ark. App. 377, 128 S.W.3d 483 (2003).

**Failure to Fulfill Obligation.**

Even though the prosecution had an open file policy, it had not fulfilled its discovery obligation when defense counsel was required to himself examine all other files in the county maintained by law enforcement officials. *Dever v. State*, 14 Ark. App. 107, 685

S.W.2d 518 (1985); *Bussard v. State*, 295 Ark. 72, 747 S.W.2d 71 (1988).

In a speedy trial case, because petitioner had appointed counsel all along in the form of the public defender's office, which could have pursued the remedies of subsection (b) of this rule much earlier than it did, the trial court properly charged petitioner with the 173 days involved in the continuance to produce the discoverable evidence from the state. *Doby v. Jefferson County Circuit Court*, 350 Ark. 505, 88 S.W.3d 824 (2002).

**Obligation Fulfilled.**

Where the evidence was not known to exist in the hands of Arkansas state agencies so that the evidence could be obtained by the prosecution, the prosecution did not violate this rule by not supplying this evidence to defendant pursuant to his discovery requests. *Lukach v. State*, 310 Ark. 119, 835 S.W.2d 852 (1992).

**Preservation for Review.**

Appellate court did not address defendant's argument based on this rule, because defendant made a passing argument that the state violated the rule by making no effort to obtain or preserve the tape that was later unable to be found, and this argument was never made before the trial court. *Elliott v. State*, 2012 Ark. App. 126, — S.W.3d —, 2012 Ark. App. LEXIS 226 (Feb. 8, 2012).

**Cited:** *Hunter v. State*, 316 Ark. 746, 875 S.W.2d 63 (1994); *Nelson v. State*, 324 Ark. 404, 921 S.W.2d 593 (1996).

**Rule 17.4. Discretionary disclosures.**

(a) The court in its discretion may require disclosure to defense counsel of other relevant material and information upon a showing of materiality to the preparation of the defense.

(b) The court may deny disclosure authorized by this Article if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisal, or unnecessary annoyance or embarrassment, resulting from such disclosure, and that the risk outweighs any usefulness of the disclosure to defense counsel.

## CASE NOTES

## ANALYSIS

Construction.  
 Depositions.  
 Privileged matters.

**Construction.**

This rule does not provide that an accused has a right to take the deposition of a victim; rather, it confers authority on the trial court to require disclosure of material or informa-

tion not produced under other provisions of this Article. *Caldwell v. State*, 319 Ark. 243, 891 S.W.2d 42 (1995).

**Depositions.**

The trial court did not abuse its discretion in denying defendant's attempt to take the depositions of the interrogating officers, where the court offered to make the officers available for questioning. *Misskelley v. State*,



323 Ark. 449, 915 S.W.2d 702 (1996), cert. denied, 519 U.S. 898, 117 S. Ct. 246, 136 L. Ed. 2d 174 (1996).

#### Privileged Matters.

The psychotherapist-patient privilege preempts the need to discover all admissible

evidence. *Johnson v. State*, 342 Ark. 186, 27 S.W.3d 405 (2000), cert. denied 532 U.S. 944, 121 S. Ct. 1408, 149 L. Ed. 2d 350 (2001).

**Cited:** *Sanders v. State*, 276 Ark. 342, 635 S.W.2d 222 (1982).

### Rule 17.5. Matters not subject to disclosure.

(a) *Work Product*. Except as provided in Rule 17.1(a)(i) and (iv), disclosure shall not be required of research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of his staff or other state agents.

(b) *Informants*. Disclosure shall not be required of an informant's identity where his identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. This subsection shall not be construed to permit refusal to disclose the identity of witnesses to be produced at any hearing or at trial.

(c) *National Security*. Disclosure shall not be required where it involves a substantial risk of grave prejudice to national security and a failure to disclose will not infringe upon the constitutional rights of the defendant. This subsection shall not be construed to permit refusal to disclose the identity of witnesses to be produced at any hearing or at trial.

#### 1987 Unofficial Supplementary Commentary to Rule 17.5

#### Informants.

Rule 17.5(b) serves as notice that circumstances exist under which the informant's identity need not be disclosed.

Where an informant merely supplies information that steers a police investigation to the defendant so that the state's case stands or falls without the informant's testimony, and where the informant was not present at the time of the illegal act charged, the Arkan-

sas Supreme Court has held that it is not error for the state to refuse to disclose the informant's identity. *Shackleford v. State*, 261 Ark. 721, 551 S.W.2d 205 (1977), relying upon *Brothers v. State*, 261 Ark. 64, 546 S.W.2d 715 (1977) and *West v. State*, 255 Ark. 668, 501 S.W.2d 771 (1973). See, also, *Cooper v. California*, 386 U.S. 58, 17 L.Ed.2d 730 (1967); *Parks v. State*, 11 Ark. App. 238, 669 S.W.2d 496 (1984).

### CASE NOTES

#### ANALYSIS

#### Informants.

Motion to reveal informant's identity.

#### Informants.

By balancing the public interest against the mere possibility that a disclosure of the identity of the informant would help defendant's defense, after considering all the circumstances, the trial court did not err in denying defendant's request for disclosure or in denying cross-examination designed to accomplish the same result. *Hicks v. State*, 28 Ark. App. 268, 773 S.W.2d 113 (1989).

The general rule is that when an informant is also a witness or a participant to the criminal incident, the identity of the informant should be disclosed, and the burden is placed on the defendant to show the existence

of any facts or circumstances which would require the identity of the informant. *Brown v. State*, 310 Ark. 427, 837 S.W.2d 457 (1992).

Because the appellant failed to present sufficient evidence that the state's failure to identify the informant was not prejudicial to the appellant's defense. *Brown v. State*, 310 Ark. 427, 837 S.W.2d 457 (1992).

When an informant is also a witness or a participant to the criminal incident, the identity of the informant should be disclosed. *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994).

Disclosure of an informant's identity was not required where defendant was arrested for fleeing from police and for being in possession of contraband that was found in his pocket, not for behavior specifically witnessed or participated in by the informant and where

the elements of the State's case were proven without the informant's testimony or participation. *Miller v. State*, 2011 Ark. App. 554, — S.W.3d —, 2011 Ark. App. LEXIS 585 (Sept. 21, 2011).

#### **Motion to Reveal Informant's Identity.**

In a drug case, a court did not err by denying defendant's motion to reveal an informant's identity because an officer's testimony revealed that the informant never actually witnessed defendant possessing or manufac-

turing drugs; the testimony revealed that the informant witnessed methamphetamine on the houseboat but not while defendant was actually there, and the informant was not present at the time the search warrant was executed. Further, defendant provided no evidence that the informant participated in any criminal activity. *Eastin v. State*, 370 Ark. 10, 257 S.W.3d 58 (2007).

**Cited:** *Warrior v. State*, 299 Ark. 337, 772 S.W.2d 592 (1989); *Johninson v. State*, 317 Ark. 431, 878 S.W.2d 727 (1994).

## **RULE 18. DISCLOSURES BY DEFENDANT**

### **Rule 18.1. The person of the defendant.**

(a) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, a judicial officer may require the defendant to:

- (i) appear in a line-up or show up;
- (ii) speak for identification by witnesses to an offense;
- (iii) be fingerprinted;
- (iv) pose for photographs not involving reenactment of a scene;
- (v) try on articles of clothing;
- (vi) permit the taking of specimens of material under his fingernails;
- (vii) permit the taking of samples of his blood, hair and other materials of his body which involve no unreasonable intrusion thereof;
- (viii) provide specimens of his handwriting; and
- (ix) submit to a reasonable physical or medical inspection of his body.

(b) Whenever the personal appearance of the defendant is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the prosecuting attorney to the defendant and his counsel. Provision may be made for appearances for such purposes in an order admitting the defendant to bail or providing for his release.

### **CASE NOTES**

#### **ANALYSIS**

Appeals.  
Order.  
Pretrial identification.  
Review.  
Right to counsel.  
Samples.

#### **Appeals.**

The Supreme Court had no jurisdiction to hear the interlocutory appeal under this rule for want of reasonable cause. A defendant does not have any general right to an interlocutory appeal in criminal cases. *Butler v. State*, 311 Ark. 334, 842 S.W.2d 435 (1992).

#### **Order.**

Where the order allowing samples to be taken did not specifically refer to the evidence taken, but the order did refer to the motion which requested these things, subsection (a) of this rule requires a judicial officer to order a defendant to submit to taking samples.

*Davasher v. State*, 308 Ark. 154, 823 S.W.2d 863, cert. denied 504 U.S. 976, 112 S. Ct. 2948, 119 L. Ed 2d 571 (1992).

#### **Pretrial Identification.**

A pretrial identification violates the due process clause where there are suggestive elements in the identification procedure that make it all but inevitable that the victim will identify one person as the culprit. *Prowell v. State*, 324 Ark. 335, 921 S.W.2d 585 (1996), overruled *State v. Bell*, 948 S.W.2d 557 (1997).

Even when pretrial identification procedure is impermissibly suggestive, the trial court may determine that under the totality of circumstances the identification was sufficiently reliable for the matter to be submitted to the jury to decide the weight the identification testimony should be given; in determining reliability, the following factors are considered: (1) the prior opportunity of the witness to observe the alleged act; (2) the accuracy of the prior description of the ac-



cused; (3) any identification of another person prior to the pretrial identification; (4) the level of certainty demonstrated at the confrontation; (5) the failure of the witness to identify the defendant on a prior occasion; and (6) the lapse of time between the alleged act and the pretrial identification procedure. *Prowell v. State*, 324 Ark. 335, 921 S.W.2d 585 (1996), overruled *State v. Bell*, 948 S.W.2d 557 (1997).

A trial court's decision to allow in-court identifications by two witnesses was not clearly erroneous because the photo spread was not unduly suggestive and defendant was not the only one shown wearing a gold mouthpiece. *Bradley v. State*, 2009 Ark. App. 714, — S.W.3d —, 2009 Ark. App. LEXIS 885 (2009).

#### Review.

The standard of review on imposing sanctions for discovery violations is whether there has been an abuse of discretion. *Davasher v. State*, 308 Ark. 154, 823 S.W.2d 863, cert. denied 504 U.S. 976, 112 S. Ct. 2948, 119 L. Ed 2d 571 (1992); *Moore v. State*, 323 Ark. 529, 915 S.W.2d 284 (1996).

When there has been a failure to comply with discovery procedures, a trial court is not required to suppress evidence unless prejudice will result. *Davasher v. State*, 308 Ark.

154, 823 S.W.2d 863, cert. denied 504 U.S. 976, 112 S. Ct. 2948, 119 L. Ed 2d 571 (1992); *Moore v. State*, 323 Ark. 529, 915 S.W.2d 284 (1996).

#### Right to Counsel.

Although defendant argued on appeal that he was deprived of counsel when his blood was drawn, it was clear that he initially caused the delay in the appointment of counsel by representing to the judge at his probable cause hearing that he had already hired an attorney; defendant cannot decline appointed counsel on the one hand and later claim he was denied the assistance of counsel. *Moore v. State*, 323 Ark. 529, 915 S.W.2d 284 (1996).

This rule does not give a defendant a right to consult with counsel prior to giving a sample; it merely states that if a defendant has an attorney, notice of the taking of the samples will be given to that attorney. *Birmingham v. State*, 342 Ark. 95, 27 S.W.3d 351 (2000).

#### Samples.

A consensual taking of blood does not contravene subdivision (a)(vii) of this rule because the rule does not require a court order when the drawing of blood is voluntary. *Mills v. State*, 322 Ark. 647, 910 S.W.2d 682 (1995).

### Rule 18.2. Medical and scientific reports.

Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of and permitted to inspect and copy or photograph any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

#### CASE NOTES

##### Privileged Matters.

Where an accident reconstructionist was hired by an attorney representing a driver who was involved in a car accident, the accident reconstruction report and testimony of

the accident reconstructionist's employee were confidential, privileged communications that could not be subpoenaed. *Holt v. McCastlain*, 357 Ark. 455, 182 S.W.3d 112 (2004).

### Rule 18.3. Nature of defense.

Subject to constitutional limitations, the prosecuting attorney shall, upon request, be informed as soon as practicable before trial of the nature of any defense which defense counsel intends to use at trial and the names and addresses of persons whom defense counsel intends to call as witnesses in support thereof.

#### 1987 Unofficial Supplementary Commentary to Rule 18.3

The term "defense" is defined for purposes of the Arkansas Criminal Code by Ark. Stat. Ann. § 41-110(3) (Repl. 1977). In *Weaver v. State*, 290 Ark. 556, 720 S.W.2d 905 (1986),

appellant argued that the court should give meaning to the word "defense" as used in Rule 18.3 by reference to the § 41-110 definition, the Code and the Rules of Criminal Procedure

having been written by the same Commission. The court rejected this argument, finding that the term "defense" in Rule 18.3 encompasses a general denial and upholding the trial court's rejection of appellant's argument that his witnesses would not testify

about a "defense." The Court upheld the trial court's refusal to permit two defense witnesses to testify upon a showing that their identities had not been disclosed in response to a timely request for disclosure filed by the state.

## CASE NOTES

### ANALYSIS

Applicability.  
Affirmative defenses.  
Any defense.  
Limitation upon disclosure.  
Notice.  
Refusal to disclose.  
Request required.  
Witnesses.

#### Applicability.

This rule applies with equal force to testimony offered in support of a general denial defense and testimony offered in an affirmative defense. *Mitchell v. State*, 306 Ark. 464, 816 S.W.2d 566 (1991).

#### Affirmative Defenses.

There is no requirement in the criminal law requiring the pleading of affirmative defenses. *Sumner v. State*, 35 Ark. App. 203, 816 S.W.2d 623 (1991).

#### Any Defense.

Where defense is a general denial, the phrase "any defense" in this rule does apply. *Weaver v. State*, 290 Ark. 556, 720 S.W.2d 905 (1986).

#### Limitation upon Disclosure.

An accused must reveal, upon the state's request, the nature of any defense which he intends to establish at trial, and the names and addresses of the witnesses who will testify in support of these defenses; therefore, at the in camera hearing, it appears that the accused is not forced to reveal any more of his defense strategy than he is required to do under existing procedural rules. *Marion v. State*, 267 Ark. 345, 590 S.W.2d 288 (1979).

#### Notice.

The trial court was incorrect in ruling that the defense should not refer to the word "entrapment" during the trial because even though the defense of entrapment had not been pled, the state acknowledged that it had been put on notice that the defense would be raised. *Sumner v. State*, 35 Ark. App. 203, 816 S.W.2d 623 (1991).

#### Refusal to Disclose.

Where court granted prosecutor's motion under this rule to require defendant to disclose the nature of the defense to be asserted and the names and addresses of persons

whom defendant intended to call as witnesses in support thereof and defendant on advice of counsel refused to furnish such information and defendant's counsel stated that he was not presenting a certain witness because of the court's ruling and later stated that he had not received the witness' name until after the court's order had been made, since court's order did not require disclosure of the identity of a witness of which defendant at the time was unaware and there was no showing that by the exercise of proper diligence defendant or his attorney could not have discovered the witness or obtained his name, but the witness was not present to testify and no effort was made to subpoena him and no proffer was made, trial court did not err in granting the motion for discovery and precluding testimony of defendant's witness. *Russell v. State*, 262 Ark. 447, 559 S.W.2d 7 (1977).

#### Request Required.

Without a showing that the prosecutor actually requested information regarding defendant's defense and potential witnesses pursuant to this rule, it was error to sanction defendant for not providing this information to the prosecutor. *Watson v. State*, 50 Ark. App. 98, 902 S.W.2d 253 (1995).

#### Witnesses.

Genuine rebuttal witnesses need not be disclosed, for neither the state nor the defense would necessarily know in advance of the need for their testimony. *Weaver v. State*, 290 Ark. 556, 720 S.W.2d 905 (1986).

Defendant failed to comply with this rule where he failed to disclose the identity of a witness as soon as practicable before trial. *Tubbs v. State*, 19 Ark. App. 306, 720 S.W.2d 331 (1986).

The trial court did not err in refusing to give defendant the benefit of the rebuttal witness exception to the discovery rule, since defendant knew in advance of the need for the witnesses' testimony. *Mitchell v. State*, 306 Ark. 464, 816 S.W.2d 566 (1991).

The defendant is not required to inform the state of the names of rebuttal witnesses until the state's case has been presented, because until that time, the defendant cannot know of witnesses needed for rebuttal. *Williams v. State*, 338 Ark. 178, 992 S.W.2d 89 (1999).

Where defendant did not identify his alibi witness until the morning of trial, the trial



court's exclusion of the witness was proper under Ark. R. Crim. P. 19.7; the state was surprised by the identification of the witness and it would have been unfair to allow defendant to proceed with the witness's testimony. *McEwing v. State*, 366 Ark. 456, 237 S.W.3d 43 (2006).

District court did not abuse its discretion by limiting defense counsel's questioning of certain state witnesses whom defendant alleged were accomplices because defendant's argument that the accomplice liability of these witnesses was part of the state's burden of proof was a de facto attempt to establish an accomplice defense by circumventing this rule. *Boldin v. State*, 373 Ark. 295, 283 S.W.3d 565 (2008).

In defendant's trial on charges of capital murder and kidnapping, although the trial court erroneously ruled on the credibility of a proffered witness in holding that the witness

would not be permitted to testify at trial, the trial court's decision was nevertheless affirmed on appeal because discovery was a two-way street and it would be unfair to the state under this rule to permit a defense witness who came forward on the morning of trial to testify. *Neal v. State*, 375 Ark. 389, 291 S.W.3d 160 (2009).

Trial court did not err in excluding a proffered defense witness, where the state filed its discovery motion requesting the names and address of all defense witnesses eight months before trial and submitted its list to the defense at that time, but the defense did not inform the prosecutor about the excluded witness until the day before trial. *Hardaway v. State*, 2011 Ark. App. 99, — S.W.3d —, 2011 Ark. App. LEXIS 113 (Feb. 9, 2011).

**Cited:** *Haynes v. State*, 313 Ark. 407, 855 S.W.2d 313 (1993).

## RULE 19. REGULATION OF DISCOVERY

### Rule 19.1. Investigation not to be impeded.

Subject to the provisions of Rules 17.5 and 19.4, neither the prosecuting attorney, the defense counsel, nor members of their staffs shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel or from showing opposing counsel any relevant material.

#### CASE NOTES

**Cited:** *Prince v. State*, 304 Ark. 692, 805 S.W.2d 46 (1991); *Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996).

### Rule 19.2. Continuing duty to disclose.

If before trial, but subsequent to compliance with these rules, or an order entered pursuant thereto, a party discovers additional material or information comprehended by a previous request to disclose, he shall promptly notify opposing counsel or the other party of the existence of such material or information. If additional material or information is discovered during trial, the party shall notify the court and opposing counsel of the existence of the material or information.

#### 1987 Unofficial Supplementary Commentary to Rule 19.2

##### Disclosure of Theory of Case.

In *Masingill v. State*, 7 Ark. App. 90, 644 S.W.2d 614 (1983) the Arkansas Court of Appeals reviewed the conviction of an appellant prosecuted for tampering with physical evidence. Appellant filed a discovery motion under Rule 17.1 prior to trial. At trial a prosecution witness implicated both appellant and a city councilman in the offense. Appellant had no reason to believe that the

state's witness would implicate another person in the crime. Appellant attempted to call the councilman as a defense witness, but the court sustained the prosecution's objection on grounds that appellant had not disclosed to the prosecution the name of this witness before trial. The Court did not attempt to fashion a remedy permitting such testimony by an undisclosed defense witness where defendant is clearly surprised by testimony of a

prosecution witness. Neither did it characterize it as rebuttal testimony. Instead, the court reversed, finding that,

Under Rule 19.2 ... the prosecutor had a continuing duty to notify appellant of any additional material or information comprehended by appellant's prior discovery motion. ... [T]he prosecutor ... improperly withheld details of the alleged crime which should have been set out in the State's Bill of Particulars.

7 Ark. App. at 93, 644 S.W.2d at 615.

The court also found that the state failed to comply properly with a discovery motion, apparently because it failed to identify its main witness by name. Counsel for appellant knew the witness' identity, however, and attempted to interview her prior to trial, so it appears that reversal stemmed mainly from failure to

disclose that there was an uncharged accomplice. The case seems to stand for the proposition that in response to a Rule 17.1 motion the state should disclose the identity of any other participant in the crime if it intends to produce evidence that there was another participant. Failure to do so places the defendant in the position of being unable to present testimony from a witness who would in some cases be both available and eager to dispute the state's evidence. See *Speer v. State*, 18 Ark. App. 1, 708 S.W.2d 94 (1986), where the court of appeals observed that the *Masingill* decision was required because "withholding of details of the crime ... clearly served to frustrate the appellant's defense preparation." 18 Ark. App. at 6, 708 S.W.2d at 96. In addition, see supplementary commentary to Rule 17.1.

## CASE NOTES

### ANALYSIS

Construction.

Appellate review.

Failure to disclose.

No prejudice.

Timely disclosure.

Timely request.

### Construction.

ARCrP 17.1(a)(ii) mandates that the prosecutor disclose statements made by the defendant; this rule imposes a continuing duty on the prosecutor to disclose this information. *Rayford v. State*, 326 Ark. 656, 934 S.W.2d 496 (1996).

### Appellate Review.

Where defendant argued that state witness should not have been permitted to testify because her name was not included on state's witness list, defendant's failure to abstract parts of the record relating to his discovery requests precluded the appellate court from considering the issue. *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996).

### Failure to Disclose.

Where the attorney for the defendant mother in a child abuse case had filed a motion for discovery prior to trial and had requested all statements that might at any time have been made by the defendant to police officers or others, and the state had responded to the motion without disclosing that the defendant had made a statement to the doctor who treated her child, that if she knew he was going to call the police she would not have taken the child to him, the trial court should have excluded that statement or granted the defendant a continuance since the state failed in its obligation to timely inform the defendant of all information it had been properly requested to furnish. *Williams*

*v. State*, 267 Ark. 527, 593 S.W.2d 8 (1980).

There was no reversible error arising from the state's failure to provide defendant with the photograph of defendant identified by witness and the names of state witnesses, where the record indicated that the state did provide the photograph after defense counsel requested it at the omnibus hearing before trial, and where, although the state did not disclose in advance of the trial the names of the two witnesses, one witness was listed by defendant as a defense witness and the other was interviewed by defense counsel in advance of his testimony after the court recessed explicitly for that purpose. *Martinez v. State*, 269 Ark. 231, 601 S.W.2d 576 (1980).

Knowledge of a codefendant's statement to a police officer implicating the defendant in a rape case is imputed to the prosecutor, with ARCrP 17.1 and this rule requiring disclosure to the defendant of the statement; accordingly, where the codefendant's statement was given five months before the rape trial, but the state's attorney only learned of it the day before the trial and mistakenly believed that the defendant's counsel was also aware of it, the trial court should not have permitted use of the undisclosed statement for any purpose. *Browning v. State*, 274 Ark. 13, 621 S.W.2d 688 (1981).

Where the prosecutor failed to comply properly with defendant's discovery motion requesting names of all state witnesses and also improperly withheld details of the alleged crime which should have been set out in the state's bill of particulars, defendant's conviction for tampering with evidence was reversed. *Masingill v. State*, 7 Ark. App. 90, 644 S.W.2d 614 (1983).

When the state is charged with knowledge of the existence of a material witness and fails



in response to a discovery order to disclose that information, it should not be assumed that in every case a cursory opportunity to interview the witness will cure the omission because there are instances where the demands of a fair trial require the granting of a continuance. *Lewis v. State*, 286 Ark. 372, 691 S.W.2d 864 (1985).

Where defendant did not object to witness's testimony until witness had taken the stand and answered twenty-four questions, defendant had not objected at the earliest opportunity, and his argument that witness should not have been permitted to testify because state failed to include her name on its witness list was held without merit. *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996).

Where the trial court entered at least two discovery orders in which it directed the attorneys to file a list of witnesses, and where the state provided witness lists to defendant on two occasions, but neither list included witness' name, the state violated the discovery rules. *Mosley v. State*, 323 Ark. 244, 914 S.W.2d 731 (1996).

#### **No Prejudice.**

Trial court did not err in denying defendant's motion for a continuance or for a mistrial, for purposes of Ark. R. Crim. P. 19.7; there was only one recording in question and it was simply in three different copies, and defendant declined the digital copy, which contained the same recording that was on a microcassette, and thus defendant was not prejudiced by any alleged failure to disclose under Ark. R. Crim. P. 17.1(a)(ii) and this rule. *Travis v. State*, 371 Ark. 621, 269 S.W.3d 341 (2007).

### **Rule 19.3. Custody of materials.**

Any materials furnished to counsel pursuant to this Article shall remain in his custody and be used only for the purposes of preparation and trial of the case. The court may provide that the material be furnished subject to other reasonable terms and conditions.

#### **RESEARCH REFERENCES**

**Ark. L. Notes.** Watkins, Using the Freedom of Information Act as a Discovery Device, 1994 Ark. L. Notes 59.

### **Rule 19.4. Protective orders.**

Upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit his counsel to make beneficial use thereof.

Applying the plain language of the Rules of Criminal Procedure, including Ark. R. Crim. P. 17.1, 17.2, and this rule, it seemed at first glance that the state's conduct amounted to a violation of the discovery rules, but the Arkansas Supreme Court had interpreted the discovery rules to focus on prejudice to a defendant; appellant wrote the letter to the judge and knew of its existence, and he was unable to show that he was prejudiced by the state's failure to disclose the letter until the state cross-examined him, and in the absence of demonstrable prejudice, the court had to affirm. *Smith v. State*, 2012 Ark. App. 130, — S.W.3d —, 2012 Ark. App. LEXIS 221 (Feb. 8, 2012).

#### **Timely Disclosure.**

There was no violation of this rule where the prosecutor immediately forwarded a witness' statement to defense counsel upon his learning of it. *Tester v. State*, 342 Ark. 549, 30 S.W.3d 99 (2000).

#### **Timely Request.**

The state, by filing a timely motion for discovery, discharged its duty and was not required to request an order from the court to compel defendant to comply. *Tubbs v. State*, 19 Ark. App. 306, 720 S.W.2d 331 (1986).

**Cited:** *Bennett v. State*, 297 Ark. 115, 759 S.W.2d 799 (1988); *Shankle v. State*, 309 Ark. 40, 827 S.W.2d 642 (1992); *Mills v. State*, 322 Ark. 647, 910 S.W.2d 682 (1995); *Hinzman v. State*, 53 Ark. App. 256, 922 S.W.2d 725 (1996); *Farmer v. State*, 54 Ark. App. 66, 923 S.W.2d 876 (1996); *MacKintrush v. State*, 60 Ark. App. 42, 959 S.W.2d 404 (1997), *aff'd* 334 Ark. 390, 978 S.W.2d 293 (1998).

## CASE NOTES

**Nondisclosure of Untested Materials.**

Where certain objects were seized at the scene of a murder and sent to the state crime lab for testing, but were never tested, and where there was disclosure by the prosecuting attorney of all material and information, including a copy of the state crime lab report, that were within the possession and control of members of his staff or others who had participated in the investigation or evaluation of the case and regularly reported to the prosecutor, there was no violation of the obligation to disclose under ARCrP 17.1, subject to this

rule, since these rules do not impose a duty on the state to make tests on all materials seized and the defendant cannot rely upon discovery as a total substitution for his own investigation. *Thomerson v. State*, 274 Ark. 17, 621 S.W.2d 690 (1981), criticized *Mayfield v. State*, 293 Ark. 216, 736 S.W.2d 12 (1987).

**Cited:** *Bennett v. State*, 297 Ark. 115, 759 S.W.2d 799 (1988); *Shankle v. State*, 309 Ark. 40, 827 S.W.2d 642 (1992); *In re Badami*, 309 Ark. 511, 831 S.W.2d 905 (1992); *Johninson v. State*, 317 Ark. 431, 878 S.W.2d 727 (1994).

**Rule 19.5. Excision.**

(a) When some parts of certain material are discoverable under the provisions of these rules, and other parts are not discoverable, the discoverable material shall be made available pursuant to the rules after excision of the remainder.

(b) Material excised pursuant to judicial order shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

**Rule 19.6. In camera proceedings.**

The court may permit any showing of cause in whole or in part for denial or regulation of disclosures to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

## CASE NOTES

## ANALYSIS

Permissiveness of rule.  
Polygraph examinations.

**Permissiveness of Rule.**

This rule is permissive in nature. *Yates v. State*, 303 Ark. 79, 794 S.W.2d 133 (1990).

**Polygraph Examinations.**

Polygraphic examination of defendant qualified as a "scientific test" for the purpose

of discovery, and all materials relating thereto should, upon request, have been made available to defendant for his examination, or the examination of his experts, without need or necessity of an in camera proceeding. *Yates v. State*, 303 Ark. 79, 794 S.W.2d 133 (1990).

**Cited:** *Cozad v. State*, 303 Ark. 137, 792 S.W.2d 606 (1990).

**Rule 19.7. Failure to comply: sanctions.**

(a) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant thereto, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems proper under the circumstances.



(b) Wilful violation by counsel or a defendant of an applicable discovery rule or an order issued pursuant thereto may subject counsel or a defendant to appropriate sanctions by the court.

### 1987 Unofficial Supplementary Commentary to Rule 19.7

Rule 19.7(a) creates four avenues of relief for failure to disclose. On appeal, the appellate court will reverse only on a showing that the trial court abused the discretion explicitly conferred by this rule. See, for example, *Lear v. State*, 278 Ark. 70, 643 S.W.2d 550 (1982); *Hunter v. State*, 8 Ark. App. 283, 653 S.W.2d 159 (1983).

In order to show on appeal that the trial court erred in refusing to grant a continuance, it is necessary to show "such a clear abuse of the court's discretion as to amount to a denial of justice." *Heffernan v. State*, 278 Ark. 325, 329, 645 S.W.2d 666, 668 (1983).

### Waiver of Discovery Rights.

If the prosecution fails to disclose information under circumstances that should reasonably alert the defendant that, through inadvertence, incomplete disclosure has been made, the defendant must act promptly or risk being found to have waived discovery. *Rubio v. State*, 18 Ark. App. 277, 715 S.W.2d 214 (1986). This may be so even if appellant is genuinely, albeit unjustifiably, surprised. But see, *Thrasher v. State*, 270 Ark. 322, 604 S.W.2d 931 (1980). See, also, *Heffernan v. State*.

## CASE NOTES

### ANALYSIS

Change of counsel.  
Compliance.  
Continuance.  
Exclusion of evidence not disclosed.  
Failure to request discovery.  
Mistrial.  
Objection by defendant.  
Prejudice.  
Recorded transcript.  
Sanctions.  
Sanctions not imposed.  
Waiver.

### Change of Counsel.

The right of discovery is the right of the defendant, not the personal right of his attorney, and where substituted counsel failed to show circumstances that required a repetition of disclosures made to defendant's original attorney, the trial court did not abuse its discretion in refusing to grant a continuance because the prosecuting attorney did not repeat the disclosures. *Rowland v. State*, 263 Ark. 77, 562 S.W.2d 590 (1978).

### Compliance.

If the court's discovery rules are to be meaningful, the rules must be complied with where there has been a timely request, there is no finding of compliance by the state and there is prejudice to the defense. *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993).

### Continuance.

Where defendant claimed continuance should have been granted because prosecutor failed to give defense counsel copies of certain lab reports until day of trial and allegedly failed to give defense copy of letter concerning defendant's companion in murder, but evi-

dence showed the prosecutor did not receive report until day of trial and prosecutor claimed copy of letter had been furnished to defense, defendant failed to show that trial court abused its discretion in denying motion for continuance based on asserted failure of prosecutor to comply with court's discovery order. *Heffernan v. State*, 278 Ark. 325, 645 S.W.2d 666 (1983).

The granting of a continuance rests within the sound discretion of the trial court and the trial court's decision will not be set aside in the absence of abuse. *Hunter v. State*, 8 Ark. App. 283, 653 S.W.2d 159 (1983).

Where, at a pretrial hearing held five days prior to the jury trial, the state provided a list of the names of five additional possible witnesses after the defendant announced that there would be no plea bargain agreement, the trial court did not abuse its discretion when it refused the defendant's motion for a continuance based on the belated disclosure of additional witnesses, where the evidence showed that the prosecuting attorney's office maintained an open file policy, that the names of all the additional witnesses were to be found in the file, that the defendant's counsel had examined the file, and that all of the additional witnesses were residents of the city where the offense occurred. *Hunter v. State*, 8 Ark. App. 283, 653 S.W.2d 159 (1983).

When the state is charged with knowledge of the existence of a material witness and fails in response to a discovery order to disclose that information, it should not be assumed that in every case a cursory opportunity to interview the witness will cure the omission because there are instances where the de-

mands of a fair trial require the granting of a continuance. *Lewis v. State*, 286 Ark. 372, 691 S.W.2d 864 (1985).

ARCrP 17.1 imposes a duty on the prosecutor to disclose information in sufficient time to permit the defense to make beneficial use of it; therefore, where the prosecutor failed to disclose the identity of a material witness until the day of the trial, the prosecutor failed to comply with the rule, and the five minutes period granted to the defendant in order to interview the witness was insufficient to cure the prosecutor's noncompliance and a continuance was proper. *Lewis v. State*, 286 Ark. 372, 691 S.W.2d 864 (1985).

A continuance may be sufficient to cure the state's failure to comply with ARCrP 17.1. *Reed v. State*, 312 Ark. 82, 847 S.W.2d 34 (1993); *Furlough v. State*, 314 Ark. 146, 861 S.W.2d 297 (1993).

Where an evidentiary statement made by the defendant had not been disclosed by the prosecution because it did not know of the statement until ten o'clock the previous night, and where, under the plain language of ARCrP 17.1(a)(ii), this evidence should have been provided to defendant because the statement came within the knowledge of the prosecuting attorney after timely discovery requests had been made, the trial court's granting of a one-day continuance was an appropriate remedy. *Caldwell v. State*, 319 Ark. 243, 891 S.W.2d 42 (1995).

Even assuming state violated its discovery obligations by failing to disclose name of prospective witness, defendant could have requested a continuance. *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996).

A 10-day continuance was properly granted to the defendant so that he could interview witnesses who observed the murder victim's earlier battery of another person where the state failed to disclose an offense report related to that incident; the defendant was not entitled to a mistrial, notwithstanding his contention that the prejudice was not cured by the continuance as he was denied the opportunity to use the report in his jury voir dire and in his opening statement, since the defendant already knew of the incident because of his presence at it and intervened to protect the person attacked by the murder victim. *Henry v. State*, 337 Ark. 310, 989 S.W.2d 894 (1999).

When prosecution failed to provide to defendant, before trial, an inculpatory statement, it was not abuse of discretion for the trial court to deny defendant's motion for a new trial; upon introduction to the inculpatory statement at trial, defendant should have asked for a continuance, and defendant failed to preserve any alleged error for review

by failing to object contemporaneously. *Brooks v. State*, 76 Ark. App. 164, 61 S.W.3d 916 (2001).

Defendant failed to show how he was prejudiced by late discovery and entitled to a continuance where the state never attempted to introduce the fire inspector's report and made no attempt to introduce defendant's cellular telephone records until after defendant himself referenced the records in his direct examination; there could be no prejudice from the admission of the phone records because they were defendant's own records, and the prosecution was not required to disclose information that was already accessible by the defendant. *Lowry v. State*, 364 Ark. 6, 216 S.W.3d 101 (2005).

Trial court did not err in denying defendant's motion for a continuance. For purposes of this rule; there was only one recording in question and it was simply in three different copies, and defendant declined the digital copy, which contained the same recording that was on a microcassette, and thus defendant was not prejudiced by any alleged failure to disclose under Ark. R. Crim. P. 17.1(a)(ii) and 19.2. *Travis v. State*, 371 Ark. 621, 269 S.W.3d 341 (2007).

#### **Exclusion of Evidence Not Disclosed.**

ARCrP 17.1 requires that the prosecuting attorney disclose to defense counsel, upon timely request, any material and information the prosecutor intends to use in any hearing or at trial but the exclusion of evidence not so disclosed is not mandatory unless there is a likelihood that prejudice will result. *Smith v. State*, 10 Ark. App. 390, 664 S.W.2d 505 (1984).

Under this rule, the trial court has the discretion to exclude or to admit material not disclosed through discovery, based upon the likelihood that prejudice will result. *Beck v. State*, 12 Ark. App. 341, 680 S.W.2d 110 (1984).

The exclusion of undisclosed evidence is not the only remedy available under subsection (a) of this rule, the trial court may remedy the failure to disclose by granting appropriate relief, such as the opportunity for defense counsel to interview the undisclosed witness. *Burton v. State*, 314 Ark. 317, 862 S.W.2d 252 (1993).

In defendant's stalking case, the court erred by allowing the state's expert to testify when he was not disclosed as a witness prior to trial because the state acknowledged that they had identified the expert as a witness well in advance of the trial, but chose not to disclose that to defendant, and defendant did not open the door to the use of the witness in the state's case-in-chief. *Lowry v. State*, 90 Ark. App. 333, 205 S.W.3d 830 (2005).

Trial court's exclusion of an alibi witness who defendant identified for the first time on



the morning of trial was proper as the state was surprised by the identification of the witness and it would have been unfair to allow defendant to proceed with the witness's testimony. *McEwing v. State*, 366 Ark. 456, 237 S.W.3d 43 (2006).

Trial court did not err in excluding a proffered defense witness, where the state filed its discovery motion requesting the names and address of all defense witnesses eight months before trial and submitted its list to the defense at that time, but the defense did not inform the prosecutor about the excluded witness until the day before trial. *Hardaway v. State*, 2011 Ark. App. 99, — S.W.3d —, 2011 Ark. App. LEXIS 113 (Feb. 9, 2011).

#### **Failure to Request Discovery.**

Where police officer in search under search warrant for stolen bottles of whiskey and gin, found a cashbox stolen in a separate burglary under a counter in a night club owned by defendants, and identified it as such immediately, it was not an abuse of discretion by the trial court under this rule to prohibit the prosecution from introducing into evidence the affidavit for the search warrant, the search warrant itself, and the cashbox, even though the existence of those three items had not been disclosed by the state during pretrial discovery, since defendants had not filed a request for discovery, claimed surprise or filed a motion for continuance and since the sheriff's return shows that he left a copy of the warrant listing the cashbox as an item taken with the defendant. *Heard v. State*, 272 Ark. 140, 612 S.W.2d 312 (1981).

#### **Mistrial.**

Where defendant does not seek any of the sanctions provided for in this rule, such as a continuance, choosing instead to ask only for a mistrial, the most extreme recourse open to a trial court, a mistrial is to be avoided except where the fundamental fairness of the trial itself is at stake. *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986), cert. denied 484 U.S. 872, 108 S. Ct. 202, 98 L. Ed. 2d 153 (1987).

Trial court did not err in denying defendant's motion for a mistrial. For purposes of this rule; there was only one recording in question and it was simply in three different copies, and defendant declined the digital copy, which contained the same recording that was on a microcassette, and thus defendant was not prejudiced by any alleged failure to disclose under Ark. R. Crim. P. 17.1(a)(ii) and 19.2. *Travis v. State*, 371 Ark. 621, 269 S.W.3d 341 (2007).

#### **Objection by Defendant.**

Where the defendant's counsel discovered three days before trial that he had not received information requested from prosecutor under discovery order, his duty to come forward as soon as possible with a request to

obtain the information was not as great as the duty of the prosecuting attorney to furnish the information as required by ARCrP 17.1 and the court was not authorized to overrule the defendant's objection to the prosecuting attorney's complete failure to produce the evidence as required by the rule and the order of the court; under the circumstances it was improper to force the defendant into a joint trial without the benefit of any of the information which had been sought through discovery. *Thrasher v. State*, 270 Ark. 322, 604 S.W.2d 931 (1980).

#### **Prejudice.**

Whether defendant was prejudiced by the trial court's refusal to grant her request for a continuance after its decision to admit the luminol test results was evident from the state's announced intention to nol pros its case when the trial court had earlier ruled the luminol test results inadmissible. *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993).

The key in determining if a reversible discovery violation exists under subsection (a) of this rule is whether the defendant was prejudiced by the prosecutor's failure to disclose. *Burton v. State*, 314 Ark. 317, 862 S.W.2d 252 (1993).

Although the state clearly violated the letter of this rule and ARCP 17.1(d), the defendant was not prejudiced where the court granted time so that the defense could interview the witness whose identity was improperly withheld. *Mills v. State*, 322 Ark. 647, 910 S.W.2d 682 (1995).

#### **Recorded Transcript.**

In prosecution for robbery, defendant was not only entitled to the written transcription prepared by the state from the recorded statements, but was entitled to discover the tapes not only because the tapes represented the best evidence, but without the tapes, defendant had no way of comparing the transcription in order to determine if the transcription was a correct reproduction of the recordings, for the statement as well as the tapes would have been most helpful to defendant in his cross-examination of state's witnesses. *Williamson v. State*, 263 Ark. 401, 565 S.W.2d 415 (1978).

#### **Sanctions.**

The prosecution's delay in listing the former girlfriend of a defendant in a capital murder case as a witness, the delay in affording that defendant an interview with her, and the presence of FBI agents at the interview, did not violate the disclosure requirements of ARCrP 17.1 since ARCrP 17.1 only allows a criminal defendant the opportunity to discover the state's testimony prior to trial, but does not create a substitute for his own investigation; any delay was cured by granting the interview as a permissible sanction under

subsection (a) of this rule. *Renton v. State*, 274 Ark. 87, 622 S.W.2d 171 (1981).

The prosecutor's admitted oversight in neglecting to inform defense counsel of a statement by the defendant to the FBI agents who arrested him that the agents were lucky because they "should have been hurt" was not sufficient to cause suppression of the statement under subsection (a) of this rule, since suppression is based upon a showing of prejudice or abuse of discretion, which was not shown by the defendant's version of the statement ("I am glad nobody got hurt") that at best was susceptible of similar inferences and at worst, equivocal. *Renton v. State*, 274 Ark. 87, 622 S.W.2d 171 (1981).

A trial court is not required under this rule to prohibit the introduction of evidence where there has been a failure to comply with discovery procedures, unless there is a likelihood that prejudice will result. *Fisk v. State*, 5 Ark. App. 5, 631 S.W.2d 626 (1982).

It is within the trial court's discretion which sanction to employ. *Reed v. State*, 312 Ark. 82, 847 S.W.2d 34 (1993).

It is within the trial court's discretion which subsection (a) of this rule sanction to employ. *Furlough v. State*, 314 Ark. 146, 861 S.W.2d 297 (1993).

Trial court did not err by excluding the testimony of a defense expert witness because of an alleged discovery violation as defense counsel failed to properly prepare the witness's findings and give them to the state well in advance of the trial so that the state could prepare its cross-examination and any rebuttal witness; the trial court correctly noted that the witness's findings did not provide anything more than common knowledge where, in two exhibits, the witness stated that she claimed that an interviewer led the child victims with her questions and the expert failed to suggest how she would have conducted the interviews of the victims. *White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006).

### **Sanctions Not Imposed.**

Trial court in capital murder prosecution did not err in admitting testimony by officer that when he first approached defendant at the scene of murder defendant stated: "Don't shoot, I give up," where although the statement was not provided in response to motion for discovery, the prosecutor contended the state itself did not know the statement had been made until revealed in the testimony at trial and there was no evidence that the state deliberately avoided obtaining this information in order to have it presented at the trial. *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, cert. denied 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983).

### **Waiver.**

Failure to object to the admission of evidence at trial, which was illegally withheld during discovery, waives the provisions of this rule. *Brenneman v. State*, 264 Ark. 460, 573 S.W.2d 47 (1978), cert. denied 442 U.S. 931, 99 S. Ct. 2863, 61 L. Ed. 2d 299 (1979).

**Cited:** *Newton v. State*, 271 Ark. 427, 609 S.W.2d 328 (1980), appeal dismissed 454 U.S. 805, 102 S. Ct. 77, 70 L. Ed. 2d 74 (1981); *Browning v. State*, 274 Ark. 13, 621 S.W.2d 688 (1981); *Nelson v. State*, 274 Ark. 113, 622 S.W.2d 188 (1981); *Bennett v. State*, 297 Ark. 115, 759 S.W.2d 799 (1988); *Terrell v. State*, 26 Ark. App. 8, 759 S.W.2d 46 (1988); *Taylor v. State*, 299 Ark. 123, 771 S.W.2d 742 (1989); *Guinn v. State*, 27 Ark. App. 260, 771 S.W.2d 290 (1989); *Johnson v. State*, 303 Ark. 313, 796 S.W.2d 342 (1990); *State v. Stuart*, 306 Ark. 24, 810 S.W.2d 939 (1991); *Shankle v. State*, 309 Ark. 40, 827 S.W.2d 642 (1992); *Bond v. State*, 45 Ark. App. 177, 873 S.W.2d 569 (1994); *Davis v. State*, 317 Ark. 592, 879 S.W.2d 439 (1994); *Mosley v. State*, 323 Ark. 244, 914 S.W.2d 731 (1996); *Hinzman v. State*, 53 Ark. App. 256, 922 S.W.2d 725 (1996); *Johnson v. State*, 325 Ark. 197, 926 S.W.2d 837 (1996); *Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996); *Lovelady v. State*, 326 Ark. 196, 931 S.W.2d 430 (1996); *Rayford v. State*, 326 Ark. 656, 934 S.W.2d 496 (1996).

## **RULE 20. PROCEDURE BEFORE TRIAL: OMNIBUS HEARING**

### **Rule 20.1. General procedural requirements: policy statement.**

(a) In all criminal cases, procedures prior to trial should reflect recognition of the possible need for the following three (3) stages:

(i) an exploratory stage, initiated by counsel and conducted without court supervision to implement discovery required or authorized under these rules;

(ii) an omnibus stage, supervised by the trial court and requiring court appearance when necessary;



- (iii) a trial planning stage, requiring pretrial conferences when necessary.
- (b) These stages should be adapted to the needs of the particular case and may be modified or eliminated as appropriate.

#### CASE NOTES

**Cited:** Walker v. State, 288 Ark. 52, 701 29 Ark. App. 42, 780 S.W.2d 338 (1989); Smith S.W.2d 372 (1986); Jones v. City of Newport, v. Lockhart, 923 F.2d 1314 (8th Cir. 1991).

### Rule 20.2. Setting of omnibus hearing.

- (a) If a plea of guilty is not entered at the time the defendant is first called upon to plead by a court having jurisdiction to try the defendant, the court may set a time for an omnibus hearing.
- (b) In determining the date for the omnibus hearing the court shall allow counsel sufficient time:
  - (i) to initiate and complete discovery required or authorized under these rules;
  - (ii) to conduct further investigation necessary to the defendant's case; and
  - (iii) to continue plea discussions.

#### CASE NOTES

**Cited:** Jones v. City of Newport, 29 Ark. App. 42, 780 S.W.2d 338 (1989).

### Rule 20.3. Omnibus hearing.

- (a) At the omnibus hearing, the trial court on its own initiative shall:
  - (i) ensure that standards regarding provision of counsel have been complied with;
  - (ii) ascertain whether the parties have completed the discovery required in Rule 17.1, and if not, make orders appropriate to expedite completion;
  - (iii) ascertain whether there are requests for additional disclosures under Rules 17.3, 17.4, 18.2, and 18.3;
  - (iv) make rulings on any motions, demurrers or other requests then pending, and ascertain whether any additional motions, demurrers or requests will be made at the hearing or continuations thereof;
  - (v) ascertain whether there are any procedural or constitutional issues which should be considered;
  - (vi) upon agreement of counsel, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, set a time for a pretrial conference; and
  - (vii) permit a defendant to change his plea.
- (b) Unless the court otherwise directs, all motions, demurrers and other requests prior to trial should be reserved for the omnibus hearing and presented orally. All issues presented at the omnibus hearing may be raised without prior notice either by counsel or by the court. If discovery, investigation, preparation, or evidentiary hearing, or a formal presentation is necessary for a fair determination of any issue, the omnibus hearing should be continued until all matters are properly disposed of.

(c) Any pretrial motion, request or issue which is not raised at the omnibus hearing shall be deemed waived, unless the party concerned did not have the information necessary to make the motion or request or raise the issue.

(d) Stipulations by any party or his counsel shall be binding upon the parties at trial unless set aside or modified by the court in the interests of justice.

(e) A verbatim record or comprehensive summary of the omnibus hearing shall be made and preserved. This record shall include the disclosures made, all rulings and orders of the court, stipulations of the parties, and an identification of other matters determined or pending.

#### RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey, Criminal Procedure, 14 U. Ark. Little Rock L.J. 335.

#### CASE NOTES

**Cited:** State v. Bland, 260 Ark. 511, 542 S.W.2d 497 (1976); Rowland v. State, 263 Ark. 77, 562 S.W.2d 590 (1978); Jones v. City of Newport, 29 Ark. App. 42, 780 S.W.2d 338 (1989); Moore v. State, 303 Ark. 1, 791 S.W.2d 698 (1990); Smith v. Lockhart, 923 F.2d 1314 (8th Cir. 1991).

#### Rule 20.4. Pretrial conference.

(a) Whenever a trial is likely to be protracted or unusually complicated, or upon request by or agreement of counsel, the trial court, whether or not an omnibus hearing has been held, may hold one (1) or more pretrial conferences with trial counsel present to consider such matters as will promote a fair and expeditious trial. Matters which might usefully be considered include, but are not limited to:

- (i) stipulations as to facts about which there is no dispute;
- (ii) marking for identification various documents and other exhibits of the parties;
- (iii) waivers of foundation as to such documents;
- (iv) excision from admissible statements of material prejudicial to a codefendant;
- (v) severance of defendants or offenses;
- (vi) seating arrangements for defendant and counsel;
- (vii) use of jurors and questionnaires;
- (viii) number and use of peremptory challenges;
- (ix) procedure on objections where there are multiple counsel;
- (x) order of presentation of evidence and arguments where there are multiple defendants;
- (xi) order of cross-examination where there are multiple defendants; and
- (xii) temporary absence of defense counsel during trial.

(b) Pretrial conferences should be recorded. At the conclusion of the conference a memorandum of the matters agreed upon should be signed by counsel, approved by the court, and filed. Such memorandum should be binding upon the parties at trial, on appeal and in post-conviction proceedings unless set aside or modified by the court in the interests of justice. However, admissions of fact should bind a defendant only if they are included in the pretrial order and are signed by him and his counsel.



## ARTICLE VI. PRETRIAL PROCEDURES: JOINDER AND SEVERANCE

### RULE 21. JOINDER OF OFFENSES AND DEFENDANTS

#### Commentary to Article VI

Rules 21 through 23 are calculated to promote expeditious disposition of criminal cases without, in the process, causing undue strain on prosecutorial or judicial resources or, of course, prejudice to defendants. The language of the rules closely tracks that of the ABA *Standards* relating to *Joinder and Severance*, here cited *Standards, Joinder and Severance*.

In concept and practice, joinder has traditionally enjoyed popularity among prosecutors, courts, and scholars in as much as it produces savings of time, money and effort.

As pointed out by *Standards, Joinder and Severance*, "[s]everance, on the other hand, is typically sought on the ground that a unified disposition of several charges or several defendants would put those proceeded against at an unfair disadvantage, due to confusion of law and evidence by the trier of fact and the 'smear' effect such confusion can produce." *Id.* at 1.

It is felt that the following rules treat the subject matter at hand with a specificity not attended by unwarranted narrowness, and that proper recognition and protection is accorded the legitimate concerns of all parties. Particularly, it should be noted that the following rules do not unreasonably restrict a trial court's authority to exercise discretion for the purpose of accommodating reason and justice with the facts of particular cases.

Rule 21 is concerned with joinder of both offenses and defendants. Present Arkansas statutory authority respecting joinder of offenses is found in Ark. Stat. Ann. §§ 43-1009, 43-1010 (Repl. 1964). The latter provision is a very narrowly drawn statute which limits offenses which may be joined to certain groups of crimes identified therein.

Joinder of defendants is now controlled by authority found in Ark. Stat. Ann. §§ 43-1801, 43-1802 (Repl. 1964).

Rules 21.1 and 21.2 provide the prosecution with broad latitude to effect joinder absent objection by defendant and as such demarcate the limits of permissible joinder.

Rule 21.1 allows joinder of offenses based on the same conduct or on acts which are parts of a single scheme or plan. In addition, the provision is uncommonly broad in that it permits, without requiring, joinder of offenses of the same or similar character whether or not they were committed as a part of a common scheme or plan. Rule 21.1 will replace §§ 43-1009, 43-1010 (Repl. 1964).

Rule 21.2 treats joinder of defendants with the liberality characterizing Rule 21.1. For example, defendants alleged to have committed different offenses can be jointly indicted or informed against and tried, although the offenses charged were not part of a common scheme or plan, if the offenses were so intimately connected respecting time, place, and occasion that it would be difficult to separate proof of one from proof of the other.

It should be borne in mind, of course, that Rules 21.1 and 21.2 are "permissive" in nature and do not withdraw prosecutorial discretion as to when to seek joinder. As the introductory comments to *Standards, Joinder and Severance*, note, "[i]t must be emphasized ... that [Rules 21.1 and 21.2] state the outer limits of joinder, that is, what the prosecutor may do absent any objection from a defendant. Such joinder is not required of the prosecutor, nor is there any assurance that such joinder would always withstand a motion for severance." *Standards, Joinder and Severance* at 3.

The last of Rules 21-21.3 is designed to provide relief for a defendant faced with the prospect of a number of trials involving related offenses. This rule is without counterpart in present Arkansas law and permits a defendant in such circumstances to compel joinder if joinder would not work to defeat the ends of justice. The provisions of this rule are also designed to encompass a situation in which a defendant, having been tried for one offense, finds himself confronted with a related charge of which he was unaware prior to the other trial. Again, if the ends of justice would not be defeated — for example, because the prosecuting attorney does not have sufficient evidence to warrant trying the offense — the defendant is entitled to a dismissal of the charge.

Finally, this rule makes it clear that the entry of a plea of guilty or nolo contendere to one offense does not bar subsequent prosecution for a related offense.

Severance of both offenses and defendants is dealt with in Rule 22. Rule 22.1 is concerned with the concept of timeliness, waiver, and double jeopardy in the severance context. These are problems of procedure unique to the motion for severance. The rule seeks to eliminate double jeopardy problems by providing that a successful motion to sever made

by defendant during a trial will not bar a subsequent prosecution of that defendant for the offense served.

Arkansas statutory authority pertaining to the subject of Rule 22.1 is found at Ark. Stat. Ann. §§ 43-1213, 43-1216 (Repl. 1964). These provisions indicate that at present the appropriate way of raising the issue of misjoinder is by demurrer. *Harris v. State*, 140 Ark. 46, 215 S.W. 620 (1919), overruling *Gramlich v. State*, 135 Ark. 243, 204 S.W. 848 (1918); *Malone v. State*, 202 Ark. 796, 152 S.W.2d 1019 (1941). Under 22.1 misjoinder must be attacked by "motion to sever."

Rule 22.2 (a) embodies the Commission's recognition of the grave risk of prejudice from joint disposition of unrelated charges and, accordingly, provides a defendant with an absolute right to severance of offenses joined solely on the ground that they are of the same or similar character.

### Rule 21.1. Joinder of offenses.

Two (2) or more offenses may be joined in one (1) information or indictment with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

(a) are of the same or similar character, even if not part of a single scheme or plan; or

(b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

#### 1987 Unofficial Supplementary Commentary to Rule 21.1

#### Status Offenses Joined With Other Offenses.

The Arkansas Court of Appeals has held that a defendant charged with burglary, attempted theft, and with being a felon in possession of a firearm under Rule 21 is not entitled to a severance under Rule 22.1(a), which accords the defendant a right to a severance of offenses joined solely on grounds that they are of "the same or similar character." *Parker v. State*, 18 Ark. App. 252, 715 S.W.2d 210 (1986). The Court then pointed out that appellant was arrested with a gun as he fled from the scene of a burglary and that "if the offenses had been severed, it would have required two trials and the State would have had to call the same witnesses to testify to the same facts." 18 Ark. App. at 256, 715 S.W.2d at 212.

*Parker* may be seen as indicating that under these circumstances, when status offenses such as felon in possession of a firearm are joined with offenses such as burglary or theft, for purposes of ruling on a motion for severance the joinder will be treated as one permitted by Rule 21.1(b). See, also, *Guy v. State*,

Rule 22.2 (b) permits severance if fairness so requires.

Rule 22.3 deals with the problematical situation created by the proffer as evidence of an out-of-court statement referring to a defendant but not admissible against him. As is the case with Rule 22.2, the criteria for severance include distinctions between rulings before and during trial.

Rule 22.4 comes to grips with the knotty problem arising when the prosecution's case discloses insufficient evidence to support the allegation upon which the defendants were initially joined for trial. Again fairness is the touchstone supplied by the rule.

Finally, Rule 23 simply constitutes a recognition of the authority of a court to consolidate or sever offenses and defendants on its own motion.

282 Ark. 424, 668 S.W.2d 952 (1984); *Rubio v. State*, 18 Ark. App. 277, 715 S.W.2d 214 (1986).

#### "Single Scheme or Plan" vs. "Criminal Episode."

The Arkansas Supreme Court has differentiated between a "single scheme or plan" and a "criminal episode." In *Ruiz v. State*, 273 Ark. 94, 617 S.W.2d 6, cert. denied, 454 U.S. 1093, 70 L.Ed.2d 631 (1981), appellants argued that two murders were not part of a single scheme or plan. The Supreme Court upheld the trial court's refusal to sever the offenses, stating:

"They argue that the offenses are not part of a single scheme or plan. That assertion is debatable, but whether they were part of a single plan or simply random, disconnected crimes, is beside the point, because they constitute one criminal episode and when a series of acts are connected, that is enough to give the state a right to join them in a single information."

273 Ark. at 99, 617 S.W.2d at 9.

One who burglarizes an office on January 1 and a home on February 1 may be charged in the same information with both offenses,



since they are "of similar character." He would be entitled to a severance under Rule 22.2(a), however, unless the offenses were part of a single scheme or plan or criminal episode. Even though roughly the same type of conduct might be argued to be involved in both burglaries, justifying joinder under Rule 21.1(b), the term "same conduct" in Rule 21.1(b) was probably intended to be read literally to refer to contemporaneous events and to permit joinder in a situation where, for example, a defendant robs three persons simultaneously.

#### **Permissible Joinder (Rule 21.1) vs. Right to Severance (Rule 22.2).**

In *Parker v. State*, 18 Ark. App. 252, 715 S.W.2d 210 (1986), the court of appeals had the following to say about joinder and severance:

"A defendant has a right to a severance whenever two or more offenses have been joined solely on the grounds that they are of the same or similar character. ... Otherwise, granting or refusing a severance is within the discretion of the trial court."

18 Ark. App. at 256, 715 S.W.2d at 212.

*Parker* should not be read to say that any two offenses may be joined on the whim of the prosecutor or that a defendant has a right to a severance *only* where offenses have been joined solely on grounds that they are of the same or similar character. Rule 21.1 establishes the outer boundaries of joinder. Where offenses that are proposed to be joined cannot be brought within any standard established by the rule, they should not be joined and, if joined, should be severed on motion of the defendant. On the other hand, Rule 22.2, authorizing severances, appears to address only situations where joinder was originally made within Rule 21.1 limits, permitting severances of offenses permissibly joined under Rule 21 solely on grounds of "same or similar character," but not explicitly conferring a right to severance where not even a tenuous "same or similar character" connection can be shown. Rule 22.2 could thus be read to allow the trial court to permit joinder of a January

1 rape and a June 1 theft upon a finding that such joinder would "promote a fair determination of the defendant's guilt" under Rule 22.2(b)(i). But since such a joinder is beyond the bounds permitted by Rule 21.1, a defendant should be accorded an absolute right to severance under these circumstances. See supplementary commentary to Rule 22.2.

#### **History of Rule.**

It should be mentioned that the source of this Rule, the *American Bar Association's Standards, Joinder and Severance*, has an interesting history post-dating the Arkansas Supreme Court's adoption of the *Standards* language. The text of Rule 21 was drawn from *Standards, Joinder and Severance* approved on August 6, 1968 by the Association's House of Delegates. See original commentary to Rule 21. Subsequently, on August 9, 1978, the House of Delegates approved modifications to both joinder and severance standards, so unlimited joinder of offenses and absolute rights of severance of unrelated offenses are now permitted. *ABA Standards for Criminal Justice*, 2d Ed., Chapter 13, Little & Brown Co. (1986). The amendments have been explained as follows:

"The unlimited joinder of unrelated offenses has been authorized for the occasional case when the prosecutor and the defendant agree that a joint trial of the offenses is desirable. In most cases, however, joint trials of unrelated offenses are difficult to justify because the defendant suffers all of the disadvantages of a joint trial while the prosecutor achieves few, if any, of the benefits of a joint trial. ... The revised standard has adopted the unlimited joinder of unrelated offenses subject to the coextensive right to severance."

*Id.* at 13.30-13.31.

The relationship between Rule 21 and statutes contemporaneously adopted to define the scope of the former jeopardy defense is examined in the commentary to Ark. Stat. Ann. § 41-107 (Repl. 1977). But see commentary to Rule 21.3.

### **CASE NOTES**

#### **ANALYSIS**

In general.  
Conspiracy to commit crime.  
Continuous criminal episode.  
Prosecutor's discretion.  
Right to severance.  
Series of connected acts.

#### **In General.**

This joinder rule is much broader than the prior statutes, A.S.A. §§ 43-1009 and 43-1020, and is designed to establish the outer

boundaries of joinder of offenses; however, the liberal joinder rule is accompanied by a limiting severance rule that recognizes the grave risk of prejudice from joint disposition of unrelated charges and, accordingly, provides a defendant with an absolute right to a severance of offenses joined solely on the ground that they are of same or similar character. *Clay v. State*, 318 Ark. 550, 886 S.W.2d 608 (1994), questioned *Dale v. State*, 935 S.W.2d 274 (1996).

This rule is permissive and not mandatory;

thus, once defendant was charged in the Sixth Judicial District, the trial court possessed no power to transfer the case outside the district. *State v. Brooks*, 360 Ark. 499, 202 S.W.3d 508 (2005).

#### **Conspiracy to Commit Crime.**

Where in arson charge in indictment it was alleged that the defendant and his codefendant burned the house and the burning of the house was alleged to be a part of the conspiracy charged, under the Rules of Criminal Procedure which were in effect at the time of defendant's trial, the court had the authority to consolidate the two indictments of arson and conspiracy to commit arson subject to defendant's right to move for a severance. *Owen v. State*, 263 Ark. 493, 565 S.W.2d 607 (1978).

#### **Continuous Criminal Episode.**

Where the proof showed that defendant, a stranger in town with no means of transportation, had committed a serious felony by shooting first victim and the judge and the jury could infer that he took flight, flagged down a passing driver, and held him up at gunpoint in order to flee in the driver's truck, leaving the driver out in the country without clothing, trial court did not err in denying motion for separate trials of battery and robbery charges since offenses were part of a continuous criminal episode. *Jones v. State*, 282 Ark. 56, 665 S.W.2d 876 (1984).

In a prosecution for two counts of rape, the offenses were part of a single criminal episode, where the victims were picked up together, ordered simultaneously to remove their clothing, driven together to a remote location where they were both raped and otherwise abused until one escaped. *Johnson v. State*, 290 Ark. 166, 717 S.W.2d 805 (1986).

#### **Prosecutor's Discretion.**

Joinder is not required of a prosecutor, nor is there any assurance that such joinder will always withstand a motion for severance. *Lockhart v. State*, 314 Ark. 394, 862 S.W.2d 265 (1993).

#### **Right to Severance.**

A trial court's decision to deny a motion for severance is discretionary. *Easter v. State*, 306 Ark. 517, 815 S.W.2d 391 (1991).

Where defendant was accused of committing five unconnected sexual assaults against five different girls, the alleged offenses occurred over a twelve-month period, involved different charges, and were committed in different manners, against different victims, and at different locations, the charges should not have been consolidated for trial; since these five crimes were of a similar character, but were not part of a single scheme or plan, the defendant had a right to a severance of

the offenses. *Clay v. State*, 318 Ark. 550, 886 S.W.2d 608 (1994), questioned *Dale v. State*, 935 S.W.2d 274 (1996).

A defendant has an absolute right to a severance of offenses joined solely on the ground that they are of same or similar character but not in a case where the offenses were a part of a common scheme or plan. *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996).

Trial court did not abuse its discretion in denying defendants' motion to sever where the proximity in time and place of the crimes, possession and fleeing, provided a basis for the denial of severance; additionally, some of the state's proof was pertinent to both crimes and the state was using the evidence of defendant's return to the property by motorcycle and subsequent fleeing as circumstantial evidence of defendant's possession of contraband. *Garner v. State*, 82 Ark. App. 496, 122 S.W.3d 24 (2003), superseded 131 S.W.3d 734 (2003).

#### **Series of Connected Acts.**

Where defendants, who were escaped convicts, abducted three men and placed two in the trunk of a car, fatally shooting one and critically wounding the other, then had the third man guide them through wooded areas and killed him in another county, the two murders were a single criminal episode or series of connected acts sufficient to permit joinder of the offenses under this rule, since the second man's murder was deferred only until he could guide them through unfamiliar territory. Thus the charges were not joined solely on the ground that they were of the same or similar character and defendants did not have the right under ARCrP 22.2, to a severance of the offenses. *Ruiz v. State*, 273 Ark. 94, 617 S.W.2d 6 (1981), cert. denied 454 U.S. 1093, 102 S. Ct. 659, 70 L. Ed. 2d 631 (1981).

The trial court did not abuse its discretion in denying defendant's motion to sever the offenses where the two crimes were committed within one hour of each other and were factually intertwined. *Gillie v. State*, 305 Ark. 296, 808 S.W.2d 320 (1991).

Two or more criminal offenses are based on a series of acts connected together when the offenses occurred close together in time and place. *Easter v. State*, 306 Ark. 517, 815 S.W.2d 391 (1991).

Court properly granted state's motion to consolidate the offenses of capital murder, kidnapping, aggravated robbery, and attempted capital murder as the officer was shot during a shootout between defendant and law enforcement where defendant participated in a previous murder, fled, armed himself, and used weapons in an attempt to evade capture as law enforcement closed in and



tried to execute a search warrant. *Holsombach v. State*, 368 Ark. 415, 246 S.W.3d 871 (2007).

**Cited:** *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978); *Parker v. State*, 292 Ark. 421,

731 S.W.2d 756 (1987); *Wicks v. Lockhart*, 569 F. Supp. 549 (E.D. Ark. 1983); *Hardcastle v. State*, 25 Ark. App. 157, 755 S.W.2d 228 (1988); *Bunn v. State*, 320 Ark. 516, 898 S.W.2d 450 (1995).

## Rule 21.2. Joinder of defendants.

Two (2) or more defendants may be joined in one (1) information or indictment

(a) when each of the defendants is charged with accountability for each offense included; or

(b) when each of the defendants is charged with conspiracy and some of the defendants are also charged with one (1) or more offenses alleged to be in furtherance of the conspiracy; or

(c) when, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:

(i) were part of a common scheme or plan; or

(ii) were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one (1) charge from proof of others.

### CASE NOTES

#### ANALYSIS

Joinder upheld.  
Sentencing.

#### Joinder Upheld.

Joint trial of capital murder defendants upheld where joint trial was lengthy, lasting seventeen days, and perhaps separate trials would have taken twice as long and required twice as many jurors; the evidence was not difficult for the jury to segregate; the evidence was not significantly stronger against one defendant than the other; the testimony of one did not compel the other to testify; there was no significant disparity in criminal records of the defendants; and the trial judge thought the jurors could distinguish the evidence and apply the law intelligently to each offense and to each defendant. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

Court properly granted state's motion to consolidate the offenses of capital murder, kidnapping, aggravated robbery, and attempted capital murder as the officer was shot during a shootout between defendant and law enforcement where defendant participated in a previous murder, fled, armed himself, and used weapons in an attempt to evade capture as law enforcement closed in and tried to execute a search warrant. *Holsombach v. State*, 368 Ark. 415, 246 S.W.3d 871 (2007).

#### Sentencing.

A joint sentencing trial does not, per se, deprive any defendant of the right to individualized sentencing; where the evidence relating to the separate defendants is readily identifiable, and the jury is properly instructed, there is no problem. *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), aff'd 71 F.3d 1404 (8th Cir. 1995).

## Rule 21.3. Failure to join related offenses.

(a) Two (2) or more offenses are related offenses for the purposes of this rule if they are within the jurisdiction and venue of the same court and are based on the same conduct or arise from the same criminal episode.

(b) When a defendant has been charged with two (2) or more related offenses, his timely motion to join them for trial shall be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion is

granted. A defendant's failure to so move constitutes a waiver of any right of joinder as to related offenses with which the defendant knew he was charged.

(c) A defendant who has been tried for one (1) offense may thereafter move to dismiss a charge for a related offense, unless a motion for joinder of these offenses was previously denied or the right of joinder was waived as provided in subsection (b). The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

(d) Entry of a plea of guilty or nolo contendere to one (1) offense does not bar the subsequent prosecution of a related offense. A defendant may enter a plea of guilty or nolo contendere on the basis of a plea agreement in which the prosecuting attorney agrees to seek or not to oppose dismissal of other related charges or not to prosecute other potential related charges.

#### 1987 Unofficial Supplementary Commentary to Rule 21.3

The Arkansas Supreme Court has apparently held that Rule 21.3 has constitutional dimensions based on the double jeopardy prohibitions of the United States and Arkansas Constitutions. *Cozzaglio v. State*, 289 Ark. 33, 709 S.W.2d 70 (1986). In *Cozzaglio*, appellant kidnapped a teenager in Washington County and drove her to Madison County, raping her during and after the journey. The court found that "the acts or effects" (Ark. Stat. Ann. § 43-1414 (Repl. 1977)) of rape occurred in both counties and went on to hold that appellant's motion under Rule 21.3 to join the offenses for a single trial in Washington County should have been granted. The court affirmed a Washington County kidnapping conviction, but reversed a Madison County rape conviction. If one assumes that venue for the rape charge was properly in Washington County, elements of the offense of rape having occurred in both counties, then the *Cozzaglio* decision is correct. As explained by the court:

Cozzaglio's argument that the trials should have been joined under A.R.Cr.P. Rule 21.3 does have merit.

...

This rule has three requirements: the offenses must be within the jurisdiction of the same court, arise from the same conduct or criminal episode, and a timely motion to join must be made. All three requirements were met in this case and when that motion to join was made in Washington County, the trial judge should have granted it. Necessarily that means the second trial was barred; the conviction of rape must be reversed and the charged dismissed. See *People v. White*, 390 Mich. 245, 212 N.W.2d 222 (1973). *Cozzaglio* could have been tried in either county for both offenses, but not separately on separate charges.

289 Ark. at 38-39, 709 S.W.2d at 72-73. See, also, *Ellis v. State*, 291 Ark. 72, 722 S.W.2d 575 (1987). Compare *Gardner v. State*, 263 Ark. 739, 569 S.W.2d 74 (1978), *cert. denied*, 440 U.S. 911, 59 L. Ed. 2d 460 (1979) (if elements of a crime are committed in different jurisdictions, any state in which an essential part of the crime occurs may take jurisdiction).

*Cozzaglio* has been followed in *Crook v. State*, 290 Ark. 163, 717 S.W.2d 803 (1986). Appellant was arrested in a stolen car with a firearm and cocaine in his possession in June 1984. He was charged in August 1984 with theft by receiving and with being a felon in possession of a firearm. Because of a clerical error, he was not charged with possession of cocaine. In February 1985, the clerical error was detected and he was charged with possession of cocaine, but he was not notified that the information had been amended. In July he was tried and convicted by a jury of theft by receiving after the felon in possession of firearm charge had been dismissed. Then the state, evidently contending that a clerical error had resulted in appellant's not being prosecuted for the cocaine possession, demanded a trial on that charge. Appellant's motion to dismiss under Rule 21.3(c) was denied, and he was convicted at a bench trial. The Arkansas Supreme Court reversed, finding that the cocaine charge was related to the other offenses for which claimant had been convicted and that "clerical oversights" did not excuse the state's failure to join the related offenses for trial. 290 Ark. at 166, 717 S.W.2d at 805.

Less than a month after the decision in *Crook*, the court decided *Martin v. State*, 290 Ark. 293, 718 S.W.2d 938 (1986), where appellant was convicted of murder and first degree



battery for shooting different victims within the space of a few minutes. The court affirmed the murder conviction but reversed the battery conviction because the trial court erroneously refused to give a justification instruction on the battery charge, which was remanded for another trial. Three justices dissented from the remand, arguing that appellant's trial would place him in jeopardy twice in violation of Rule 21 and that the decision departed from the interpretation of Rule 21 approved in *Crook*.

Related offenses may be joined under Rule 21.1, which is permissive in nature. See supplementary commentary to Rule 21. But if the prosecution does not join related charges for trial and the defendant knowingly waives joinder, a later trial for a related offense is not barred. It is only where at the time of the earlier trial the defendant was unaware of the charge that is the subject of the proposed later trial that the defendant is entitled to a dismissal. In *Martin*, this rule was not violated, and when the three judge dissent states that "the murder and battery charges were required to be tried together because they were of a similar character . . .," 290 Ark. App. at 298, 718 S.W.2d at 940, it oversimplifies the rule. Rule 21.1 is permissive and only "requires" joinder in the sense that, under Rule 21.3, multiple trials on charges that could have been joined under Rule 21.1 will not be permitted if the defendant has moved to join the charges for trial.

Reading Rule 21 as embodying constitutional guarantees against former jeopardy rather than as merely promoting efficient disposition of criminal cases is, perhaps, un-

necessarily complicating the law of former jeopardy. The retrial in *Martin* certainly would not violate Ark. Stat. Ann. §§ 41-106 to -109 (Repl. 1977), the new statutory scheme exhaustively defining the sweep of the former jeopardy defense in Arkansas.

In this connection, it should be noted that Ark. Stat. Ann. § 41-107 (Repl. 1977) is not perfectly congruous with Rule 21.1, inasmuch as § 41-107 may preclude consecutive trials for different offenses based on the same conduct, while Rule 21.1 permits such trials in the sense that it does not require joinder of such charges unless a defendant demands this. See commentary to § 41-107, which incorrectly states that Rule 21.1 compels disposition in a single trial of all offenses arising out of the same conduct. In fact, this is "compelled" only where the defendant moves to join. But, however one interprets the relationship between § 41-107 and Rule 21, it does not appear that a retrial of one offense originally joined for trial with a related offense, as was the case in *Martin*, is barred. *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed.2d 469 (1970), relied upon by the dissent in *Martin*, stands for the proposition that "when an issue of ultimate fact has once been determined by a final and valid judgment, that issue cannot again be litigated between the same parties in any future lawsuit," 397 U.S. at 443, 25 L.Ed.2d at 475, and is not germane to a decision about whether to permit a retrial in circumstances such as those presented in *Martin*. The rule of *Martin* is also consistent with the public policy considerations set forth in *United States v. Tateo*, 377 U.S. 463, 12 L. Ed. 2d 448 (1964).

## CASE NOTES

### ANALYSIS

Applicability.  
Basis for rule.  
Elements of rule.  
Failure to join.  
Waiver.

### Applicability.

The rules regarding severance do not apply to offenses used as aggravating circumstances in a capital murder case. *Lee v. State*, 327 Ark. 692, 942 S.W.2d 231 (1997), cert. denied 522 U.S. 1002, 118 S. Ct. 572, 139 L. Ed 2d 412 (1997).

Where prior charges against defendant for making false insurance claims had been dismissed, a subsequent prosecution for defrauding Medicaid was not subject to dismissal under subsection (c) of this rule since there was no single episode or single act of conduct due to the fact the fraud was against different entities. *Dilday v. State*, 369 Ark. 1, 250 S.W.3d 217 (2007).

### Basis for Rule.

This rule has its basis in the double jeopardy clause of the United States Constitution, contained in the Fifth Amendment. *Cozzaglio v. State*, 289 Ark. 33, 709 S.W.2d 70 (1986).

### Elements of Rule.

This rule has three requirements: the offenses must be within the jurisdiction of the same court, they must arise from the same conduct or criminal episode; and a timely motion to join must be made. *Cozzaglio v. State*, 289 Ark. 33, 709 S.W.2d 70 (1986).

### Failure to Join.

Where the kidnapping occurred in Washington County, continued into Madison County and culminated with a rape in Madison County, both counties had jurisdiction and venue over both the kidnapping and rape charges as they arose from the same continuing course of conduct. Thus, this rule required the judge to grant the defense motion to join

the charges in one trial, and when joinder was denied, the latter conviction had to be reversed and the charge dismissed. *Cozzaglio v. State*, 289 Ark. 33, 709 S.W.2d 70 (1986).

Where, five months after his trial for theft by receiving, charges for possession of a controlled substance arising out of the same episode were brought against the defendant, the trial court erred in denying the defendant's motion to dismiss, where the failure to include the possession charge was due to a clerical oversight. *Crook v. State*, 290 Ark. 163, 717 S.W.2d 803 (1986).

Unless the "ends of justice" would be defeated by doing so, this rule requires the trial court to grant a motion to dismiss when a defendant has been tried for one offense and then later learns that he is to be tried for a related charge of which the defendant was unaware prior to the first trial; in exercising its discretion to determine whether the "ends of justice" would be defeated, the trial court must do so with the purpose of accommodating reason and justice with the facts of particular cases. *Crook v. State*, 290 Ark. 163, 717 S.W.2d 803 (1986).

Where defendant's motion, although entitled motion for severance of offenses, plainly showed on its face that defendant intended some charges be joined together and others severed, the trial court erroneously denied the motion, and defendant was entitled to dismissal of capital felony murder charge after being convicted of conspiracy to commit theft. *McMillan v. Donovan*, 301 Ark. 393, 784 S.W.2d 752 (1990).

#### **Waiver.**

Issues concerning this rule not presented at trial cannot be considered on appeal. *Stephens v. State*, 293 Ark. 366, 738 S.W.2d 91 (1987).

Defendant's failure to make a request for joinder pursuant to this rule constituted a waiver of any right of joinder as to the related offenses with which he knew he had been charged. *Gonzalez v. State*, 306 Ark. 1, 811 S.W.2d 760 (1991).

**Cited:** *Jones v. State*, 2010 Ark. App. 470, — S.W.3d —, 2010 Ark. App. LEXIS 501 (June 2, 2010).

## **RULE 22. SEVERANCE OF OFFENSES AND DEFENDANTS**

### **Rule 22.1. Timeliness of motion; waiver; double jeopardy.**

(a) A defendant's motion for severance of offenses of defendants must be timely made before trial, except that a motion for severance may be made before or at the close of all the evidence if based upon a ground not previously known. Severance is waived if the motion is not made at the appropriate time.

(b) If a defendant's pretrial motion for severance was overruled, he may renew the motion on the same grounds before or at the close of all the evidence. Severance is waived by failure to renew the motion.

(c) Unless consented to by the defendant, a motion by the prosecuting attorney for severance of offenses or defendants may be granted only if timely made prior to trial.

(d) If a motion for severance is granted during the trial and the motion was made or consented to by the defendant, the granting of the motion shall not bar a subsequent trial of that defendant on the offenses severed.

#### **1987 Unofficial Supplementary Commentary to Rule 22.1**

##### **Timeliness of Motion.**

The Arkansas Court of Appeals has held that where two cases have been consolidated for trial for over a month and no motion for severance is made on Rule 22.2(a) grounds until after a jury is qualified and sworn, the motion is not timely, and the trial court's refusal to grant it will not be reversed without a showing of abuse of discretion. *Parks v. State*, 11 Ark. App. 238, 669 S.W.2d 496

(1984). See, also, *Owen v. State*, 263 Ark. 493, 565 S.W.2d 607 (1978).

##### **Renewal of Motion Required.**

In *James v. State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984) the record showed that counsel for appellant moved under Rule 22.2(a) for a severance, but he presented no evidence in support of the motion, which was denied. Since the record was devoid of evidence, the court of appeals declined to over-



turn the trial court's decision and, because appellant failed to renew the motion under Rule 22.1(b), affirmed the conviction. The court gave no indication how it would have ruled had appellant introduced enough evidence at the first hearing on the motion to

convince it that the motion should have been granted at that time. Under Rule 22.1(b) the same result might be required inasmuch as "severance is waived by failure to renew the motion." Rule 22.1(b).

## CASE NOTES

### ANALYSIS

**Appeal.**

Denial of motion.

Discretion of court.

Information.

Motion requirements.

Renewal of motion.

Waiver.

### Appeal.

Where defendant, prior to the day of the trial, moved for severance and premised his argument on certain prejudicial testimony, and where defendant then made severance motions twice on the day of the trial before and after voir dire — once in connection with peremptory challenges and once without specifying the grounds — but failed to raise the motion pertaining to the challenged testimony, the defendant failed to preserve the severance issue relating to the testimony for appeal. *Rockett v. State*, 319 Ark. 335, 891 S.W.2d 366 (1995).

### Denial of Motion.

A defendant in a prosecution for the manufacture of marijuana was not prejudiced by the court's denial of his severance motion since his codefendant's testimony tended to exonerate him of any illegal knowledge or conduct relative to the two marijuana patches. *Brown v. State*, 5 Ark. App. 181, 636 S.W.2d 286 (1982).

The trial court did not err in refusing the defendant's motion to sever the two controlled substances charges against him that the trial court had consolidated where the record reflected that the fact that these two offenses had been consolidated for trial was known to the defendant at least 34 days before the date of trial, that no pretrial motion for severance was made, and that the defendant did not make his motion until the morning of the trial and after the jury had been qualified and sworn. *Parks v. State*, 11 Ark. App. 238, 669 S.W.2d 496 (1984).

### Discretion of Court.

The matter of severance lies within the sound discretion of the trial judge and will not be reversed absent a showing of an abuse of discretion. *Brown v. State*, 5 Ark. App. 181, 636 S.W.2d 286 (1982).

The trial court's action with regard to matters of severance lies within the sound discretion of the trial judge and will not be reversed

absent a showing of abuse. *Parks v. State*, 11 Ark. App. 238, 669 S.W.2d 496 (1984).

In a fleeing and drug case, the trial court did not err by failing to sever the offenses where defendant's act of fleeing occurred within hours of the initial traffic stop at an intersection located about one-half mile from where the contraband was found. *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003).

### Information.

State's amendment of an information did not violate § 16-85-407 because the amendment did not constitute a severance of offenses under subsection (c) of this rule, and the evidence would have been introduced in any case as part of the events leading up to the shooting whether it was included in the charging instrument or not; the only offense charged in the case was first-degree battery under § 5-13-201(a)(3), and the amendment did not change the nature or degree of the crime but merely clarified the manner in which the offense was committed. *Reed v. State*, 2011 Ark. App. 352, — S.W.3d —, 2011 Ark. App. LEXIS 374 (May 11, 2011).

### Motion Requirements.

An attorney's statement that "I renew all motions, including motion for directed verdict" was insufficient under the renewal requirement of subsection (b) of this rule to preserve the issue of severance for appeal. *Jacobs v. State*, 317 Ark. 454, 878 S.W.2d 734 (1994); *Goins v. State*, 319 Ark. 689, 890 S.W.2d 602 (1994).

To preserve the issue of the sufficiency of the evidence in a criminal case, the appellant must move for a directed verdict both at the close of the state's case and at the close of all of the entire case; both times, the motion must state specific grounds. *Jones v. State*, 318 Ark. 704, 889 S.W.2d 706 (1994).

A "bright line" has been drawn: all directed verdict motions must state specific grounds. *Jones v. State*, 318 Ark. 704, 889 S.W.2d 706 (1994).

### Renewal of Motion.

Even if a general renewal of all "objections" could be said to constitute renewal of all motions, it does not make clear to the court the grounds for severance, and is, therefore, insufficient. *Wynn v. State*, 316 Ark. 414, 871 S.W.2d 593 (1994).

Subsection (b) of this rule does not require

that a motion to sever be renewed at the end of all the evidence, but before or at the close of all proof. *Rockett v. State*, 319 Ark. 335, 891 S.W.2d 366 (1995).

Failure to renew severance motion before or at the close of all the evidence after denial of a pretrial severance motion precludes review of the issue on appeal. *Gray v. State*, 327 Ark. 113, 937 S.W.2d 639 (1997).

#### **Waiver.**

Where a defendant in a joint trial failed to move before the trial for severance of defendants or offenses, her objections were waived. *Burnett v. State*, 262 Ark. 235, 556 S.W.2d 653 (1977), cert. denied 435 U.S. 944, 98 S. Ct. 1525, 55 L. Ed. 2d 540 (1978).

Where defendant's objection came after the jury was selected and sworn, there was a waiver of severance. *Owen v. State*, 263 Ark. 493, 565 S.W.2d 607 (1978); *King v. State*, 300 Ark. 3, 775 S.W.2d 897 (1989).

Where the defendant's severance motion was not filed until immediately before the state called its first witness, her motion was untimely since she waited to raise the severance objection until after the jury was selected and sworn. *Brown v. State*, 5 Ark. App. 181, 636 S.W.2d 286 (1982).

Court did not abuse discretion by not granting the severance of offenses of carnal abuse and sexual abuse of two different victims where the allegation that both offenses occurred on the same day between members of the same household might have been indicative of a single scheme or plan. At point at which motion was made the two victims had not testified as to the circumstances under

which the two crimes were committed and there was no evidence indicating that the two acts were not parts of a single episode; even if the evidence disclosed that the two offenses were not a part of a single scheme or plan, and were joined solely because they were of similar character, failure to renew the motion constituted a waiver of a right to severance under the clear wording of subsection (b) of this rule. *James v. State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984).

Where defendant made a pretrial motion for severance, but failed to renew the motion at the trial, under subsection (b) of this rule, defendant waived any right to a severance. *Brown v. State*, 315 Ark. 466, 869 S.W.2d 9 (1994).

Failure to renew a motion for severance in accordance with the rule constitutes a waiver of the objection. *Wynn v. State*, 316 Ark. 414, 871 S.W.2d 593 (1994).

Even if one has a right to sever, that right can be waived, and the issue cannot be raised for the first time on appeal. *Thompson v. State*, 338 Ark. 564, 999 S.W.2d 192 (1999).

**Cited:** *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978); *Lunon v. State*, 264 Ark. 188, 569 S.W.2d 663 (1978); *Clines v. State*, 282 Ark. 541, 669 S.W.2d 883 (1984), criticized *Echols v. State*, 936 S.W.2d 509 (1996); *Fisher v. State*, 290 Ark. 490, 720 S.W.2d 900 (1986); *Butler v. State*, 303 Ark. 380, 797 S.W.2d 435 (1990); *Simpson v. State*, 310 Ark. 493, 837 S.W.2d 475 (1992); *Williams v. State*, 54 Ark. App. 271, 927 S.W.2d 812 (1996), superseded 944 S.W.2d 822 (1997); *Brewer v. State*, 68 Ark. App. 216, 6 S.W.3d 124 (1999); *Johnson v. State*, 71 Ark. App. 58, 25 S.W.3d 445 (2000).

### **Rule 22.2. Severance of offenses.**

(a) Whenever two (2) or more offenses have been joined for trial solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan, the defendant shall have a right to a severance of the offenses.

(b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), shall grant a severance of offenses:

(i) if before trial, it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense; or

(ii) if during trial, upon consent of the defendant, it is deemed necessary to achieve a fair determination of the defendant's guilt or innocence of each offense.

#### **Comment to Rule 22.2**

The court should consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the

trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.



## 1987 Unofficial Supplementary Commentary to Rule 22.2

**Severance of Same or Similar Character Offenses Under Rule 22.2(a).**

Cases examining joinder and severance on Rule 22.2(a) grounds are discussed above in the supplementary commentary to Rules 21.1 and 21.3.

Rule 21.1 establishes the outer boundaries of joinder. Where offenses that are proposed to be joined cannot be brought within any standard established by the rule, they should not be joined and, if joined, should be severed on motion of the defendant. Rule 22.2 authorizing severances appears to address only situations where joinder was originally made within Rule 21.1 limits. Rule 22.2 permits

severances of offenses permissibly joined under Rule 21 solely on grounds of "same or similar character," but does not explicitly confer a right to severance where not even a tenuous "same or similar character" connection can be shown. Rule 22.2 could be read to allow the trial court to permit joinder of a January 1 rape and a June 1 theft upon a finding that such joinder would "promote a fair determination of the defendant's guilt" under Rule 22.2(b)(i). But since such a joinder is beyond the bounds permitted by Rule 21.1, the defendant should be accorded an absolute right to severance.

**CASE NOTES****ANALYSIS**

In general.

Purpose.

Applicability.

Discretion of court.

Harmless error.

Improper joining.

Prejudice.

Separate crimes and victims.

Severance denied.

Single scheme or plan.

**In General.**

A defendant has an absolute right to a severance of offenses joined solely on the ground that they are of same or similar character but not in a case where the offenses were a part of a common scheme or plan. *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996).

**Purpose.**

Where defendant contended that the purpose of this rule is to give effect to the principle that the state cannot bolster its case against the accused by proving that he committed other similar offenses in the past, assuming that this is the underlying purpose of the rule, that purpose would not be served by granting a severance in a case where evidence of the earlier conduct would very likely be admissible in a prosecution for the later offense. *Starks v. State*, 33 Ark. App. 165, 804 S.W.2d 728 (1991).

**Applicability.**

The rules regarding severance do not apply to offenses used as aggravating circumstances in a capital murder case. *Lee v. State*, 327 Ark. 692, 942 S.W.2d 231 (1997), cert. denied 522 U.S. 1002, 118 S. Ct. 572, 139 L. Ed 2d 412 (1997).

**Discretion of Court.**

Granting or refusing a severance is within the discretion of the trial court. *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, cert. denied 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983); *Fisher v. State*, 290 Ark. 490, 720 S.W.2d 900 (1986); *McArdell v. State*, 38 Ark. App. 261, 833 S.W.2d 786 (1992); *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996).

**Harmless Error.**

Any prejudice resulting from the refusal to sever was rendered harmless where: (1) the evidence against the defendant was overwhelming; (2) a curative instruction was given concerning evidence on prior convictions; (3) the defendant voluntarily took the stand where his prior conviction was brought out on cross-examination; and (4) no further objection was made by the defense counsel that the defendant was in any way compelled to testify by introduction of the prior conviction. *Ferrell v. State*, 305 Ark. 511, 810 S.W.2d 29 (1991).

**Improper Joining.**

Where the only connection between two sales of drugs was the fact that both were made to an informer, this showing alone was insufficient to connect the two sales by a single scheme or plan, thus the trial court erred in joining the two offenses for purpose of trial. *Teas v. State*, 266 Ark. 572, 587 S.W.2d 28 (1979).

**Prejudice.**

Joinder of a felon/firearm charge with a second felony charge does not constitute prejudice by that fact alone in all instances, however, the danger that the jury's perception of the defendant will be adversely affected is so strong as to create a presumption favoring severance. *Sutton v. State*, 311 Ark. 435, 844 S.W.2d 350 (1993).

**Separate Crimes and Victims.**

There are circumstances under which separate crimes committed upon different individuals close in time may constitute a single scheme or plan within the meaning of subsection (a) of this rule. *James v. State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984).

Where defendant was accused of committing five unconnected sexual assaults against five different girls, the alleged offenses occurred over a twelve-month period, involved different charges, and were committed in different manners, against different victims, and at different locations, the charges should not have been consolidated for trial; since these five crimes were of a similar character, but were not part of a single scheme or plan, the defendant had a right to a severance of the offenses. *Clay v. State*, 318 Ark. 550, 886 S.W.2d 608 (1994), questioned *Dale v. State*, 935 S.W.2d 274 (1996).

**Severance Denied.**

A defendant was not entitled to separate trials on charges of burglary and conspiracy, where all the charges were related and grew out of the same conversation and course of conduct. *Gustafson v. State*, 267 Ark. 278, 590 S.W.2d 853 (1979), criticized *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982), questioned *Sitz v. State*, 23 Ark. App. 126, 743 S.W.2d 18 (1988).

Murders were a single criminal episode or series of connected acts sufficient to permit joinder of the offenses under ARCrP 21.1; thus the charges were not joined solely on the ground that they were of the same or similar character and defendants did not have the right to a severance of the offenses. *Ruiz v. State*, 273 Ark. 94, 617 S.W.2d 6 (1981), cert. denied 454 U.S. 1093, 102 S. Ct. 659, 70 L. Ed. 2d 631 (1981).

The trial court did not abuse its discretion in denying defendant's motion for severance of the offenses of hindering apprehension and accomplice to capital murder where the facts necessary to prove the offenses would almost all be required in each trial, if a severance were granted, in order to establish a plan, scheme, motive or state of mind. The conduct of defendant, both before and after the murder, would be admissible for the purpose of showing a plan or scheme. *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, cert. denied 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983).

Court did not abuse discretion by not granting the severance of offenses of carnal abuse and sexual abuse of two different victims where the allegation that both offenses occurred on the same day between members of the same household might have been indicative of a single scheme or plan. Even if the evidence disclosed that the two offenses were not a part of a single scheme or plan, and were

joined solely because they were of similar character, failure to renew the motion constituted a waiver of a right to severance under the clear wording of ARCrP 22.1(b). *James v. State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984).

Severance properly denied. *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987).

Denial of a motion to sever is proper if the offenses at issue are part of a single scheme or plan or if the same body of evidence would be offered to prove each offense. *Henry v. State*, 309 Ark. 1, 828 S.W.2d 346 (1992).

Where the facts necessary to prove the rape offenses would be required in both trials, and where each of the girls' testimonies would be admissible in the trial of the other's rape to show appellant's intent, motive, or common scheme or plan, the trial court did not abuse its discretion in refusing to sever the two cases. *Lukach v. State*, 310 Ark. 119, 835 S.W.2d 852 (1992).

Where acts alleged with respect to each victim occurred within a few blocks of each other about thirty minutes apart, the proximity in time and place provided an ample basis for denial of severance under this rule. *Kimbley v. State*, 315 Ark. 653, 869 S.W.2d 692 (1994).

There was a sufficient basis for the trial court's denial of the motion for severance given the proximity in time and place of a series of burglaries committed over a two-day period. *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996).

Severance of counts denied where defendant picked up amphetamines and had metamphetamine in his jeans pocket; defendant was in possession of two distinct amounts of the same type of controlled substance at the same time and at the same location. *Heritage v. State*, 326 Ark. 839, 936 S.W.2d 499 (1996).

The defendant was not entitled to severance of 2 charges of sexual abuse where the defendant obtained access to each victim through his relationships with their parents, the similarity of the manner in which the defendant committed the acts was remarkable, and the acts overlapped in time. *Dillard v. State*, 333 Ark. 418, 971 S.W.2d 764 (1998).

Four murders committed by defendant occurred at the same location, at the same time, and were clearly the result of a single scheme or plan; since the evidence offered at trial to establish each offense would be identical, a severance of the offenses was not proper and trial counsel was not ineffective in failing to move for severance. *Kemp v. State*, 348 Ark. 750, 74 S.W.3d 224 (2002).

Trial court was not required to sever a charge for exposure to the Human Immunodeficiency Virus (HIV) under this rule because the exposure to HIV was committed as part of a single scheme with a sexual assault



in the fourth degree. It was discretionary whether or not to sever under subdivision (b)(i) of this rule. *White v. State*, 370 Ark. 284, 259 S.W.3d 410 (2007).

Trial court did not abuse its discretion in refusing to sever the rape charge from the other charges as the record contained nothing suggesting that the victim was not raped or that she was raped by someone else; evidence of the other charges was admissible to prove defendant's scheme as the evidence showed that defendant would invite the children to his residence and that he would take pictures and touch the children while they were there. *Mason v. State*, — Ark. App. —, 330 S.W.3d 445, 2009 Ark. App. LEXIS 740 (2009).

In a family doctor's trial on two counts of second-degree sexual abuse, violations of § 5-14-125, the trial court correctly refused to sever the offenses under this rule because the two charges were for the same crime, the alleged assaults occurred within a one-day period at the same location and in the same manner, and the victims' narrative of events were virtually identical. *Arendall v. State*, 2010 Ark. App. 358, — S.W.3d —, 2010 Ark. App. LEXIS 381 (Apr. 28, 2010).

#### Single Scheme or Plan.

Denial of severance was proper where proximity in time and place of two robberies indicated the crimes were part of a single scheme or plan and where some evidence was pertinent to both offenses. *Brown v. State*, 304 Ark. 98, 800 S.W.2d 424 (1990).

The trial judge erred in refusing to sever a firearm/felon count from a murder count for trial because an offense based in part on a prior conviction is not part of a single scheme or plan with first degree murder, as subsection (a) of this rule requires. *Ferrell v. State*, 305 Ark. 511, 810 S.W.2d 29 (1991).

Trial judge did not abuse his discretion in denying defendant's severance motion, and in deciding that rapes by father of his two daughters were part of a single scheme or plan, where there was ample evidence that the sexual activity relating to the two daughters was inextricably connected, defendant admitted, according to the testimony of witnesses, that he had fondled his children, there was additional testimony that deviate sexual activity had occurred involving the children more than once over a period of a year, and the victims and defendant were all residing in the same household at the time. *Simpson v. State*, 310 Ark. 493, 837 S.W.2d 475 (1992).

When offenses are based on the same conduct or a series of acts connected together or

constituting parts of a single scheme or plan, they may be joined for trial. *McArdell v. State*, 38 Ark. App. 261, 833 S.W.2d 786 (1992).

There are circumstances under which separate crimes committed upon different individuals close in time may constitute a single scheme or plan within the meaning of this rule. *McArdell v. State*, 38 Ark. App. 261, 833 S.W.2d 786 (1992).

Where offenses of rape and sexual abuse comprised a common scheme: the victims were sisters, step-daughters of the defendant; the sexual conduct all occurred in the home of the defendant and the victims; and contact continued over a period of eighteen months; the trial court did not abuse its discretion in refusing to sever the offenses. These acts constituted a continuing course of conduct which, in effect, constituted a single scheme or plan. *McArdell v. State*, 38 Ark. App. 261, 833 S.W.2d 786 (1992).

Severance is not necessary to promote a fair determination of the defendant's guilt or innocence, where the facts necessary to prove the offenses would almost all be required in each trial if a severance were granted, and such evidence would be used in order to establish a plan, scheme, motive, or state of mind. *Kimbley v. State*, 315 Ark. 653, 869 S.W.2d 692 (1994).

In a fleeing and drug case, the trial court did not err by failing to sever the offenses where defendant's act of fleeing occurred within hours of the initial traffic stop at an intersection located about one-half mile from where the contraband was found. *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003).

In a sexual assault case, a court properly denied defendant's motion to sever offenses because both victims' testimony was admissible in the trial of the other to show defendant's intent, motive, common scheme, or plan. *Parish v. State*, 357 Ark. 260, 163 S.W.3d 843 (2004).

**Cited:** *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978); *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983); *Johnson v. State*, 290 Ark. 166, 717 S.W.2d 805 (1986); *King v. State*, 300 Ark. 3, 775 S.W.2d 897 (1989); *McEwen v. State*, 302 Ark. 454, 790 S.W.2d 432 (1990), overruled *Sutton v. State*, 844 S.W.2d 350 (1993); *Sullinger v. State*, 310 Ark. 690, 840 S.W.2d 797 (1992); *Lindsey v. State*, 319 Ark. 132, 890 S.W.2d 584 (1994); *Donaldson v. State*, 2009 Ark. App. 119, 302 S.W.3d 622 (2009); *Turner v. State*, 2011 Ark. 111, — S.W.3d —, 2011 Ark. LEXIS 103 (Mar. 17, 2011).

### Rule 22.3. Severance of defendants.

(a) When a defendant moves for a severance because an out-of-court

statement of a codefendant makes reference to him but is not admissible against him, the court shall determine whether the prosecution intends to offer the statement in evidence at the trial. If so, the court shall not use a joint trial with dual juries but shall instead require the prosecuting attorney to elect one (1) of the following courses:

(i) a joint trial at which the statement is not admitted into evidence against any defendant;

(ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been deleted, provided that, as deleted, the statement will not prejudice the moving defendant; or

(iii) severance of the moving defendant.

(b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), shall grant a severance of defendants:

(i) if before trial it is deemed necessary to protect a defendant's right to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of one (1) or more defendants; or

(ii) if before trial the court determines that one (1) or more of the defendants will not receive a fair trial because of potentially prejudicial publicity against another defendant; or

(iii) if during trial, upon consent of the defendant to be severed, it is deemed necessary to achieve a fair determination of the guilt or innocence of one (1) or more defendants.

(c) When such information would assist the court in ruling on a motion for severance of defendants, the court may order the prosecuting attorney to disclose any statements made by the defendant which he intends to introduce in evidence at the trial. (Amended July 13, 1987, effective October 1, 1987; amended February 24, 2005.)

**Reporter's Note, 2005 Amendment:** In *Woolbright v. State*, 357 Ark. 63, 160 S.W.3d 315 (2004), the Supreme Court barred the use of dual juries until development of a rule that

specifically addresses the practical considerations necessary to safeguard the rights of defendants. The 2005 amendments modified subsection (a) to incorporate this holding.

### 1987 Unofficial Supplementary Commentary to Rule 22.3

#### Factors Justifying Severance of Defendants.

The Arkansas Supreme Court has construed Rule 22.3 to permit, but not required, a severance in a capital case. *McDaniel v. State*, 278 Ark. 631, 648 S.W.2d 57 (1983). In *McDaniel*, the court found that the two appellants had antagonistic defenses, citing with approval a Delaware case observing that "defenses are antagonistic when to believe one defendant, it is necessary to disbelieve the other." *Jenkins v. State*, 230 A.2d 262 (Del. 1967). The *McDaniel* court pointed out that the following conclusions may be drawn from two A.L.R. annotations (82 A.L.R.3d 245 and 54 A.L.R.2d 858):

The issue of severance is to be determined on a case by case basis, considering the totality of the circumstances, with the

following factors favoring severance: (1) where defenses are antagonistic; (2) where it is difficult to segregate the evidence; (3) where there is a lack of substantial evidence implicating one defendant except for the accusation of the other defendant; (4) where one defendant could have deprived the other of all peremptory challenges; (5) where if one defendant chooses to testify the other is compelled to do so; (6) where one defendant has no prior criminal record and the other has; (7) where circumstantial evidence against one defendant appears stronger than against the other. 278 Ark. at 638, 648 S.W.2d at 60.

As pointed out subsequently in *Rhodes v. State*, 280 Ark. 156, 655 S.W.2d 421 (1983), *McDaniel* does not say that in every case — even capital cases — where antagonistic de-



fenses are presented the trial court must grant a severance, but merely that when defenses are antagonistic the trial court must be particularly careful that neither defendant is "unduly jeopardized" by a joint trial. *Id.* at 158-59, 655 S.W.2d at 422, quoting *McDaniel* at 639, 648 S.W.2d at 57. See, also, *Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986); *Burnett v. State*, 287 Ark. 158, 697 S.W.2d 95 (1985); *Baird v. State*, 12 Ark. App. 71, 671 S.W.2d 191 (1984); *Spears v. State*, 280 Ark. 577, 660 S.W.2d 913 (1983); and *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983).

Last, the most recent version of the ABA *Standards* on severance of defendants contains a new subsection (c) that provides:

(c) When evaluating whether severance is "appropriate to promote" or "necessary to achieve" a fair determination of one or more defendants' guilt or innocence for each of-

fense, the court should consider among other factors whether, in view of the number of offenses and defendants charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense and as to each defendant. American Bar Association, *Standards for Criminal Justice*, Joinder and Severance, Chapter 13 at pp. 13, 34, Little Brown & Co., 2d Ed. (1986).

#### **Deletion of References to Co-Defendant.**

In *Washington v. State*, 267 Ark. 1040, 594 S.W.2d 29 (Ark. App. 1980) and *Hallman v. State*, 264 Ark. 900, 575 S.W.2d 688 (1979) the Court of Appeals and the Supreme Court explicitly approved altering confessions by one defendant mentioning a co-defendant by removing all references to the co-defendant's identity.

### **RESEARCH REFERENCES**

**ALR.** Antagonistic defenses as ground for separate trials of codefendants in state homicide offenses-Factual applications. 16 ALR 6th 329.

Desire of Accused to Testify on Just One of Multiple Charges as Basis for Severance of Trials. 32 ALR 6th 385.

Antagonistic Defenses as Ground for Separate Trials of Codefendants in Criminal Case - Federal Marijuana Offenses. 34 ALR Fed. 2d 509.

### **CASE NOTES**

#### **ANALYSIS**

In general.

Antagonistic defenses.

Discretion of court.

Dual juries.

Factors favoring severance.

Failure to enter motion.

Out-of-court statements.

Severance denied.

Severance granted.

Timing of severance.

#### **In General.**

There is no abuse of the trial court's discretion in denying a severance where it is not manifest in the record that a severance was necessary in order to have a fair determination of defendant's guilt or innocence. *Legg v. State*, 262 Ark. 583, 559 S.W.2d 22 (1977).

Former § 43-1802 has been superseded by this rule; moreover, the section has been repealed. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

Where defendant and co-defendant were tried together, the trial court committed reversible error by admitting co-defendant's statement because it violated defendant's Sixth Amendment right to confront witnesses;

even when defendant's name was changed to a pronoun, it was obvious that the references were indirect or veiled references to him, and substantiated his existence and identity in the highly incriminating statement of co-defendant. *Jefferson v. State*, 86 Ark. App. 325, 185 S.W.3d 114 (2004), superseded 198 S.W.3d 527 (2004).

While defendant made a prima facie case of a speedy-trial violation under Ark. R. Crim. P. 28.1, as continuances filed by defendant and a codefendant were excluded by Ark. R. Crim. P. 28.3, and as defendant's severance motion did not comply with subdivision (b)(i) of this rule, less than 365 days expired between his arrest and trial; therefore, his motion to dismiss was properly denied. *Raymond v. State*, 2011 Ark. App. 179, — S.W.3d —, 2011 Ark. App. LEXIS 194 (Mar. 2, 2011).

#### **Antagonistic Defenses.**

Where the defenses relied on by codefendants are antagonistic, particularly in capital cases, careful consideration should be given to all the factors which weigh for or against achieving substantial justice in the trial process, and where it can be seen that either defendant is unduly jeopardized by a joint trial, severance should be granted. *McDaniel*

v. State, 278 Ark. 631, 648 S.W.2d 57 (1983).

Where a review of the proceedings indicated that the defenses relied on by the codefendants in a capital felony murder prosecution were wholly antagonistic, where each defendant admitted being present at the murder scene but that the other had murdered the victim, and where the jury, after telling the trial judge that it was unable to determine who had actually pulled the trigger, found both men guilty and fixed punishment at life without parole, the totality of the circumstances showed that the defendants were entitled to separate trials and should have been granted a severance. *McDaniel v. State*, 278 Ark. 631, 648 S.W.2d 57 (1983).

Where there was no effort among the defendants to point to another defendant as the murderer; but, rather, the proof on behalf of each defendant (only one of whom testified) was aimed for the most part at proving he was not in the bedroom, where the murder occurred, these defenses were not in the least antagonistic so as to require separate trials. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), cert. denied 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984), cert. denied sub nom. 512 U.S. 1272, 115 S. Ct. 17, 129 L. Ed. 2d 916 (1994).

Defendant's convictions for rape and kidnapping were appropriate because the trial court did not err in refusing to grant his pretrial motion for severance under subdivision (b)(i) of this rule since defendant failed to present any evidence at the pretrial hearing supporting the conclusion that he and his codefendant had antagonistic defenses. *Childs v. State*, 2010 Ark. App. 454, — S.W.3d —, 2010 Ark. App. LEXIS 472 (May 26, 2010).

#### **Discretion of Court.**

A matter of severance, or separate trials for multiple defendants, is one within the sound discretion of the trial judge to grant or deny and will not be reversed unless that discretion is abused. *Hallman v. State*, 264 Ark. 900, 575 S.W.2d 688 (1979); *Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986).

Where in a prosecution for rape, the trial court denied a motion for severance made by one of the three defendants, and ruled that the confession of each of the defendants would be allowed into evidence only against the defendant giving the statement and that any reference to the other defendants by name would be excluded, the trial court did not abuse its discretion since the instructions of the court were followed, and each of the defendants was permitted by cross-examination to refute any adverse testimony to his cause. *Washington v. State*, 267 Ark. 1040, 594 S.W.2d 29 (Ct. App. 1980).

The current state of the Arkansas law pertaining to severance of defendants in capital cases rests upon the sound discretion of the

trial court, but while the discretionary power is broad, it is not unlimited, and the overriding duty of the trial judge is to determine that defendants can be tried together without substantial injustice. *McDaniel v. State*, 278 Ark. 631, 648 S.W.2d 57 (1983).

This rule superseded former § 43-1802 and gives the trial court discretion to grant or deny a severance in all cases; the Supreme Court will not disturb that ruling on appeal in the absence of an abuse of discretion. *McDaniel v. State*, 278 Ark. 631, 648 S.W.2d 57 (1983).

Severance of defendants rests within the sound discretion of the trial court; such discretion is broad, though to be exercised judiciously in capital cases, with careful scrutiny to be given to a number of elements which could affect the fairness of the trial. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), cert. denied 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984), cert. denied sub nom. 512 U.S. 1272, 115 S. Ct. 17, 129 L. Ed. 2d 916 (1994).

This rule gives the trial court broad discretion in determining whether to grant or deny a motion to sever. *Rockett v. State*, 319 Ark. 335, 891 S.W.2d 366 (1995).

The trial court erred in denying severance motions as untimely without considering this rule or any of the seven factors that favor severance. *Eveland v. State*, 54 Ark. App. 393, 929 S.W.2d 165 (1996).

Unless conflicting strategies go to the essence of co-defendants' defenses, and the conflicting strategies are so great that both defendants' defenses cannot be accommodated by the jury, a trial court is not required to grant a severance. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

#### **Dual Juries.**

In a murder case, where the prosecutor chose to have a joint trial at which the first defendant's statement was not admitted into evidence against the second defendant and two juries would be impaneled, the Arkansas Supreme Court could find no prejudice in the defendants' case from the use of dual juries and declined to reverse their convictions. *Woolbright v. State*, 357 Ark. 63, 160 S.W.3d 315 (2004).

Regardless of the propriety of the dual-jury procedure under the Arkansas Rules of Criminal Procedure, the Arkansas Supreme Court condemned the practice and prohibited the use of dual juries until such time as a rule had been implemented to specifically address the practical considerations necessary for safeguarding a defendant's rights. *Woolbright v. State*, 357 Ark. 63, 160 S.W.3d 315 (2004).



**Factors Favoring Severance.**

The issue of severance is to be determined on a case by case basis, considering the totality of the circumstances, with the following factors favoring severance: (1) where defenses are antagonistic; (2) where it is difficult to segregate the evidence; (3) where there is a lack of substantial evidence implicating one defendant except for the accusation of the other defendant; (4) where one defendant could have deprived the other of all peremptory challenges; (5) where if one defendant chooses to testify the other is compelled to do so; (6) where one defendant has no prior criminal record and the other has; (7) where circumstantial evidence against one defendant appears stronger than against another. *Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986); *Rockett v. State*, 319 Ark. 335, 891 S.W.2d 366 (1995); *Eveland v. State*, 54 Ark. App. 393, 929 S.W.2d 165 (1996).

**Failure to Enter Motion.**

Where the defendant had not moved for severance of his trial from that of his codefendant, the defendant could not argue on appeal that the trial court erred in denying the codefendant's motion for severance. *Spillers v. State*, 268 Ark. 217, 595 S.W.2d 650 (1980).

**Out-of-Court Statements.**

Pursuant to subsection (a) of this rule, where two defendants are tried jointly, neither testifies, and the state chooses to introduce the out-of-court statement of one which implicates the other, the court shall sever the trial upon motion by the latter defendant unless: (1) the prosecution decides not to introduce the statement; or (2) all references in the statement to the moving defendant are deleted, and the statement does not, as altered, prejudice the moving defendant. The rule is mandatory. *Moore v. State*, 297 Ark. 296, 761 S.W.2d 894 (1988).

Where the prosecution chose to proceed under subsection (a) of this rule by changing the pronoun "they" in defendant's statement to "he" in order to limit the statement to defendant and avoid any reference to the other defendants, the state's effort to comply with this rule collapsed when the officer inadvertently used the pronoun "they," reflecting defendant's statement as recorded but not as altered by the state during trial pursuant to the rule, and it was clear that the other defendants who raised this issue were prejudiced. *Moore v. State*, 297 Ark. 296, 761 S.W.2d 894 (1988).

When two or more defendants are tried jointly, the pretrial confession of one which implicates the other is not admissible unless the confessing defendant takes the stand and is subject to cross-examination. *Holbird v. State*, 299 Ark. 245, 771 S.W.2d 775 (1989).

**Severance Denied.**

The trial court correctly denied severance to the codefendants where neither accused the other of having participated in the crime, and there was nothing in the record to indicate that either defendant suffered a substantial injustice as the result of a joint trial. *Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986).

Severance properly denied. *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987); *Ruiz v. State*, 299 Ark. 144, 772 S.W.2d 297 (1989); *Williams v. State*, 304 Ark. 279, 801 S.W.2d 296 (1990); *Cox v. State*, 305 Ark. 244, 808 S.W.2d 306 (1991).

In a prosecution for kidnapping, aggravated robbery, and theft of property, the defendant was not entitled to a severance, notwithstanding his argument that the evidence against his codefendant was stronger than that against him and that the codefendant was a habitual offender, while he had no criminal record, since the testimony of the victim implicated both defendants and a prior criminal record of a codefendant is only one of multiple factors to be considered; further, the jury was appropriately instructed to consider the evidence for or against each of them separately and to render verdicts as if each were being tried separately, which sufficiently offset any prejudice. *Nichols v. State*, 69 Ark. App. 212, 11 S.W.3d 19 (2000).

**Severance Granted.**

The trial court erred in failing to sever Count III from Counts I and II where Counts I and II each alleged that defendant had illegally delivered approximately 1/4 gram of crack cocaine to a confidential informant in exchange for \$50.00 on October 21, 1993, and Count III alleged that defendant had delivered approximately 1/4 gram of crack cocaine to a different confidential informant in exchange for \$50.00 on October 23, 1993, as the offenses did not involve a single scheme or plan. *Bunn v. State*, 320 Ark. 516, 898 S.W.2d 450 (1995).

Defendant's convictions for rape and kidnapping were appropriate because the trial court did not err in granting the codefendant's motion for severance on the second day of trial under subdivision (b)(iii) of this rule since the trial court was concerned about the effect on the codefendant if the jury chose not to believe defendant's testimony. The trial court was also concerned that the codefendant might be forced to testify against his will. *Childs v. State*, 2010 Ark. App. 454, — S.W.3d —, 2010 Ark. App. LEXIS 472 (May 26, 2010).

**Timing of Severance.**

Subdivision (b)(iii) of this rule indicates that the trial court should continue to be sensitive to the advisability of a severance as the trial evolves. *Ruiz v. Norris*, 868 F. Supp.

1471 (E.D. Ark. 1994), *aff'd* 71 F.3d 1404 (8th Cir. 1995).

**Cited:** *Williams v. State*, 267 Ark. 527, 593 S.W.2d 8 (1980); *Davis v. State*, 268 Ark. 1154, 599 S.W.2d 424 (1980); *Wilson v. State*, 298 Ark. 608, 770 S.W.2d 123 (1989); *Lopez v.*

*State*, 29 Ark. App. 145, 778 S.W.2d 641 (1989); *Butler v. State*, 303 Ark. 380, 797 S.W.2d 435 (1990); *Cloird v. State*, 314 Ark. 296, 862 S.W.2d 211 (1993); *Williams v. State*, 338 Ark. 178, 992 S.W.2d 89 (1999).

#### **Rule 22.4. Failure to prove grounds for joinder of defendants.**

If a defendant moves for severance at the conclusion of the prosecution's case or of all the evidence, and there is not sufficient evidence to support the allegation upon which the moving defendant was joined for trial with the other defendant or defendants, the court shall grant a severance if, in view of this lack of evidence, severance is deemed necessary to achieve a fair determination of that defendant's guilt or innocence.

### **RULE 23. AUTHORITY OF COURT TO ACT ON OWN MOTION**

#### **Rule 23.1. Consolidation; severance of defendants and offenses.**

(a) The court may order consolidation of two (2) or more charges for trial if the offenses, and the defendants if there are more than one (1), could have been joined in a single indictment or information without prejudice to any defendant's rights to move for severance under preceding provisions.

(b) The court may order a severance of offenses or defendants before trial if a severance could be obtained on motion of a defendant or the prosecution.

### **RESEARCH REFERENCES**

**ALR.** *Desire of Accused to Testify on Just One of Multiple Charges as Basis for Severance of Trials*. 32 ALR 6th 385.

### **CASE NOTES**

#### **ANALYSIS**

In general.  
Showing of prejudice.

#### **In General.**

Where in arson charge in indictment it was alleged that the defendant and his codefendant burned the house and the burning of the house was alleged to be a part of the conspiracy charged, under the Rules of Criminal Procedure which were in effect at the time of defendant's trial, the court had the authority to consolidate the two indictments of arson and conspiracy to commit arson subject to defendant's right to move for a severance. *Owen v. State*, 263 Ark. 493, 565 S.W.2d 607 (1978).

Court properly granted state's motion to consolidate the offenses of capital murder, kidnapping, aggravated robbery, and attempted capital murder as the officer was shot during a shootout between defendant and law enforcement where defendant partic-

ipated in a previous murder, fled, armed himself, and used weapons in an attempt to evade capture as law enforcement closed in and tried to execute a search warrant. *Holsombach v. State*, 368 Ark. 415, 246 S.W.3d 871 (2007).

#### **Showing of Prejudice.**

Where in a child abuse case, the fact that the defendant mother and the man she was living with were separately charged by information as defendants, did not preclude a joint trial where there was no allegation of prejudice and none was shown to have resulted from their joint trial. *Williams v. State*, 267 Ark. 527, 593 S.W.2d 8 (1980).

**Cited:** *Ruiz v. State*, 273 Ark. 94, 617 S.W.2d 6 (1981), cert. denied 454 U.S. 1093, 102 S. Ct. 659, 70 L. Ed. 2d 631 (1981); *Wilson v. State*, 298 Ark. 608, 770 S.W.2d 123 (1989); *Clark v. State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989).



## ARTICLE VII. PLEAS OF GUILTY AND NOLO CONTENDERE

### RULE 24. RECEIVING AND ACTING UPON THE PLEA

#### Commentary to Article VII

The following rules deal with the related pleas of guilty and nolo contendere. Each rule focuses on a different aspect of the standards and procedures to be followed in negotiation and acceptance of such pleas. The breadth of the Article is considerable, encompassing and delineating with all practicable precision the proper roles of the prosecuting attorney, the court, and the defendant and his counsel.

The scope and specificity of these rules are born of a recognition of the fundamental role played by the guilty plea in the criminal justice system. Not only is the plea of guilty the most common means of conviction,<sup>1</sup> but, because it eliminates the necessity for trial, it is also a means which not only properly is, but will almost assuredly continue to be, one of the most frequently used methods of disposition of criminal causes.

These rules also reflect the Commission's efforts to devise standards and procedures which will expedite the disposition of criminal causes through the process of "plea agreement," while ensuring that the results accomplished will be equitable with respect to both the defendant and society.

The practice of "plea agreement," variously referred to in different jurisdictions as "plea bargaining" or "plea negotiations," is scarcely a new one. It finds support both in history and in the context of various considerations bearing on the effective administration of criminal justice. A partial enumeration of these considerations appears in the ABA *Standards, Pleas of Guilty*, hereafter cited *Standards, Pleas of Guilty*:

By his plea, the defendant aids in ensuring the prompt and certain application of correctional measures to him. He also aids in avoiding delay in the disposition of other cases, thereby increasing the probability of prompt and certain application of correctional measures to other offenders.

In addition, the plea provides a means by which the defendant may acknowledge his guilt and manifest a willingness to assume responsibility for his conduct. Also, in some cases the plea will make it possible to avoid a public trial when the consequences of such publicity outweigh any legitimate

need for a public trial. Pleas to lesser offenses make possible alternative correctional measures better adapted to achieving the purposes of correctional treatment, and often prevent undue harm to the defendant from the form of conviction. Such pleas also make it possible to grant concessions to a defendant who has given or offered cooperation in the prosecution of other offenders. *Id.* at 2.

Accordingly, the Commission feels that "plea agreement" has an attractiveness independent of mere considerations of administrative convenience or expediency. It also serves in diverse ways to ensure and protect the quality and integrity of the administration of criminal justice.

In attempting to follow the *Standards* the Commission acknowledges that "plea bargaining" does not meet with unanimous approval and that some of the critics of the practice are responsible authorities who have studied the subject in connection with surveys of the administration of criminal justice. However, for the reasons stated above the practice has become an integral component of the criminal process. Because of this widespread acceptance and the recommendations made in the *Standards*, the Commission has deemed it advisable to recognize plea agreement practices while incorporating procedures designed to minimize abuses of the system. This is done in the belief that much of the criticism arises from the lack of uniform guidelines for the administration of the practice.

Rule 24 sets standards governing a court's receipt of a guilty plea.

Rule 24.1 defines the ambit of the Article's application. The language of the rule is intended to encourage application of the Article's provisions by courts subject to the superintending jurisdiction of circuit courts, while permitting a necessary degree of flexibility.

Rule 24.2 is one of expansive scope. It provides that no defendant shall be required to enter any plea whatever without first having had an opportunity to retain counsel or, in appropriate cases, having had counsel ap-

<sup>1</sup>"The plea of guilty is probably the most frequent method of conviction in all jurisdictions; in some localities as many as 95% of the criminal cases are disposed of in this way." ABA *Standards, Guilty Pleas* (Approved Draft: 1968) at 1, 2.

pointed for him. Present Arkansas law is in accord. *See, Swagger v. State*, 227 Ark. 45, 296 S.W.2d 204 (1956), following *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). *See, also, Meeks v. State*, 239 Ark. 1066, 396 S.W.2d 306 (1965).

The rule is also consistent with the opinion of the United States Supreme Court in the recent case of *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972). The precise holding of *Argersinger* is that "no person may be imprisoned" for any offense unless represented by counsel at trial. 407 U.S. at 37, 32 L. Ed. 2d at 538 [emphasis supplied]. However, there is language in the opinion recognizing the importance of advice of counsel respecting entry of a guilty plea:

Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution. 407 U.S. at 34, 32 L. Ed. 2d at 536, 537. *See, also, Kitchens v. Smith*, 401 U.S. 847, 91 S. Ct. 1089, 28 L. Ed. 2d 519 (1971).

Rule 24.3 requires that, except in narrowly defined circumstances, a plea of guilty or nolo contendere be entered only by the defendant himself in open court. This requirement is currently imposed by Arkansas law. *See, Ark. Stat. Ann. § 43-1221* (Repl. 1964).

To the extent that it makes express provision for the entrance of a plea of guilty by a corporation, Rule 24.3 apparently breaks new ground.

Also, that part of Rule 24.3 which sets out criteria to be followed by a court in determining whether to accept a plea of nolo contendere is a new addition to Arkansas law, as is 24.3(c), requiring that the prosecutor in the district in which the offense occurred be accorded the opportunity to be heard at the time the plea is tendered.

Rule 24.4 is a comprehensive one, making it incumbent upon a court to explain to the defendant, and determine that he understands, the nature and possible consequences of conviction of the charges facing him. No corollary to Rule 24.4 exists in Arkansas statutory law, although cases have dealt with some of the requirements imposed by the rule. *See, e.g., Medley v. Stephens*, 242 Ark. 215, 412 S.W.2d 823 (1967).

To the extent that the rule requires that the consequences of a charge under the Habitual Criminal Act [Ark. Stat. Ann. § 43-2328 *et seq.* (Supp. 1973)] be explained to the defendant, it restates in clarified form the requirements of present law. *See, e.g., Wilson v. State*, 251 Ark. 900, 475 S.W.2d 543 (1972).

Rules 24.5 and 24.6 require, among other

things, that prior to acceptance of a plea of guilty or nolo contendere the court must determine that the plea is voluntarily proffered and that there is a factual basis for the plea. Thus, the rules follow recent decisions of the United States Supreme Court and the Arkansas Supreme Court. *See, e.g., Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *Cullum v. State*, 244 Ark. 290, 424 S.W.2d 523 (1968). Although Arkansas law is silent on the question of whether a court must satisfy itself that there is a factual basis for a guilty plea, it is believed that most courts now make such a determination as a matter of course.

Rule 24.5 requires that a court determine whether a tendered plea is the result of a plea agreement. Neither the Arkansas Supreme Court nor the General Assembly has required such a prior inquiry regarding the plea agreement.

The Arkansas Supreme Court has made it clear that it favors, but does not require, the making of a verbatim record of guilty pleas. *Turner v. State*, 245 Ark. 439, 432 S.W.2d 757 (1968); *Orman v. Bishop*, 243 Ark. 609, 420 S.W.2d 908 (1967), and *Medley, supra*. Rule 24.7 goes further by requiring the making of a verbatim record of any proceeding at which a defendant enters a plea of guilty or nolo contendere.

Rule 24.8 facilitates simultaneous disposition of several offenses committed by a defendant by allowing him to waive venue and enter a guilty plea to any offense committed in this state, whether or not he has been formally charged with that offense. This provision is grounded on the assumption that the contemplated waiver of venue is permissible if effected pursuant to the detailed requirements of the rule. *See, Cockrell v. Dobbs*, 238 Ark. 348, 381 S.W.2d 756 (1964). *See, also, Ark. Stat. Ann. § 43-1426* (Repl. 1964) and interpretive case authority respecting presumption as to venue.

The *Comment* to Rule 24 gives explicit recognition to charge and sentence concession practice already universally followed.

Rule 25 is addressed to plea discussions and agreements. "Plea bargaining" has, of course, received the explicit approval of the Arkansas Supreme Court. *Meyers v. State*, 252 Ark. 367, 479 S.W.2d 238 (1972). Consequently, Rule 25.1 follows existing case law and practice in permitting "plea discussions" where "it would serve the interest of the public in the effective administration of justice." The comment sets out guidelines for prosecutors and is virtually a verbatim rendition of *Standards, Pleas of Guilty* § 3.1(b).

Rule 25.2 and the comment accompanying it set out the roles to be played by the defen-



dant and his attorney in the negotiation and decision making process.

The trial judge's responsibilities in this area are governed by Rule 25.3 which is without counterpart in present Arkansas statutory law. The rule is fashioned to eliminate to the maximum extent possible the chance of a defendant misunderstanding the nature and consequences of the plea bargaining procedure.

Rule 25.4 is drawn from Rules 29(d) and 32(e) of the *Uniform Rules of Criminal Procedure* (Second Tentative Draft: 1973), proposed by the National Conference of Commissioners on Uniform State Laws, hereafter cited *Uniform Rules*. The rule is designed to promote free and open plea negotiations by eliminating the possibility that the substance of statements made during such discussions will be used against a defendant. Evidence that discussions took place is also declared inadmissible. As is pointed out in the commentary to the *Uniform Rules*, the provision is similar in concept to *Standards, Pleas of Guilty* § 3.4.

There is no Arkansas statutory or decisional authority with regard to permitting testimony as to a withdrawn guilty plea. There is a split of authority in other jurisdictions. See, Annot., 86 A.L.R.2d 326 (1962); commentary to *Standards, Pleas of Guilty* § 2.2 at 59. Cf., *Barnhardt v. State*, 169 Ark. 567, 275 S.W. 909 (1925), holding admissible testimony that a defendant entered guilty plea, in a justice of the peace court, to a

charge related to an offense for which he was subsequently tried in circuit court. See, also: *Comment, Evidence — Admissibility of Withdrawn Plea of Guilty in Criminal Trial*, 3 Ark. L. Rev. 471 (1949).

Rule 26 deals with the circumstances under which a defendant must be allowed to withdraw a plea of guilty or nolo contendere, and the effect of such a withdrawal on pending or subsequent criminal, civil, or administrative proceedings.

Present Arkansas statutory authority is found at Ark. Stat. Ann. § 43-1222 (Repl. 1964). This statute apparently curtails the trial court's discretion to permit withdrawal in so far as it provides that the plea may be withdrawn before judgment. See, *Thornton v. State*, 243 Ark. 829, 422 S.W.2d 852 (1968). Of course, notwithstanding the foregoing statutory language, a circuit court may set aside a judgment of conviction prior to the expiration of the term of court in which it was entered. *Morris v. State*, 226 Ark. 472, 290 S.W.2d 624 (1956).

In setting out specific guidelines to facilitate a determination of whether "manifest injustice" requires that withdrawal be permitted, Rule 26.1(c) speaks where current statutory law is silent. For decisional law respecting withdrawal, see, *Cross v. State*, 248 Ark. 553, 452 S.W.2d 854 (1970); *Wiser v. State*, 249 Ark. 271, 459 S.W.2d 58 (1970).

## Rule 24.1. Scope of article.

The provisions of this Article shall be applied in all criminal cases in circuit courts of this state and, to the extent constitutionally required and whenever otherwise practicable, in criminal cases in other courts.

### 1987 Unofficial Supplementary Commentary to Rule 24.1

#### Rule 37.

Virtually all cases arising under all subparts of Rule 24 are decisions on petitions for post-conviction relief under Rule 37. That rule and the annotations thereto should be

consulted. Analysis of rules of pleading, burden of proof, and the standard of review in Rule 37 proceedings is beyond the scope of the commentary to this rule.

## CASE NOTES

### ANALYSIS

In general.

Failure to ascertain if plea voluntary.

Rule mandatory.

Substantial compliance.

#### In General.

A plea of guilty is in effect until the trial court orders it withdrawn. *Kennedy v. State*, 297 Ark. 488, 763 S.W.2d 648 (1989).

#### Failure to Ascertain If Plea Voluntary.

Failure of the trial court to ascertain whether a guilty plea is voluntarily given in accordance with this rule does not automatically make the plea involuntary. *Smith v. State*, 264 Ark. 329, 571 S.W.2d 591 (1978).

#### Rule Mandatory.

This rule is mandatory. *McDaniel v. State*, 288 Ark. 629, 708 S.W.2d 613 (1986), ques-

tioned *Bolt v. State*, 314 Ark. 387, 862 S.W.2d 841 (1993); *Peterson v. State*, 296 Ark. 324, 756 S.W.2d 897 (1988).

#### **Substantial Compliance.**

Where the defendant was advised of his rights before his guilty plea was accepted and where the trial court was informed of the details of the crime and the circumstances surrounding the defendant's arrest, the defendant's contention that the trial court ignored provisions of this rule in that the court was not advised of the facts of the case, and that the sentencing judge stated that he did not know what had happened, was without

basis and there was substantial compliance with this rule. *Shipman v. State*, 261 Ark. 559, 550 S.W.2d 424 (1977).

Compliance with ARCrP 24 is mandatory, but substantial compliance will suffice. *Snelgrove v. State*, 292 Ark. 116, 728 S.W.2d 497 (1987).

**Cited:** *Haywood v. State*, 288 Ark. 266, 704 S.W.2d 168 (1986); *Wilmoth v. State*, 291 Ark. 233, 724 S.W.2d 148 (1987); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996); *Mullinax v. State*, 327 Ark. 41, 938 S.W.2d 801 (1997), cert. denied 520 U.S. 1252, 117 S. Ct. 2411, 138 L. Ed. 2d 176 (1997).

### **Rule 24.2. Aid of counsel.**

A defendant shall not be required to plead until he has had an opportunity to retain counsel, or, if he is eligible for the appointment of counsel, until counsel has been appointed, or, in either case, unless he has waived or refused the assistance of counsel.

#### **CASE NOTES**

#### **Substantial Compliance.**

Where the evidence showed that the defendant had been in jail for two months without representation when he was sentenced, the defendant's father had been unable or unwilling to procure counsel, and the defendant had been represented by a public defender, the defendant was not denied the aid of counsel required by this rule. *Shipman v. State*, 261 Ark. 559, 550 S.W.2d 424 (1977).

Where trial judge explained to defendant that he was charged with having conspired with others to promote the commission of the capital murder and that the range of punishment was not less than 5 nor more than 50 years or life and/or a fine not to exceed \$15,000 the record contained a prima facie showing of substantial compliance with this rule. *Welch v. State*, 283 Ark. 281, 675 S.W.2d 641 (1984).

### **Rule 24.3. Pleading by defendant.**

(a) A plea of guilty or nolo contendere shall be received only from the defendant himself in open court, except that counsel may enter a plea of guilty or nolo contendere on behalf of a defendant in misdemeanor cases where only a fine is imposed by the court. If the defendant is a corporation the plea may be received from counsel or an authorized corporate officer.

(b) With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment,

(i) to review an adverse determination of a pretrial motion to suppress seized evidence or a custodial statement;

(ii) to review an adverse determination of a pretrial motion to dismiss a charge because not brought to trial within the time provided in Rule 28.1 (b) or (c); or

(iii) to review an adverse determination of a pretrial motion challenging the constitutionality of the statute defining the offense with which the defendant is charged.

(c) A defendant may plead nolo contendere only with the consent of the court. The court shall not accept a plea of nolo contendere unless it is



satisfied, after due consideration of the views of the parties, that the interest of the public in the effective administration of justice would thereby be served.

(d) No plea of guilty or nolo contendere shall be accepted by any court unless the prosecuting attorney fo the governmental unit in which the offense occurred is given the opportunity to be heard at the time the plea is tendered. In any criminal case in which trial by jury is right, a court shall not accept a plea of guilty or nolo contendere unless the prosecuting attorney has assented to the waiver of trial by jury.

CONDITIONAL PLEA FORM

[For use with Rule 24.3(b), Arkansas Rules of Criminal Procedure]

IN THE CIRCUIT COURT OF \_\_\_\_\_, ARKANSAS  
\_\_\_\_\_ Division

No. \_\_\_\_\_

STATE OF ARKANSAS

v.

\_\_\_\_\_, Defendant

CONDITIONAL PLEA

I, \_\_\_\_\_ (*name of defendant*), with the approval of the court, and the consent of the Prosecuting Attorney am entering a plea of [guilty] [no contest] to

Count 1. \_\_\_\_\_

Count 2. \_\_\_\_\_

Count 3. \_\_\_\_\_

I understand my plea is conditioned upon the filing of an appeal on the issue of \_\_\_\_\_ (*describe [motion to suppress seized evidence] [motion to suppress custodial statement] [motion to dismiss a charge because not brought to trial within the time provided in Rule 28.1 (b) or (c)] or [challenge to the constitutionality of Ark. Code Ann. § \_\_\_\_\_] upon which appeal will be based*).

I understand that, if the judge approves my plea of [guilty] [no contest], a judgment and sentence will be entered, and that I may appeal on the issue specified above in the manner provided by the rules of court.

I understand that if I win my appeal on the issue specified above, that I may withdraw my plea of [guilty] [no contest].

I have read and understand the above. I have discussed the case and my constitutional rights with my lawyer. I understand that by pleading [guilty] [no contest], if my plea is not later withdrawn, I will be giving up my right to a trial by jury, to confront, cross-examine, and compel the attendance of witnesses, and my privilege against self-incrimination. I agree to enter my plea as indicated above on the terms and conditions set forth herein.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Defendant

**DEFENSE COUNSEL REVIEW**

I have reviewed this conditional plea with my client, and I have discussed with my client its consequences.

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Defense counsel

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Date**PROSECUTOR APPROVAL**

I have reviewed this conditional plea and consent to it.

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Prosecutor Attorney

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Date**COURT APPROVAL**

This Conditional Plea Agreement is approved, and I direct that it be entered of record in this case.

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Circuit Judge

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Date

**This Conditional Plea Form shall accompany the Sentencing Order and be made a part of the record in the case.**

I certify this is a true and correct record of this Court.

Date: \_\_\_\_\_ Circuit Clerk/Deputy: \_\_\_\_\_

(Amended July 13, 1987, effective October 1, 1987; amended February 15, 2001; amended October 2, 2003; amended September 18, 2008, effective October 1, 2008; amended April 9, 2009, effective June 1, 2009; amended February 23, 2012, effective April 1, 2012.)

**Reporter's Notes, 2001 Amendment:** The last sentence was added to subdivision (d). It does not change prior practice, but incorporates the requirement found in Rule 31.1 that the prosecuting attorney must not only be given the opportunity to be heard in response to a plea, but also he must assent if a jury trial is to be waived.

**Addition to Reporter's Notes, 2003 Amendment:** Subsection (b) was amended to clarify that a defendant may reserve the right to appeal following an adverse determination on a motion to suppress a custodial statement as well as a motion to suppress seized evidence.

**Addition to Reporter's Notes, 2009 Amendment:** The 2009 change permitted a defendant to enter a conditional plea of guilty

following the court's denial of a motion to dismiss due to a violation of the defendant's right to speedy trial as provided in Rule 28.1.

**Addition to Reporter's Notes, 2012 Amendment:** Prior to the 2012 amendments, subsection (a) allowed the court to take a guilty plea to a misdemeanor not involving imprisonment even though the defendant was not present in the courtroom. The 2012 amendment made it clear that the court could also accept a plea of nolo contendere in such circumstances. A plea of guilty or nolo contendere when the defendant is absent is still subject to the requirements of subsections (c) and (d).

The 2012 amendment also broadened conditional pleas to include subsection (b)(iii).



### Comment to Rule 24.3

It is not the purpose of this rule to impose any limitation on a court's discretion to refuse to accept either a plea of guilty or a plea of *nolo contendere*.

### 1987 Unofficial Supplementary Commentary to Rule 24.3

#### No Constitutional Right to Plead Guilty.

The Arkansas Supreme Court has held that the Constitution of the United States does not guarantee a criminal defendant the right to have a guilty plea accepted, but a state may confer such a right by statute or rule. *Numan v. State*, 291 Ark. 22, 722 S.W.2d 276 (1987). The Court went on to hold that Arkansas has no such statute or rule and that an Arkansas defendant does not have a right to plead

guilty. The Court distinguished *Ruiz v. State*, 275 Ark. 410, 630 S.W.2d 44 (1982), *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648 (1983), and *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986), pointing out that these were capital cases specifically governed by Rule 31.4, which does not apply to non-capital cases. Even in a capital case the defendant cannot avoid a jury trial by entering a plea of guilty under Rule 24. See *Fretwell*.

### CASE NOTES

#### ANALYSIS

In general.

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#### In General.

Under the express language of this rule, if a defendant makes a conditional guilty plea but, on appeal, does not obtain a favorable determination, there is no further direct appeal; at that time, the conditional plea becomes final and is treated the same as any other plea of guilty. *Scalco v. City of Russellville*, 318 Ark. 61, 883 S.W.2d 471 (1994).

Subsection (b) of this rule requires an appeal from the judgment, not the order denying the motion to suppress, thus, where defendant's attorney failed to appeal from the June 4, 2003, judgment and instead attempted to appeal from the November 4, 2002, denial of the motion to suppress, the May 7, 2003, appeal was rejected as untimely; had the notice of appeal listed the judgment and commitment order, rather than the denial of the motion to suppress, it would have been timely even though filed early. *McDonald v. State*, 354 Ark. 680, 124 S.W.3d 438 (2003).

By the terms of subsection (b) of this rule, conditional pleas, and the accompanying right to appeal, are limited to an adverse determination on a pretrial motion to suppress and it was not clear from the partial record that the requirements of this rule had

been met; therefore, the appellate court abated defendant's appeal and remanded the matter for a determination of whether he ever informed his counsel that he wanted to appeal, whether the trial court ever made an adverse ruling on defendant's motion to suppress, and whether his guilty plea was entered conditionally. *Smother's v. State*, 359 Ark. 55, 194 S.W.3d 206 (2004).

Defendant's motion to file a belated appeal was granted where, although a notice of appeal was filed by defendant's attorney, he failed to appeal from the judgment as required under this rule; defendant was not at fault for counsel's failure to file a timely notice of appeal and he showed good cause for the motion to be granted. *Lawson v. State*, 367 Ark. 235, 238 S.W.3d 931 (2006).

#### Construction.

Both § 16-91-101(c) and the corresponding rule, former ARCrP 36.1, provide that there shall be no appeal from a plea of guilty; however, one exception is found in subsection (b) of this rule, which provides a procedure for a defendant to seek review of an adverse determination of a pretrial motion to suppress evidence. *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994).

This rule does not provide for a conditional plea with reservation of the right to review of an adverse speedy trial determination, nor does this rule provide for a conditional guilty plea reserving the right to an appeal from a motion to dismiss based on double jeopardy grounds. *Fullerton v. State*, 47 Ark. App. 141, 886 S.W.2d 887 (1994).

Even though this rule contains no express requirement that the State assent to a guilty plea except in cases of conditional pleas of guilty or *nolo contendere*, subsection (d) of

this rule does require that the trial court give the prosecutor the opportunity to be heard before accepting a guilty plea, and thus this rule can be read in harmony with ARCrP 31.1. *State v. Vasquez-Aerreola*, 327 Ark. 617, 940 S.W.2d 451 (1997).

As a general rule, one is not allowed to appeal from a conviction resulting from a plea of guilty or *nolo contendere* under RAP-Crim 1(a); subsection (b) of this rule presents an exception, but only for the purpose of determining on appeal whether a defendant should be allowed to withdraw her plea if it is concluded that evidence should have been, but was not, suppressed. *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997).

#### Acceptance of Plea.

Court violated subsection (a) of this rule where it accepted a plea of *nolo contendere* through defendant's attorney, and sentenced defendant to a fine, imprisonment, and suspension of his driver's license even though he was not present. *Elms v. State*, 299 Ark. 419, 773 S.W.2d 89 (1989).

If evidence at a post-conviction hearing supplies the factual basis for a plea of guilty, the failure of the trial court to establish it at the plea hearing is not reversible error. *Strafaci v. State*, 300 Ark. 298, 778 S.W.2d 602 (1989).

After refusing to set aside an unconditional plea of guilty, a trial court has no authority to approve a conditional plea arrangement under subsection (b) of this rule. *Mangrum v. State*, 70 Ark. App. 46, 14 S.W.3d 889 (2000).

#### Appeals.

This rule does not provide for an appeal following a plea of *nolo contendere* where the appeal challenges the admissibility of evidence as distinguished from evidence illegally obtained. *Pickett v. State*, 301 Ark. 345, 783 S.W.2d 854 (1990).

Defendant who entered a guilty plea could not directly appeal the validity of his guilty plea insofar as he wished to appeal some aspect of the procedure followed at his guilty plea hearing that was an integral part of his plea. *Matthews v. State*, 305 Ark. 207, 807 S.W.2d 29 (1991).

The statute of limitations is "jurisdictional" in the sense of not being subject to waiver in a criminal case, but the jurisdictional nature of the alleged error does not create a basis for direct appeal to the Supreme Court from a judgment of conviction resulting from a guilty plea. *Eckl v. State*, 312 Ark. 544, 851 S.W.2d 428 (1993).

Absent showing that the defendant conditioned his guilty plea by reserving, in writing, his right to appeal, nor any indication that the trial court or the prosecutor consented, defendant's appeal will be dismissed. *Noble v. State*, 314 Ark. 240, 862 S.W.2d 234 (1993).

Subsection (b) of this rule was added to allow pleas of guilty conditioned on the reversal of a pretrial determination of a motion to suppress illegally obtained evidence; if the express terms of this rule are not complied with, the appellate court acquires no jurisdiction to hear the appeal of a conditional plea. *Scalco v. City of Russellville*, 318 Ark. 61, 883 S.W.2d 471 (1994).

Defendant who entered a conditional plea of guilty pursuant to subsection (b) of this rule could, on appeal, challenge the validity of a search warrant; challenges that an informant was unreliable and that incriminating statements made by her during the search should not be admissible were not within the ambit of subsection (b) of this rule. *Costner v. State*, 318 Ark. 806, 887 S.W.2d 533 (1994).

It is of no consequence when the trial court, the prosecutor, and the defense counsel agree that a defendant can enter a conditional plea and reserve his right to appeal, if the determination appealed from is not encompassed within subsection (b) of this rule. *Fullerton v. State*, 47 Ark. App. 141, 886 S.W.2d 887 (1994).

There is no right to appeal from a guilty plea except: an appeal from a conditional plea of guilty following the denial of a motion to suppress; an appeal on the issue of the application of jail time credit appears to be permissible; the denial of a post-judgment motion, filed after a guilty plea to correct an illegal sentence, is appealable; and a defendant may also appeal after a guilty plea when a jury sets punishment under the bifurcated procedure established by § 16-97-101(6). *Hampton v. State*, 48 Ark. App. 93, 890 S.W.2d 279 (1995).

Appeal from a conditional guilty plea dismissed where defendant's issue did not involve a suppression issue as contemplated by subsection (b) of this rule. *Payne v. State*, 327 Ark. 25, 937 S.W.2d 160 (1997).

Issues such as the trial court's upward departure from the sentencing guidelines, or an alleged violation of Ark. Sup. Ct. Admin. Order No. 6 having to do with cameras in the courtroom, are two points of appeal not permitted by subsection (b) of this rule; the issues must concern suppression of evidence. *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997).

When a defendant enters a conditional guilty plea, he may retain a right to appeal an adverse suppression ruling. *Green v. State*, 334 Ark. 484, 978 S.W.2d 300 (1998).

Denial of the inmate's petition for postconviction relief was proper where an agreement between parties did not convert an otherwise incognizable claim into a cognizable one; ARCrP 37 did not provide an avenue to raise matters that could have been raised on direct appeal, including constitutional claims, and a



defendant ordinarily did not have a right to appeal a guilty plea, except as provided in subsection (b) of this rule. *Beulah v. State*, 352 Ark. 472, 101 S.W.3d 802 (2003).

Where defense attorney filed an untimely appeal of the court's denial of defendant's motion to suppress evidence, rather than waiting to file a notice appeal of the judgment and commitment order, the notice of appeal was rejected and the court ordered defense attorney to file a motion and affidavit accepting full responsibility for her error. *McDonald v. State*, 354 Ark. 28, 124 S.W.3d 438 (2003).

Dismissal of defendant's appeal was proper where the court lacked jurisdiction because defendant failed to strictly comply with subsection (b) of this rule in that the conditional plea did not specifically state that defendant reserved his right to appeal the outcome of the suppression hearing; moreover, the document failed to demonstrate that the trial court approved a conditional plea. *Hill v. State*, 81 Ark. App. 178, 100 S.W.3d 84 (2003).

State argued that defendants were not entitled to a conditional-plea appeal because the specific requirements of this rule were not met as to approval of the court and the consent of the prosecuting attorney; however, the commitment orders with an attached sheet entitled "Additional Terms/Conditions of Disposition" indicated that the pleas entered were conditional, the hearing transcript showed the trial court asked defense counsels "whether they were going to have some conditional pleas or not" and the prosecutor appeared and acquiesced to the entry of the negotiated plea agreement, thus, defendants were entitled to appeal the suppression issue. *Miller v. State*, 81 Ark. App. 401, 102 S.W.3d 896 (2003).

Defendant's appeal of his conviction for manufacturing methamphetamine and possession of methamphetamine with intent to deliver was dismissed for want of jurisdiction where the judgment and commitment order commemorating defendant's oral entry of guilty pleas, specifically reserving his right to appeal the suppression issue, was signed six days later and, thus, was not a contemporaneous writing for purposes of subsection (b) of this rule. *Grupa v. State*, 83 Ark. App. 389, 128 S.W.3d 470 (2003).

Defendant could not proceed with a pro se appeal because his guilty pleas were not conditionally entered pursuant to subsection (b) of this rule. *Smother v. State*, 359 Ark. 412, 198 S.W.3d 119 (2004).

Defendant could not appeal the denial of his motion to withdraw his guilty plea where the plea was not conditionally premised on the denial of a suppression motion under this rule, there was no challenge to evidence presented in a sentencing hearing, and the appeal was not a post-trial motion challenging

the validity of the sentence. *Hewitt v. State*, 362 Ark. 369, 208 S.W.3d 185 (2005).

Because subsection (b) of this rule required an appeal from the judgment, not the order denying the motion to suppress, defendant's notice appealing the order denying his motion to suppress was defective and of no effect; therefore, neither the court of appeals nor the Arkansas Supreme Court had jurisdiction to hear his appeal. *Hill v. State*, 363 Ark. 505, 215 S.W.3d 586 (2005).

Dismissal of defendant's appeal was appropriate where defendant did not appeal from the judgment and conviction order that was entered based on his conditional guilty plea but, instead, appealed from the plea agreement itself, which was insufficient to grant the court jurisdiction to hear the appeal. *Webb v. State*, 94 Ark. App. 234, 228 S.W.3d 527 (2006).

Inmate's attorney stated in the motion for a belated appeal that he erred in filing a notice of appeal from the inmate's entry of a conditional plea of guilty on April 6, 2006, rather than from the April 6, 2006, judgment, as required by subsection (b) of this rule; while the supreme court no longer required an affidavit admitting fault before it would consider the motion for a belated appeal, an attorney should candidly admit fault where he erred and was responsible for the failure to perfect the appeal. The inmate's attorney candidly admitted fault; thus, the supreme court granted the inmate's motion for a belated appeal. *Downing v. State*, 369 Ark. 180, 251 S.W.3d 243 (2007).

Motion for rule on clerk was granted because defendant's attorney candidly admitted that he was at fault for failing to timely perfect an appeal when he erroneously appealed the denial of a motion to suppress rather than a judgment of conviction, which the attorney recognized as an error under this rule. *Fuller v. State*, 370 Ark. 469, 261 S.W.3d 452 (2007).

Court dismissed an appeal of the denial of defendant's motions to suppress all evidence obtained as a result of an allegedly unlawful stop because the appeal involved the admissibility of evidence as distinguished from evidence illegally obtained as the basis for an alleged unlawful traffic stop, which was not contemplated by subsection (b) of this rule. *Nicholas v. State*, 2010 Ark. App. 696, — S.W.3d —, 2010 Ark. App. LEXIS 737 (Oct. 20, 2010).

Defendant was precluded from raising on appeal that the trial court abused its discretion when it sentenced him to a term of years without just cause for departure from the sentencing guidelines, because defendant pled guilty and neither of the exceptions under subsection (b) of this rule applied. Hower-

ton v. State, 2012 Ark. App. 331, — S.W.3d —, 2012 Ark. App. LEXIS 437 (May 9, 2012).

### **Appellate Review.**

Under former ARCrP 36.1, juvenile defendants may not appeal from a plea of guilty or nolo contendere, except as provided by subsection (b) of this rule, which permits a defendant to enter a guilty plea conditioned on the reversal of a pretrial determination of a motion to suppress illegally obtained evidence; thus, where juveniles' guilty pleas for burglary and theft were not conditional and did not fall within the terms of subsection (b) of this rule, the appellate court was precluded from hearing their appeals. *Mason v. State*, 323 Ark. 361, 914 S.W.2d 751 (1996).

Subsection (b) of this rule permits review of conditional guilty pleas solely with respect to adverse rulings on motions to suppress illegally obtained evidence. *Payne v. State*, 327 Ark. 25, 937 S.W.2d 160 (1997).

Appellate court declined to consider challenges to the sufficiency of the evidence and the factual basis of defendant's plea where defendant entered a plea under subsection (b) of this rule. *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998).

Where defendant entered a plea of guilty conditioned upon the Supreme Court of Arkansas affirming the trial court's decision that the city had the authority to regulate defendant's racing activities and the trial court's decision that a city ordinance was constitutional, the Supreme Court of Arkansas lacked jurisdiction to hear defendant's appeal because subsection (b) of this rule only allowed conditional pleas of guilty to adverse determinations of pretrial motions to suppress evidence. *Berry v. City of Fayetteville*, 354 Ark. 470, 125 S.W.3d 171 (2003).

Appellate court acquired no jurisdiction to hear an appeal from a conditional plea in the absence of compliance with the express terms of subsection (b) of this rule; because defendant's argument pertaining to the evidence of the tanks went to its admissibility, and not to whether the tanks themselves were illegally obtained, the appellate court did not have jurisdiction of this point on appeal. *Dondanville v. State*, 85 Ark. App. 532, 157 S.W.3d 571 (2004).

Report of plea negotiations between state and defendant denoted a conditional guilty plea that allowed defendant to be free during his appeal of the suppression issue as it was in writing and was signed by the prosecutor, defense counsel and defendant; thus, the report was a sufficient writing to memorialize defendant's intent to enter a conditional plea, and the appellate court had jurisdiction over defendant's appeal. *Gonder v. State*, 95 Ark. App. 144, 234 S.W.3d 887 (2006).

Appeal from an adverse ruling on a defendant's motion to reveal the identities of the

confidential informants who gave information for a search warrant was rejected because subsection (b) of this rule did not provide any appellate relief following a conditional guilty plea for such an argument. *Wagner v. State*, 2010 Ark. 389, — S.W.3d —, 2010 Ark. LEXIS 480 (Oct. 21, 2010).

Appeal of defendant who had entered a plea of nolo contendere to two counts of theft of property was dismissed where she was arguing on appeal that the trial court erred in sentencing her to the maximum sentence when the presentence report recommended probation and in not advising her of her right to withdraw her plea, but she did not file a posttrial motion challenging the validity and legality of the sentence, and her appeal fell within none of the other exceptions to the rule against appeals from guilty pleas. *Smalley v. State*, 2012 Ark. App. 221, — S.W.3d —, 2012 Ark. App. LEXIS 327 (Mar. 28, 2012).

### **Compliance.**

The reservation-in-writing requirement under subsection (b) of this rule must be strictly followed. *Payne v. State*, 327 Ark. 25, 937 S.W.2d 160 (1997).

Absent compliance with this rule, the court has no jurisdiction to hear an appeal, even where there has been an attempt at trial to enter a conditional plea. *Ray v. State*, 328 Ark. 176, 941 S.W.2d 427 (1997).

Appellate court dismissed defendants' appeal for lack of jurisdiction due to the precedent mandating that it strictly construe the requirements of subsection (b) of this rule; the conditional-guilty pleas were not signed by the prosecutor, and the appellate court had no record that indicated acquiescence by the prosecutor to a conditional plea. *Bristow v. State*, 82 Ark. App. 145, 119 S.W.3d 527 (2003).

Where defendant's attorney filed a notice of appeal following the denial of his motion to suppress, but failed to file an appeal of the order of conditional plea entered a month later, the Court granted defendant's motion to file a belated appeal as defendant was not at fault for the attorney's error. *Williams v. State*, 366 Ark. 583, 237 S.W.3d 93 (2006).

### **Consent of Prosecutor.**

Where the prosecutor is present when a defendant enters a conditional guilty plea, contests any objectionable aspects of the disposition of the case, and allows the plea to be entered as a negotiated plea of guilty, the requirement of subsection (b) of this rule that the State consent to a conditional guilty plea is satisfied. *McCormick v. State*, 74 Ark. App. 349, 48 S.W.3d 549 (2001).

### **Motion to Set Aside Plea.**

Where the accumulation of errors, the obvious confusion at the plea hearing, and the complete failure to obtain a plea on one



charge cast serious doubt on the intelligent nature of the defendant's plea, the defendant's motion to set aside his plea should have been granted. *Brundage v. State*, 298 Ark. 606, 770 S.W.2d 122 (1989).

Where defendant was stopped and cited for driving while intoxicated, the roadblock orchestrated by the police was not an illegal detention; thus, defendant was not entitled to withdraw his plea of guilty to driving while intoxicated. *Sheridan v. State*, 368 Ark. 510, 247 S.W.3d 481 (2007).

### **Motion to Suppress Evidence.**

A motion in limine to suppress the use of a prior conviction as evidence is distinguishable from the suppression of evidence contemplated in subsection (b) of this rule. A motion to suppress evidence presupposes that the evidence was illegally obtained, whereas a motion to suppress use of a prior conviction deals with the admissibility of evidence, rather than "illegally obtained" evidence. *Jenkins v. State*, 301 Ark. 20, 781 S.W.2d 461 (1989).

A question of admissibility is distinguishable from the suppression of evidence contemplated by this rule. *Scalco v. State*, 42 Ark. App. 134, 856 S.W.2d 23 (1993).

Subsection (b) of this rule does not encompass a mere motion to exclude evidence as inadmissible; instead, suppression of evidence as contemplated by subsection (b) of this rule presupposes that the evidence was illegally obtained. *Scalco v. State*, 42 Ark. App. 134, 856 S.W.2d 23 (1993).

Defendant's motion to suppress should have been granted where the officers lacked probable cause to arrest him for driving under a suspended or revoked driver's license and were consequently precluded from inventorying his impounded vehicle in which 60 kilograms (130 pounds) of cocaine were discovered. *Mounts v. State*, 48 Ark. App. 1, 888 S.W.2d 321 (1994).

The defendant failed to comply with the requirements of this rule and, therefore, his appeal with regard to the suppression of evidence was dismissed for lack of jurisdiction where (1) there was no indication that the prosecuting attorney consented to a conditional plea, and (2) the defendant's "Guilty Plea Statement" explicitly contradicted the notion that his plea was conditional and that he reserved the right to challenge the court's disposition of his motion to suppress. *Simmons v. State*, 72 Ark. App. 238, 34 S.W.3d 768 (2000).

In a case in which defendant, pursuant to subsection (b) of this rule, appealed the trial court's denial of his motion to suppress evidence, he unsuccessfully argued that two deputies had no reasonable suspicion to believe that he was armed and dangerous, thereby justifying the pat-down search. Immediately

prior to their encounter with defendant, the deputies were dealing with three individuals who appeared to be hiding from them, one of whom had a weapon on his person, defendant approached the deputies unprovoked and appeared to be under the influence of a drug, and the deputies saw a bulge in his pants soon after finding a knife on another suspect after seeing a similar bulge. *Blount v. State*, 2010 Ark. App. 219, — S.W.3d —, 2010 Ark. App. LEXIS 191 (Mar. 3, 2010).

### **Reserving Right to Review.**

Although the record of trial revealed a reference by the trial court to "a document entitled Guilty Plea Statement," where neither the abstract nor the record of trial contained any reference to a writing reserving the right to review, the appeal was dismissed for lack of jurisdiction because there was a lack of strict compliance with the provisions of subsection (b) of this rule. *Burress v. State*, 321 Ark. 329, 902 S.W.2d 225 (1995).

Failure to comply strictly with the writing requirement in subsection (b) of this rule divests the appellate courts of jurisdiction. *Tabor v. State*, 326 Ark. 51, 930 S.W.2d 319 (1996).

The defendant met the rule's requirement of "reserving in writing" his right to appellate review where the record reflected that the handwritten word "conditional" appeared above the typed heading "PLEA STATEMENT" at the top of the plea statement he signed. *Green v. State*, 334 Ark. 484, 978 S.W.2d 300 (1998).

Appellate court lacked jurisdiction to hear a defendant's appeal of an adverse suppression ruling because, although defendant entered a conditional guilty plea under subsection (b) of this rule, he did not comply with the rule's requirement that the right to appeal an adverse suppression ruling be reserved in writing. *Waters v. State*, 102 Ark. App. 8, 279 S.W.3d 493 (2008).

**Cited:** *Varnedare v. State*, 264 Ark. 596, 573 S.W.2d 57 (1978), questioned by *Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992), questioned by *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986), questioned by *Pharo v. State*, 30 Ark. App. 94, 783 S.W.2d 64 (1990), questioned by *Hayes v. Lockhart*, 852 F.2d 339 (8th Cir. 1988); *Miller v. State*, 299 Ark. 2, 770 S.W.2d 144 (1989); *Johnson v. State*, 299 Ark. 223, 772 S.W.2d 322 (1989); *Poage v. State*, 27 Ark. App. 108, 766 S.W.2d 622 (1989); *Jenkins v. State*, 301 Ark. 586, 786 S.W.2d 566 (1990); *Hall v. State*, 302 Ark. 341, 789 S.W.2d 456 (1990); *Henagan v. State*, 302 Ark. 599, 791 S.W.2d 371 (1990); *State v. Sherman*, 303 Ark. 284, 796 S.W.2d 339 (1990); *Abbott v. State*, 307 Ark. 278, 819 S.W.2d 694 (1991); *Carpenter v. State*, 36 Ark. App. 211, 821 S.W.2d 51 (1991); *Bliss v. State*, 33 Ark. App. 121, 802 S.W.2d 479 (1991);

Evans v. State, 33 Ark. App. 184, 804 S.W.2d 730 (1991); Freeman v. State, 34 Ark. App. 63, 806 S.W.2d 12 (1991); Coleman v. State, 308 Ark. 631, 826 S.W.2d 273 (1992); Sanders v. State, 310 Ark. 630, 839 S.W.2d 518 (1992); Kirk v. State, 38 Ark. App. 159, 832 S.W.2d 271 (1992); Bryant v. State, 314 Ark. 130, 862 S.W.2d 215 (1993); King v. State, 42 Ark. App. 97, 854 S.W.2d 362 (1993); Johnson v. State, 43 Ark. App. 145, 862 S.W.2d 290 (1993); Miller v. State, 44 Ark. App. 112, 868 S.W.2d 510 (1993), cert. denied 511 U.S. 1128, 114 S. Ct. 2137, 128 L. Ed. 2d 866 (1994); State v. Pylant, 319 Ark. 34, 891 S.W.2d 28 (1994); Johnson v. State, 319 Ark. 78, 889 S.W.2d 764 (1994); Noble v. State, 319 Ark. 407, 892 S.W.2d 477 (1995); Bilderback v. State, 319 Ark. 643, 893 S.W.2d 780 (1995); Smith v. State, 321 Ark. 580, 906 S.W.2d 302 (1995); Tabor v. State, 52 Ark. App. 251, 918 S.W.2d 189 (1996), appeal dismissed 930 S.W.2d 319 (1996); Williams v. State, 53 Ark. App. 63, 918 S.W.2d 209 (1996); Phillips v. State, 53 Ark. App. 36, 918 S.W.2d 721 (1996); Mullinax v. State, 53 Ark. App. 176, 920 S.W.2d 503 (1996), superseded 327 Ark. 41, 938 S.W.2d 801 (1997); Brown v. State, 55 Ark. App. 107, 932 S.W.2d 777 (1996); Rhea v. State, 327 Ark. 518, 938 S.W.2d 857 (1997); Hammons v. State, 327 Ark. 520, 940 S.W.2d 424 (1997); Vega v. State, 56 Ark. App. 145, 939 S.W.2d

322 (1997); Frette v. State, 58 Ark. App. 81, 947 S.W.2d 15 (1997), rev'd 331 Ark. 103, 959 S.W.2d 734 (1998), questioned Muhammad v. State, 337 Ark. 291, 988 S.W.2d 17 (1999); Travis v. State, 331 Ark. 7, 959 S.W.2d 32 (1998); Wofford v. State, 333 Ark. 120, 966 S.W.2d 266 (1998); Sims v. State, 333 Ark. 405, 969 S.W.2d 657 (1998), cert. denied 525 U.S. 1073, 119 S. Ct. 808, 142 L. Ed. 2d 668 (1999); Tabor v. State, 333 Ark. 429, 971 S.W.2d 227 (1998); L.H. v. State, 333 Ark. 613, 973 S.W.2d 477 (1998); Knight v. State, 62 Ark. App. 230, 971 S.W.2d 272 (1998); Beshears v. State, 340 Ark. 70, 8 S.W.3d 32 (2000); Hoay v. State, 75 Ark. App. 103, 55 S.W.3d 782 (2001), modified, aff'd 348 Ark. 80, 71 S.W.3d 573 (2002); Shirley v. State, 84 Ark. App. 395, 141 S.W.3d 921 (2004); Russell v. State, 85 Ark. App. 468, 157 S.W.3d 561 (2004); Sims v. State, 356 Ark. 507, 157 S.W.3d 530 (2004); Whitlow v. State, 357 Ark. 290, 166 S.W.3d 45 (2004); Hill v. State, 89 Ark. App. 126, 206 S.W.3d 300 (2005), reversed 363 Ark. 505, 215 S.W.3d 586 (2005); Lilley v. State, 362 Ark. 436, 208 S.W.3d 785 (2005); Noble v. Norris, 368 Ark. 69, 243 S.W.3d 260 (2006); Rodriguez v. State, 2009 Ark. App. 508, 324 S.W.3d 368 (2009); Cole v. State, 2009 Ark. App. 514, 324 S.W.3d 695 (2009).

#### Rule 24.4. Advice by court.

The court shall not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally, informing him of and determining that he understands:

- (a) the nature of the charge;
- (b) the mandatory minimum sentence, if any, on the charge;
- (c) the maximum possible sentence on the charge, including that possible from consecutive sentences;
- (d) that if the offense charged is one for which a different or additional punishment is authorized because the defendant has previously been convicted of an offense or offenses one (1) or more times, the previous conviction or convictions may be established after the entry of his plea in the present action, thereby subjecting him to such different or additional punishment; and
- (e) that if he pleads guilty or nolo contendere he waives his right to a trial by jury and the right to be confronted with the witnesses against him, except in capital cases where the death penalty is sought.

#### 1987 Unofficial Supplementary Commentary to Rule 24.4

##### Voluntary Plea Made Without Advice From Court.

*Atkins v. State*, 287 Ark. 445, 701 S.W.2d 109 (1985) illustrates that a voluntary guilty plea made without advice from the court as required by this rule is subject to being overturned. The Court held that the trial judge

cannot determine that a plea is voluntary without having made certain that the accused has information about the nature of the charge and other things specified by Rule 24.4. *Clark v. State*, 271 Ark. 866, 611 S.W.2d 502 (1981), upholding a plea upon a finding of substantial compliance with Rule 24.4, was



distinguished on grounds that the appellant in *Clark* was given more detailed advice and also because the court ascertained that there was a factual basis for the guilty plea in accordance with Rule 24.6.

#### **Erroneous Advice About Parole Eligibility.**

In *Clark*, the defendant pleaded guilty to theft and was advised by the trial court that he would have to serve one-third of his sentence before becoming eligible for parole. The trial court was informed that the petitioner had a prior felony conviction. Upon arriving at the Department of Correction, petitioner learned that under Ark. Stat. Ann. § 43-2829(B)(3) (Repl. 1977) he would not be eligible for parole until he had served one-half of his sentence because of the prior conviction. In a Rule 37 proceeding, he contended that the period of his incarceration should be reduced to comply with the advice he received from the trial judge. The Arkansas Supreme Court affirmed the trial court's denial of the petition, noting that credible testimony was adduced below that claimant had in fact been advised by counsel that the Department of Correction might take the position it ultimately did. The Court found that "there is ample evidence that appellant's plea was voluntary and with the knowledge that the provisions of § 43-2829(B)(3) ... might eventually be applied to him ... ." 271 Ark. at 869, 611 S.W.2d at 503. Thus, the Court took into account information obtained not from the trial court but from defendant's attorney. More recent cases have cast considerable doubt on the court's continued willingness to uphold sentences on this theory. See *McDaniel v. State*, 288 Ark. 629, 708 S.W.2d 613 (1986); *Atkins v. State*. For a case remarkably similar to *Clark* on its facts, see *Houff v. State*, 268 Ark. 19, 593 S.W.2d 39 (1980).

Erroneous advice concerning parole eligibility does not automatically render a guilty plea involuntary. *Garmon v. State*, 290 Ark. 371, 374, 719 S.W.2d 699, 700 (1986), relying upon *Haywood v. State*, 288 Ark. 266, 704 S.W.2d 168 (1986). Neither does bad advice from defense counsel about the defendant's maximum exposure if convicted of the crime charged, so long as the defendant does not plead guilty out of fear of a long term of imprisonment that could not, in fact, be imposed. *Garmon*. Nor does vague and only partially correct advice from defense counsel about parole eligibility. *Brown v. State*, 291 Ark. 393, 725 S.W.2d 544 (1987). See, also, *Carter v. State*, 283 Ark. 23, 670 S.W.2d 439 (1984), where the Arkansas Supreme Court held that an attack stemming from asserted misinformation about parole eligibility is an attack on the execution of a sentence, not on the validity of the sentence imposed, and, is as such, not a proper matter to be considered in a petition for post-conviction relief.

#### **Substantial Compliance.**

Earlier cases pointing out that there is no constitutional requirement under *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274 (1969) that the maximum sentence and the right to a jury trial be explained to the defendant by a court accepting a guilty plea held that a reversal was not required if the record showed that defendant entered a plea "voluntarily and intelligently." *Irons v. State*, 267 Ark. 469, 474, 591 S.W.2d 650, 652; *Sims v. State*, 271 Ark. 142, 607 S.W.2d 393 (1980); *Clark v. State*. But *McDaniel v. State*, 288 Ark. 629, 708 S.W.2d 613 (1986) and *Atkins v. State*, 287 Ark. 445, 701 S.W.2d 109 (1985) signal the advent of a standard requiring strict compliance with Rule 24.4.

### **RESEARCH REFERENCES**

**ALR.** Court's Duty to Advise Sex Offender as to Sex Offender Registration Consequences or Other Restrictions Arising from Plea of Guilty, or to Determine that Offender Is Advised Thereof. 41 ALR 6th 141.

**U. Ark. Little Rock L.J.** Arkansas Law Survey, Irving and Schoen, Criminal Procedure, 9 U. Ark. Little Rock L.J. 129.

Survey — Criminal Procedure, 12 U. Ark. Little Rock L.J. 193.

### **CASE NOTES**

#### **ANALYSIS**

Purpose.

Duty of court.

Failure to give advice.

Full disclosure by court.

Sentences.

Substantial compliance.

#### **Purpose.**

The purpose of this rule is to inform the defendant before he makes the ultimate decision to plead guilty. *McDaniel v. State*, 288 Ark. 629, 708 S.W.2d 613 (1986), questioned *Bolt v. State*, 314 Ark. 387, 862 S.W.2d 841 (1993).

**Duty of Court.**

It is not enough that the prosecutor recite into the record the allegations against the accused; the court must ascertain from the accused whether he is pleading guilty because he believes he in fact is guilty. *McDaniel v. State*, 288 Ark. 629, 708 S.W.2d 613 (1986), questioned *Bolt v. State*, 314 Ark. 387, 862 S.W.2d 841 (1993).

While it is a good practice for a trial judge to make a record concerning the recent use of drugs or alcohol, this rule does not mandate such an inquiry. *Madewell v. State*, 290 Ark. 580, 720 S.W.2d 913 (1986).

In accepting *nolo contendere* plea, trial court shall ask accused personally whether the facts proffered by the prosecution are those which accused does not contest. *Snelgrove v. State*, 292 Ark. 116, 728 S.W.2d 497 (1987).

**Failure to Give Advice.**

Because the defendant did not state that he would not have pled guilty had he been informed by the trial court that as a second offender, he would have to serve one half of his sentence before becoming eligible for parole, the defendant failed to establish that he was prejudiced by the trial court's failure to so inform him and he was not entitled to post-conviction relief on the ground that his plea was rendered involuntarily. *Carter v. State*, 283 Ark. 23, 670 S.W.2d 439 (1984).

Where the defendant was not personally informed by the court of the nature of the burglary charge or any of the other items required by this rule, except that he could have a jury trial, nor was there any compliance with ARCrP 24.6 which requires the court to make such inquiry as will establish that there is a factual basis for the plea, the defendant's plea of guilty to the burglary charge had to be set aside. *Atkins v. State*, 287 Ark. 445, 701 S.W.2d 109 (1985), questioned *McGirt v. State*, 708 S.W.2d 620 (1986).

This rule does not require that, without some indication in the record to show that the trial court fully advised the defendant, an uncounseled DWI conviction may not be allowed to enhance the sentence in any subsequent DWI conviction. *Dickerson v. State*, 24 Ark. App. 36, 747 S.W.2d 122 (1988).

State failed in its burden to show that defendant's guilty plea to a charge of Class Y felony possession of a controlled substance with intent to deliver was voluntarily and intelligently entered because there was no showing that the trial court complied with this rule or Ark. R. Crim. P. 24.4, 24.5, 24.6, or 24.7 and no showing that defendant actually pled guilty. The guilty plea statement signed by defendant indicated only that he was pleading guilty to three Class D felonies, and there was no recording of any guilty plea made before the trial court as required by

Ark. R. Crim. P. 24.7. *Dorsey v. State*, 2012 Ark. App. 183, — S.W.3d —, 2012 Ark. App. LEXIS 291 (Feb. 29, 2012).

**Full Disclosure by Court.**

Where the record showed the trial court addressed the defendant directly and stated the charges and the factual circumstances surrounding each count, the defendant acknowledged his guilty plea was consistent with the facts as he knew them regarding the assault and kidnapping charges, and he declared his guilt on each charge, the court followed the requirements regarding the receipt of a guilty plea, and the defendant's guilty plea was voluntary. *Garmon v. State*, 290 Ark. 371, 719 S.W.2d 699 (1986).

There is no requirement that the defendant himself must furnish the entire factual basis for accepting a guilty plea. *Robinson v. State*, 296 Ark. 89, 752 S.W.2d 2 (1988).

Trial court properly revoked defendant's suspended sentence for nonsupport because defendant's purported lack of knowledge and understanding of the obligation was inconsistent with what defendant was told and what defendant admitted during the process of pleading guilty. *Rhoades v. State*, 2010 Ark. App. 730, — S.W.3d —, 2010 Ark. App. LEXIS 790 (Nov. 3, 2010).

**Sentences.**

No prejudice resulted from the failure to mention consecutive sentences because the sentences were pronounced to be served concurrently. *Smith v. State*, 300 Ark. 291, 778 S.W.2d 924 (1989).

**Substantial Compliance.**

Where defendant was advised by his attorney that discovery of his prior felony conviction in another state by the department of corrections might result under § 16-93-604 in his not being eligible for parole until he had served one-half of his sentence, there was a voluntary plea on his part, even though judge advised him at trial that only one-third of the sentence would have to be served prior to being eligible for parole, since there was substantial if not technical compliance with this rule by the trial judge; thus defendant's remedy, if any, was an action against the department of corrections rather than a Rule 37 proceeding. *Clark v. State*, 271 Ark. 866, 611 S.W.2d 502 (1981).

Substantial compliance with this rule is sufficient and the critical question is whether the plea was voluntary. *Carter v. State*, 283 Ark. 23, 670 S.W.2d 439 (1984); *Van Harris v. State*, 297 Ark. 573, 764 S.W.2d 606 (1989).

Despite a trial judge's failure to comply strictly with this Rule in accepting a plea of guilty, deficiencies may be supplied at the post-conviction hearing; the key question is whether the plea of guilty was made intelli-



gently and voluntarily. *Welch v. State*, 283 Ark. 281, 675 S.W.2d 641 (1984).

Where the record reflected that the defendant understood the rights he was waiving by his entry of a guilty plea and that he entered the plea of his own free will, in that in open court the defendant admitted that after premeditation and deliberation he caused the death of the victim, the evidence was sufficient to support his conviction. *Travis v. State*, 283 Ark. 478, 678 S.W.2d 341 (1984).

Where the defendant, charged with failure to appear, at first indicated uncertainty of the extent to which his attorney had advised him of the matters mentioned in this rule, the public defender stated in open court substantially all of the information required by the rule, and the defendant ultimately acknowledged he had been advised, the record was sufficient to show substantial compliance with this rule and the voluntariness of the guilty plea. *Atkins v. State*, 287 Ark. 445, 701 S.W.2d 109 (1985), questioned *McGirt v. State*, 708 S.W.2d 620 (1986).

A substantial, though not technical, compliance with this rule is sufficient. *Peterson v. State*, 296 Ark. 324, 756 S.W.2d 897 (1988).

Compliance held not to be substantial. *Van Harris v. State*, 297 Ark. 573, 764 S.W.2d 606 (1989).

Trial court held in substantial compliance. *Wallace v. Willock*, 301 Ark. 69, 781 S.W.2d 484 (1989); *White v. State*, 301 Ark. 74, 781 S.W.2d 478 (1989).

Defendant was advised of the possible sentences and understood the plea agreement, including the application of the habitual offender enhancement, before the plea was accepted and, from the testimony, the trial court

had before it evidence that defendant was well aware of the maximum sentence on the highest level charge, the effect of his habitual criminal status on the sentencing ranges, and the possibility that the other shorter sentences could be run consecutively to the life sentence; thus, the trial court properly determined that the plea was voluntary and defendant's conviction was not void, even were the state was required to provide evidence at the plea hearing of the previous conditions and failed to do so. *Pardue v. State*, 363 Ark. 567, 215 S.W.3d 650 (2005).

Trial court did not err in denying defendant's petition for a writ of error coram nobis after defendant pled guilty to aggravated robbery, possession of a firearm by certain persons, and robbery because the rule was followed during the plea hearing; none of the evidence allegedly withheld by the prosecution would have prevented the trial court from accepting a plea under the rule. *Carter v. State*, 2012 Ark. 186, — S.W.3d —, 2012 Ark. LEXIS 202 (Apr. 26, 2012).

**Cited:** *Williams v. State*, 273 Ark. 371, 620 S.W.2d 277 (1981); *Reed v. State*, 276 Ark. 318, 635 S.W.2d 472 (1982); *Stocker v. State*, 280 Ark. 450, 658 S.W.2d 879 (1983); *Abdullah v. State*, 281 Ark. 239, 663 S.W.2d 166 (1984); *Smith v. State*, 291 Ark. 496, 725 S.W.2d 849 (1987); *Furr v. State*, 297 Ark. 233, 761 S.W.2d 160 (1988); *Hale v. Lockhart*, 903 F.2d 545 (8th Cir. 1990); *Sullinger v. State*, 310 Ark. 690, 840 S.W.2d 797 (1992); *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996); *Brown v. State*, 326 Ark. 56, 931 S.W.2d 80 (1996); *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918 (2010).

## Rule 24.5. Determining voluntariness of plea.

The court shall not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary. The court shall determine whether the tendered plea is the result of a plea agreement. If it is, the court shall require that the agreement be stated. The court shall also address the defendant personally and determine whether any force or threats, or any promises apart from a plea agreement, were used to induce the plea.

### 1987 Unofficial Supplementary Commentary to Rule 24.5

#### Duty of Trial Judge.

The Arkansas Supreme Court has ruled that Rule 24.5, read with *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274 (1969) and *Byler v. State*, 257 Ark. 15, 513 S.W.2d 801 (1974), requires that the trial judge ascertain whether a plea of guilty is voluntary. *Irons v. State*, 267 Ark. 469, 591 S.W.2d 650 (1980). The Court went on to rule, however, that:

There is no constitutional requirement that the trial judge make the explanations

of the right to jury trial and of the maximum possible sentence required by *Boykin*, and a silent record does not require automatic reversal if it be proved at a post-conviction evidentiary hearing that the plea was voluntarily and intelligently made.

*Irons*, at 474, 591 S.W.2d at 652, relying upon *Smith v. State*, 264 Ark. 329, 571 S.W.2d 591 (1978).

The judge must make inquiries of the defendant personally to determine that his plea

is voluntary under Rule 24.5. *Simmons v. State*, 265 Ark. 48, 578 S.W.2d 12 (1979).

#### **Pleas by Minors.**

Just as parental consent is not essential to a voluntary custodial confession, it is not required for a voluntary plea of guilty in open court. *Shipman v. State*, 261 Ark. 559, 550 S.W.2d 424 (1977).

#### **Mandatory Plea Agreement Disclosure.**

The Arkansas Supreme Court has ruled that "it [is] mandatory that the trial court determine whether the plea [is] the result of a plea agreement [and] require that the agreement be stated . . . ." *Irons v. State; Zoller v. State*, 282 Ark. 380, 669 S.W.2d 434 (1984); *Marshall v. State*, 262 Ark. 726, 561 S.W.2d 76 (1978).

### **RESEARCH REFERENCES**

**U. Ark. Little Rock L.J.** Survey — Criminal Procedure, 12 U. Ark. Little Rock L.J. 193.

### **CASE NOTES**

#### **ANALYSIS**

In general.  
Purpose.  
Collateral attack.  
Evidence.  
Parole information.  
Plea bargaining agreement.  
Questioning by court.  
Rule mandatory.  
Statutory language unnecessary.  
Substantial compliance.

#### **In General.**

The polestar when a guilty plea is challenged is to determine whether the plea was made intelligently and voluntarily. *Peterson v. State*, 296 Ark. 324, 756 S.W.2d 897 (1988).

Trial court clearly determined that defendant's testimony showed that he had a good understanding of consecutive and concurrent sentences, the difference between the actual sentence and the down time discussed, and the age fifty-five rule; further, any deficiencies in substantial compliance with the requirement that the plea agreement be stated were overcome by the evidence presented in the postconviction relief hearing concerning the information provided to defendant and defendant's knowledge and understanding of the sentencing range and actual plea agreement. *Pardue v. State*, 363 Ark. 567, 215 S.W.3d 650 (2005).

#### **Purpose.**

The purpose of this rule's requirements is to avoid the chance of a misunderstanding by the accused of the law and his rights. *Pettit v. State*, 296 Ark. 423, 758 S.W.2d 1 (1988).

#### **Collateral Attack.**

A guilty plea received under Arkansas' procedures is not immune from an attack in a habeas corpus petition. *Pennington v. Housewright*, 666 F.2d 329 (8th Cir. 1981), cert. denied 456 U.S. 918, 102 S. Ct. 1775, 72 L. Ed. 2d 178 (1982).

Where the record before a federal district court on a petition for a writ of habeas corpus showed that the petitioner, pursuant to a plea bargaining agreement, pleaded guilty to first-degree murder after being charged with capital felony murder, that he had executed three plea statements which provided that his guilty plea was voluntarily and knowingly made, that he had admitted his guilt and described the crimes to the trial court, and that he had responded affirmatively to the trial court's questions about understanding the consequences of such a plea, the Arkansas procedures governing the acceptance of guilty pleas were followed and the federal court was justified in dismissing the habeas corpus petition without holding an evidentiary hearing on the voluntariness of the guilty plea. *Pennington v. Housewright*, 666 F.2d 329 (8th Cir. 1981), cert. denied 456 U.S. 918, 102 S. Ct. 1775, 72 L. Ed. 2d 178 (1982).

#### **Evidence.**

Where the defendant claimed that his guilty plea was involuntarily made and the records of the trial court and the post-conviction hearing were silent on the issue, the judgment of conviction was set aside. *Irons v. State*, 267 Ark. 469, 591 S.W.2d 650 (1980).

Evidence established that plea was voluntary. *Travis v. Lockhart*, 787 F.2d 409 (8th Cir. 1986); *Snelgrove v. State*, 292 Ark. 116, 728 S.W.2d 497 (1987).

Trial court properly revoked defendant's suspended sentence for non-support because defendant's purported lack of knowledge and understanding of the obligation was inconsistent with what defendant was told and what defendant admitted during the process of pleading guilty. *Rhoades v. State*, 2010 Ark. App. 730, — S.W.3d —, 2010 Ark. App. LEXIS 790 (Nov. 3, 2010).

#### **Parole Information.**

The United States Constitution does not require the state to furnish a defendant with



information about parole eligibility in order for the defendant's plea of guilty to be voluntary. *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

#### **Plea Bargaining Agreement.**

In a prosecution for attempted robbery, the trial court's failure to determine whether defendant's guilty pleas were the result of a plea agreement raised the possibility of prejudice; thus, defendant's sentence on the attempted robbery conviction would be modified on appeal to conform with an alleged plea bargaining agreement. *McGee v. State*, 262 Ark. 473, 557 S.W.2d 885 (1977).

Where a plea agreement was made whereby a defendant would receive a five year sentence in return for his guilty plea and the court did not advise the defendant that such an agreement was not binding on the court and did not inquire in open court as to such agreement, the 20 year sentence pronounced by the trial court would be reduced to five years if acceptable to the state, or, if the reduction was not acceptable to the state, then the defendant would be permitted to plead anew. *Marshall v. State*, 262 Ark. 726, 561 S.W.2d 76 (1978).

Where a guilty plea was entered in a rape prosecution it was mandatory that the trial court determine whether the plea was the result of a plea agreement, require that the agreement be stated, and, if the judge had not previously concurred in the agreement, advise the defendant that the agreement was not binding on the trial court and that the disposition, if the plea was entered, might be different from that contemplated by the agreement. *Irons v. State*, 267 Ark. 469, 591 S.W.2d 650 (1980).

Where the proof was sufficient that the defendant in a drug prosecution did not receive the sentence concession contemplated by the plea agreement and in which the court had indicated its concurrence, and it was furthermore apparent that the prosecuting attorney failed to seek the first offender treatment the defendant had been promised, the defendant should have been allowed to withdraw his plea of *nolo contendere* when he realized that he was not going to be sentenced according to the plea agreement in which the judge had indicated concurrence. *Zoller v. State*, 282 Ark. 380, 669 S.W.2d 434 (1984).

This rule which requires the trial court to have the plea agreement stated for the record is mandatory, and where the failure to state the plea negotiation for the record allowed questions to be raised as to the trial court's understanding of the agreement, the defendant should have been allowed to plead anew to remove any possibility of prejudice. *Zoller v. State*, 282 Ark. 380, 669 S.W.2d 434 (1984).

Testimony was sufficient to overcome the mandatory requirement that the record of a

guilty plea agreement be made part of the contemporaneous record when the plea is entered, where the plea agreement was stated to the extent necessary to a resolution of the arguments advanced by the state, and all parties and the trial court fully understood the terms and conditions of the plea agreement and the record of that proceeding was reasonably faithful to that understanding. *State v. Gaddy*, 313 Ark. 677, 858 S.W.2d 81 (1993).

#### **Questioning by Court.**

It is the duty and responsibility of the trial judge to determine beyond doubt that a plea of guilty is voluntary and, in order to do so, he should inquire of the defendant personally. *Simmons v. State*, 265 Ark. 48, 578 S.W.2d 12 (1979).

Where the trial judge, after explaining the possible penalties for aggravated robbery and theft of property, asked the defendant if he wanted to plead guilty or have a jury trial, and the defendant at least three times in responses to the judge's questions stated that he wanted to enter a guilty plea, the record showed that the trial judge had sufficiently determined that the guilty plea was voluntarily made. *Scott v. State*, 267 Ark. 628, 593 S.W.2d 27 (1980).

Inasmuch as this rule requires the trial court to address the defendant personally to determine whether or not any force or threats, or any promises apart from the plea agreement were used to induce the plea, the trial court could, and should, comply with Rule 24.6 by continuing a direct inquiry of the defendant as to the factual basis for his plea. *Jones v. State*, 288 Ark. 375, 705 S.W.2d 874 (1986).

Where the record showed the trial court addressed the defendant directly and stated the charges and the factual circumstances surrounding each count, the defendant acknowledged his guilty plea was consistent with the facts as he knew them regarding the assault and kidnapping charges, and he declared his guilt on each charge, the court followed the requirements regarding the receipt of a guilty plea, and the defendant's guilty plea was voluntary. *Garmon v. State*, 290 Ark. 371, 719 S.W.2d 699 (1986).

In accepting *nolo contendere* plea, trial court shall ask accused personally whether the facts proffered by the prosecution are those which accused does not contest. *Snelgrove v. State*, 292 Ark. 116, 728 S.W.2d 497 (1987).

Unlike this rule, which requires that the court address the defendant personally before accepting a plea, ARCrP 24.6 only requires that the court shall make "such inquiry as will establish that there is a factual basis for the plea." *Ashby v. State*, 297 Ark. 315, 761 S.W.2d 912 (1988).

Trial court did not err in determining that defendant was competent where defendant responded that his medication did not affect his ability to understand the proceedings and that he had agreed to the plea agreement knowingly and soberly, and his psychiatric evaluation indicated that he was competent and did not have a mental defect; further, the judge at a postconviction relief hearing was not required to believe the testimony of any witness, particularly that of the accused. *Pardue v. State*, 363 Ark. 567, 215 S.W.3d 650 (2005).

In a rape case, although the trial court failed to determine whether defendant's guilty plea was the result of a plea agreement or that the terms of any such agreement were stated, because no objection was made to the trial court's failure to follow this rule the merits of defendant's complaint regarding his plea could not be reached on appeal. *McDonald v. State*, 364 Ark. 491, 221 S.W.3d 349 (2006).

#### **Rule Mandatory.**

This rule is mandatory. *Reed v. State*, 276 Ark. 318, 635 S.W.2d 472 (1982); *Atkins v. State*, 287 Ark. 445, 701 S.W.2d 109 (1985), questioned *McGirt v. State*, 708 S.W.2d 620 (1986); *Pettit v. State*, 296 Ark. 423, 758 S.W.2d 1 (1988).

State failed in its burden to show that defendant's guilty plea to a charge of Class Y felony possession of a controlled substance with intent to deliver was voluntarily and intelligently entered because there was no showing that the trial court complied with this rule or Ark. R. Crim. P. 24.4, 24.6, or 24.7 and no showing that defendant actually pled guilty. The guilty plea statement signed by defendant indicated only that he was pleading guilty to three Class D felonies, and there was no recording of any guilty plea made before the trial court as required by Ark. R. Crim. P. 24.7. *Dorsey v. State*, 2012 Ark. App. 183, — S.W.3d —, 2012 Ark. App. LEXIS 291 (Feb. 29, 2012).

#### **Statutory Language Unnecessary.**

The failure of the trial judge to specifically ask a defendant the precise question, "Have any threats or force, or any promises, apart from a plea agreement, been used to induce your plea of guilty?" does not render the plea

and the sentence thereon subject to collateral attack for constitutional infirmity. *Simmons v. State*, 265 Ark. 48, 578 S.W.2d 12 (1979).

#### **Substantial Compliance.**

It is the duty and responsibility of the trial court to determine beyond doubt that a plea of guilty is voluntary, and in order to do so, he should inquire of the defendant personally, substantial compliance being sufficient. However, reversal is not mandated where the deficiencies in plea proceeding are supplied at a post-conviction hearing. *Reed v. State*, 276 Ark. 318, 635 S.W.2d 472 (1982); *Flaherty v. State*, 297 Ark. 198, 761 S.W.2d 167 (1988).

Post-conviction relief petition was properly denied because, inter alia, the record showed that, at the plea hearing, the trial court inquired of the inmate whether she was under the influence of any substance or medication that would cause her not to understand her plea, to which she responded that she was not and whether she felt she understood what was "going on," to which she responded that she did; the inmate stated that she was pleading guilty freely and voluntarily and that she had not been threatened or promised anything to change her plea to guilty. Shortly after her plea hearing, the inmate filed a motion to withdraw her plea of guilty, but later directed her counsel to withdraw it, and she acknowledged to the court that it was her decision, and hers alone, after talking with her attorney and receiving his advice. *Biddle v. State*, 2011 Ark. 358, — S.W.3d —, 2011 Ark. LEXIS 438 (Sept. 15, 2011).

Trial court did not err in denying defendant's petition for a writ of error coram nobis after defendant pled guilty to aggravated robbery, possession of a firearm by certain persons, and robbery because the rule was followed during the plea hearing; none of the evidence allegedly withheld by the prosecution would have prevented the trial court from accepting a plea under the rule. *Carter v. State*, 2012 Ark. 186, — S.W.3d —, 2012 Ark. LEXIS 202 (Apr. 26, 2012).

**Cited:** *Williams v. State*, 273 Ark. 371, 620 S.W.2d 277 (1981); *Abdullah v. State*, 281 Ark. 239, 663 S.W.2d 166 (1984); *Williams v. State*, 289 Ark. 385, 711 S.W.2d 479 (1986); *Furr v. State*, 297 Ark. 233, 761 S.W.2d 160 (1988); *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996).

### **Rule 24.6. Determining accuracy of plea.**

The court shall not enter a judgment upon a plea of guilty or nolo contendere without making such inquiry as will establish that there is a factual basis for the plea.



1987 Unofficial Supplementary Commentary to Rule 24.6

**What Constitutes Factual Basis.**

Evidently, a factual basis is established by a defendant's statement that he is guilty, though this is, of course, a legal conclusion drawn by a person who would not be permitted to testify to such a conclusion in any other context. Recently, however, the Arkansas Supreme Court has indicated a preference for testimony about the facts:

An inquiry by the court of the prosecutor whether there is a basis for the charge against the accused does not establish that there is a factual basis for the plea as required by Rule 24.6. That can only be done by the court asking the defendant if he did the things of which he stands accused and is pleading guilty because he is guilty. *McDaniel v. State*, 288 Ark. 629, 633, 708 S.W.2d 613, 615 (1956).

No case has been found in which the Arkansas Supreme Court overturned a conviction pursuant to a guilty plea at a hearing at which the defendant merely testified that he was guilty rather than recounting facts to support this conclusion. In addition, see *Garmon v. State*, 290 Ark. 371, 719 S.W.2d 699 (1986), where the Court observed that "to determine the accuracy of the plea in satisfaction of Rule 24.6, the Court must ask the defendant if he did the things of which he stands accused, and if he is pleading guilty because he is guilty." *Id.* at 373, 719 S.W.2d at 700.

Recently, the Court has held that the factual basis for a plea does not have to be supplied by the defendant, though the defendant does have to confirm that he did what he is accused of doing. See, *Smith v. State*, 291 Ark. 496, 498, 725 S.W.2d 849, 851 (1987):

Appellant complains, however, that the trial judge failed to make personal inquiry of appellant in order to establish that there was a factual basis for his plea.

While the trial court must determine if a defendant's plea is voluntarily proffered and there is a factual basis for it, we have no rule that the factual basis must be furnished by the defendant. See ARCrP 24.6. We have, however, held that the court must ask the defendant if he did the things of which he stands accused and is pleading guilty because he is guilty. *McDaniel v. State*, 288 Ark. 629, 708 S.W.2d 613 (1986). Here, the prosecutor recited, in detail, the underlying facts of the crimes with which appellant and his accomplices were charged, and appellant admitted his guilt. The judge, having complied with the dictates of Rule 24, correctly received and acted upon appellant's plea of guilty.

As one might predict, evidence in the form of a signed confession introduced into evidence at the time the plea is entered or at a Rule 37 hearing goes a long way toward establishing a factual basis for the plea. See, for example, *Thomas v. State*, 277 Ark. 74, 639 S.W.2d 353 (1982).

**Duties of Trial Judge.**

In *Jones v. State*, 288 Ark. 375, 705 S.W.2d 874 (1986) the trial court, determined to achieve literal compliance with the rule, asked the defendant, "Is there a factual basis for the plea?" *Id.* at 380, 705 S.W.2d at 877, (1986). The defendant responded "Yes." His conviction was upheld against attack on Rule 24.6 grounds.

**RESEARCH REFERENCES**

**U. Ark. Little Rock L.J.** Arkansas Law Survey, Irving and Schoen, Criminal Procedure, 9 U. Ark. Little Rock L.J. 129.

Survey — Criminal Procedure, 12 U. Ark. Little Rock L.J. 193.

**CASE NOTES**

**ANALYSIS**

Constitutionality.  
In general.  
Purpose.  
Applicability.  
Duty of judge.  
Ineffective counsel.  
Rule mandatory.  
Substantial compliance.  
Sufficient factual basis.

**Constitutionality.**

Assuming a violation of this rule occurred, defendant was not denied due process because *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167, 27 L.Ed.2d 162 (1970) allows a defendant to plead guilty notwithstanding a denial of guilt, and it was defendant's voluntary act of pleading guilty to the two charges of rape that resulted in his deprivation of liberty. *Cranford v. Lockhart*, 975

F.2d 1347 (8th Cir. 1992).

### **In General.**

This particular inquiry is far and away the most important single phase of plea-taking. When the record of the proceeding clearly proves that the accused understood the nature of the offense and unmistakably admitted guilt, the possibility of a successful post-conviction challenge to the validity of the plea is remote. *Schneider v. State*, 290 Ark. 454, 720 S.W.2d 709 (1986).

The polestar when a guilty plea is challenged is to determine whether the plea was made intelligently and voluntarily. *Peterson v. State*, 296 Ark. 324, 756 S.W.2d 897 (1988).

### **Purpose.**

The evident purpose of the factual basis requirement is to prevent an accused from unwittingly pleading guilty on the mistaken assumption that his conduct was unlawful when in fact it was not. *Furr v. State*, 297 Ark. 233, 761 S.W.2d 160 (1988).

The purpose of making a factual inquiry, from whatever source, is to be certain that the accused could be found guilty of the offense and is not entering his plea based upon a misunderstanding of the law. *Ashby v. State*, 297 Ark. 315, 761 S.W.2d 912 (1988).

### **Applicability.**

This rule applies to either a guilty plea or a plea of *nolo contendere*. No distinction is made between the two in the rule. *Ashby v. State*, 297 Ark. 315, 761 S.W.2d 912 (1988).

### **Duty of Judge.**

It is the duty and responsibility of the trial court to determine beyond doubt that a plea of guilty is voluntary, and in order to do so, he should inquire of the defendant personally, substantial compliance being sufficient. However, reversal is not mandated where the deficiencies in plea proceeding are supplied at a post-conviction hearing. *Reed v. State*, 276 Ark. 318, 635 S.W.2d 472 (1982).

Denial of motion to recuse trial judge based upon circumstances supposedly indicating bias in that the trial judge had recently presided at the trial of another accused of the same murder as defendant and the judge mentioned some facts brought out at that trial in questioning defendant to determine whether he was in fact guilty was proper since under this rule it was the trial judge's duty to make that determination and since it was not shown that his having presided at the other trial was in any way a disqualification; moreover complaint that after original plea of guilty had been accepted at hearing in open court, defendant was brought back to court the next day, sworn, and asked if his answers to the questions put to him the day before would still be the same and he said they would be did not indicate that the trial judge

was so biased as to call for his recusal at Rule 37 proceeding for since a plea of guilty need not be made under oath, the second proceeding was unnecessary. *Welch v. State*, 283 Ark. 281, 675 S.W.2d 641 (1984).

No court should accept a plea of guilt without determining whether the accused believes he is guilty and that belief has a substantial factual basis. *Atkins v. State*, 287 Ark. 445, 701 S.W.2d 109 (1985), questioned *McGirt v. State*, 708 S.W.2d 620 (1986).

Inasmuch as ARCrP 24.5 requires the trial court to address the defendant personally to determine whether or not any force or threats, or any promises apart from the plea agreement were used to induce the plea, the trial court could, and should, comply with this rule by continuing a direct inquiry of the defendant as to the factual basis for his plea. *Jones v. State*, 288 Ark. 375, 705 S.W.2d 874 (1986).

Court must ask defendant if he did the things of which he stands accused and is pleading guilty because he is guilty. *Muck v. State*, 292 Ark. 310, 730 S.W.2d 214 (1987).

### **Ineffective Counsel.**

Where petitioner's plea of guilty was the result of ineffective counsel in that, at no time during his two appearances before the trial court did petitioner possess an understanding of either the law or the facts and circumstances applicable to his case, his guilty plea was not knowingly, voluntarily and intelligently made and thus the conviction, sentence, and judgment entered against him were vacated. *Thomas v. Lockhart*, 569 F. Supp. 454 (E.D. Ark. 1983), *aff'd* 738 F.2d 304 (8th Cir. 1984).

### **Rule Mandatory.**

Compliance with this rule is mandatory. *Irons v. State*, 267 Ark. 469, 591 S.W.2d 650 (1980); *Reed v. State*, 276 Ark. 318, 635 S.W.2d 472 (1982); *Muck v. State*, 292 Ark. 310, 730 S.W.2d 214 (1987); *Ashby v. State*, 297 Ark. 315, 761 S.W.2d 912 (1988); *Van Harris v. State*, 297 Ark. 573, 764 S.W.2d 606 (1989).

State failed in its burden to show that defendant's guilty plea to a charge of Class Y felony possession of a controlled substance with intent to deliver was voluntarily and intelligently entered because there was no showing that the trial court complied with this rule or Ark. R. Crim. P. 24.4, 24.5, or 24.7 and no showing that defendant actually pled guilty. The guilty plea statement signed by defendant indicated only that he was pleading guilty to three Class D felonies, and there was no recording of any guilty plea made before the trial court as required by Ark. R. Crim. P. 24.7. *Dorsey v. State*, 2012 Ark. App. 183, — S.W.3d —, 2012 Ark. App. LEXIS 291 (Feb. 29, 2012).



**Substantial Compliance.**

Arkansas procedures governing the acceptance of guilty pleas were followed and the federal court was justified in dismissing the habeas corpus petition without holding an evidentiary hearing on the voluntariness of the guilty plea. *Pennington v. Housewright*, 666 F.2d 329 (8th Cir. 1981), cert. denied 456 U.S. 918, 102 S. Ct. 1775, 72 L. Ed. 2d 178 (1982).

The trial court substantially complied with this rule where the judge asked the defendant and his attorney if there were a factual basis for the guilty pleas. *Jones v. State*, 288 Ark. 375, 705 S.W.2d 874 (1986).

Where the court did not inquire of the defendant whether he was in fact guilty, there was not substantial compliance with this rule. *McDaniel v. State*, 288 Ark. 629, 708 S.W.2d 613 (1986), questioned *Bolt v. State*, 314 Ark. 387, 862 S.W.2d 841 (1993).

Substantial compliance with the rule is all that is required. *Muck v. State*, 292 Ark. 310, 730 S.W.2d 214 (1987); *Ashby v. State*, 297 Ark. 315, 761 S.W.2d 912 (1988).

Trial court held in substantial compliance. *White v. State*, 301 Ark. 74, 781 S.W.2d 478 (1989).

Trial court did not err in denying defendant's petition for a writ of error coram nobis after defendant pled guilty to aggravated robbery, possession of a firearm by certain persons, and robbery because the rule was followed during the plea hearing; none of the evidence allegedly withheld by the prosecution would have prevented the trial court from accepting a plea under the rule. *Carter v. State*, 2012 Ark. 186, — S.W.3d —, 2012 Ark. LEXIS 202 (Apr. 26, 2012).

**Sufficient Factual Basis.**

The factual basis of a plea of guilty, if not sufficiently determined by the court during the plea proceedings, may be established at an ARCrP 37 post-conviction hearing. *Davis v. State*, 267 Ark. 507, 592 S.W.2d 118 (1980); *Grover v. State*, 291 Ark. 508, 726 S.W.2d 268 (1987); *Knee v. State*, 297 Ark. 346, 760 S.W.2d 874 (1988).

Evidence established sufficient factual basis for the guilty plea. *Davis v. State*, 267 Ark. 507, 592 S.W.2d 118 (1980); *Treadwell v. State*, 271 Ark. 823, 610 S.W.2d 884 (1981); *Muck v. State*, 292 Ark. 310, 730 S.W.2d 214 (1987); *Branham v. State*, 292 Ark. 355, 730 S.W.2d 226 (1987); *Parks v. State*, 301 Ark. 513, 785 S.W.2d 213 (1990).

Where there was no compliance with this rule which requires the court to make such inquiry as will establish that there is a factual basis for the plea, the defendant's plea of guilty had to be set aside. *Atkins v. State*, 287 Ark. 445, 701 S.W.2d 109 (1985), questioned *McGirt v. State*, 708 S.W.2d 620 (1986).

The court's inquiry of the prosecutor of

whether there is a basis for the charge against the accused does not establish that there is a factual basis for the plea as required by this rule. *McDaniel v. State*, 288 Ark. 629, 708 S.W.2d 613 (1986), questioned *Bolt v. State*, 314 Ark. 387, 862 S.W.2d 841 (1993).

Where the record showed the trial court addressed the defendant directly and stated the charges and the factual circumstances surrounding each count, the defendant acknowledged his guilty plea was consistent with the facts as he knew them and he declared his guilt on each charge, the court followed the requirements regarding the receipt of a guilty plea, and the defendant's guilty plea was voluntary. *Garmon v. State*, 290 Ark. 371, 719 S.W.2d 699 (1986).

"A factual basis" means that the accused is actually guilty. *Schneider v. State*, 290 Ark. 454, 720 S.W.2d 709 (1986).

While the trial court must determine if a defendant's plea is voluntarily proffered and there is a factual basis for it, there is no rule that the factual basis must be furnished by the defendant. The court must ask the defendant if he did the things of which he stands accused and is pleading guilty because he is guilty. *Smith v. State*, 291 Ark. 496, 725 S.W.2d 849 (1987).

Deficiencies in establishing a factual basis for nolo contendere pleas at a plea hearing may be remedied by evidence from the post-conviction hearing. *Snelgrove v. State*, 292 Ark. 116, 728 S.W.2d 497 (1987).

Evidence sufficient to establish factual basis for nolo contendere plea. *Snelgrove v. State*, 292 Ark. 116, 728 S.W.2d 497 (1987); *Ashby v. State*, 297 Ark. 315, 761 S.W.2d 912 (1988).

The better practice is to ask the accused if he committed the acts with which he is charged, but failure to do so will not automatically result in setting aside a guilty plea, as this rule contains no requirement that the accused be addressed personally. *Flaherty v. State*, 297 Ark. 198, 761 S.W.2d 167 (1988).

Significantly, this rule, unlike ARCrP 24.4 and ARCrP 24.5, contains no requirement that the accused be addressed personally by the trial judge in determining the factual basis for a guilty plea. By separating this step in the procedure from those steps which must be addressed directly to the accused, the framers of the rules did not contemplate that only the accused could establish a factual basis for a plea of guilty or nolo contendere. *Furr v. State*, 297 Ark. 233, 761 S.W.2d 160 (1988).

There is no distinction in the factual inquiry required for acceptance of a guilty plea and a plea of nolo contendere. *Ashby v. State*, 297 Ark. 315, 761 S.W.2d 912 (1988).

The factual basis to support the plea does

not have to come from the accused himself. *Ashby v. State*, 297 Ark. 315, 761 S.W.2d 912 (1988).

Unlike ARCrP 24.5, which requires that the court address the defendant personally before accepting a plea, this rule only requires that the court shall make “such inquiry as will establish that there is a factual basis for the plea.” *Ashby v. State*, 297 Ark. 315, 761 S.W.2d 912 (1988).

The requirement of a factual basis for a plea does not require that the defendant be proven guilty, but merely that there is sufficient evidence from which the trial court can conclude that the defendant would be found guilty if he elected to proceed to trial. *Knee v. State*, 297 Ark. 346, 760 S.W.2d 874 (1988).

Even if a factual basis had been wanting at the guilty plea hearing, it can be adequately supplied by testimony at an ARCrP 37 hearing, which is sufficient. *Gibson v. State*, 301 Ark. 44, 781 S.W.2d 469 (1989).

Defendant had the capacity to enter the guilty plea and understood the sentence ranges and agreement; further, at the time of the guilty plea, it was established that the prosecution would present a positive eyewitness identification and another witness, which was evidence sufficient to convict. *Pardue v. State*, 363 Ark. 567, 215 S.W.3d 650 (2005).

Appellate court affirmed the denial of an inmate’s petition for postconviction relief under Ark. R. Crim. P. 37.1 because, while the court failed to ask the inmate if he agreed with the facts at the plea hearing, the trial court established that the facts presented were sufficient to find the inmate guilty, as required by this rule. *O’Connor v. State*, 367 Ark. 173, 238 S.W.3d 104 (2006).

Trial court properly revoked defendant’s suspended sentence for nonsupport because defendant’s purported lack of knowledge and understanding of the obligation was inconsistent with what defendant was told and what defendant admitted during the process of pleading guilty. *Rhoades v. State*, 2010 Ark. App. 730, — S.W.3d —, 2010 Ark. App. LEXIS 790 (Nov. 3, 2010).

**Cited:** *Abdullah v. State*, 281 Ark. 239, 663 S.W.2d 166 (1984); *Crockett v. State*, 282 Ark. 582, 669 S.W.2d 896 (1984); *Nation v. State*, 283 Ark. 250, 674 S.W.2d 939 (1984); *Nation v. State*, 287 Ark. 291, 697 S.W.2d 918 (1985); *Proctor v. State*, 291 Ark. 459, 725 S.W.2d 827 (1987); *Smith v. State*, 291 Ark. 496, 725 S.W.2d 849 (1987); *State v. Knight*, 318 Ark. 158, 884 S.W.2d 258 (1994); *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996); *Friend v. Norris*, 364 Ark. 315, 219 S.W.3d 123 (2005); *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918 (2010).

## Rule 24.7. Record of proceedings.

The court shall cause a verbatim record of the proceedings at which a defendant enters a plea of guilty or nolo contendere to be made and preserved.

### CASE NOTES

#### Absence of Record.

In the absence of the required record, the state has the burden of proving the plea was voluntarily and intelligently entered. *Reed v. State*, 276 Ark. 318, 635 S.W.2d 472 (1982).

State failed in its burden to show that defendant’s guilty plea to a charge of Class Y felony possession of a controlled substance with intent to deliver was voluntarily and intelligently entered because there was no showing that the trial court complied with Ark. R. Crim. P. 24.4, 24.5, 24.6, or this rule

and no showing that defendant actually pled guilty. The guilty plea statement signed by defendant indicated only that he was pleading guilty to three Class D felonies, and there was no recording of any guilty plea made before the trial court as required by this rule. *Dorsey v. State*, 2012 Ark. App. 183, — S.W.3d —, 2012 Ark. App. LEXIS 291 (Feb. 29, 2012).

**Cited:** *Thomas v. Lockhart*, 738 F.2d 304 (8th Cir. 1984); *Schneider v. State*, 290 Ark. 454, 720 S.W.2d 709 (1986).

## Rule 24.8. Pleading to other offenses.

(a) Upon a plea of guilty or nolo contendere, or after conviction on a plea of not guilty, the defendant may make a written request, indorsed by his attorney, if any, for permission to plead guilty or nolo contendere as to any other offense or offenses he has committed which are within the jurisdiction of other courts of this state.



(b) Upon receipt of written approval of the prosecuting attorney in that governmental unit in which an offense has been or could be charged, together with either a certified copy of the charge filed in the unit or with a statement of that prosecuting attorney describing the offense, the defendant may be allowed to enter the plea.

(c) In making a request for transfer of a charge under the provisions of this rule, the defendant shall be deemed to have waived:

(i) venue as to an offense committed in another governmental unit of the state; and

(ii) return of an indictment or filing of an information as to an offense not yet formally charged.

(d) Before accepting any plea to other offenses contemplated by this rule, the court shall follow the procedure prescribed for any other plea of guilty or nolo contendere.

#### Comment to Rule 24.8

#### Consideration of Plea in Final Disposition.

(a) It is proper for the court to grant charge and sentence concessions to a defendant who enters a plea of guilty or nolo contendere when the interest of the public in the effective administration of justice would thereby be served. Among the considerations which are appropriate in determining whether such concessions should be granted are:

(i) that the defendant by his plea has aided in ensuring the prompt and certain application of correctional measures to him;

(ii) that the defendant has indicated his guilt and shown a willingness to assume responsibility for his conduct;

(iii) that the concessions will make possible the application of alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form or description of the conviction;

(iv) that the defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial;

(v) that the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders;

(vi) that the defendant by his plea has aided in avoiding delay in the disposition of other cases and thereby has contributed to the efficient administration of criminal justice and the prompt and certain application of correctional measures to other convicted offenders.

(b) The court shall not impose upon a defendant any sentence in excess of that which would be justified by any of the rehabilitative, protective, deterrent or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove his guilt at trial rather than to enter a plea of guilty or nolo contendere.

#### CASE NOTES

##### Withdrawn Guilty Plea.

Defendant's four alleged points of "detrimental reliance" on his withdrawn guilty plea were illusory as all of the facts he asserted would have occurred if, and only if, the trial court had accepted the plea agreement, which

it stated it would not have done because of the victim's objection to the agreement. *Diggs v. State*, 93 Ark. App. 332, 219 S.W.3d 654 (2005).

**Cited:** *Davis v. Reed*, 316 Ark. 575, 873 S.W.2d 524 (1994).

### RULE 25. PLEA DISCUSSIONS AND PLEA AGREEMENTS

#### Rule 25.1. Propriety of plea discussions and plea agreements.

(a) In cases in which it appears that it would serve the interest of the public in the effective administration of justice, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He shall engage in plea discussions and reach a plea agreement with

the defendant only through defense counsel, except when the defendant has waived or refused his right to be represented by appointed or retained counsel.

(b) Similarly situated defendants shall be afforded equal opportunities for plea discussions and plea agreements.

#### Comment to Rule 25.1

##### **Guidelines for the Prosecuting Attorney.**

The prosecuting attorney may agree to one or more of the following, as appropriate in the circumstances of the individual case:

(a) to make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere;

(b) to seek or not to oppose dismissal of the

charge if the defendant enters a plea of guilty or nolo contendere to a charge or another offense reasonably related to the offense charged;

(c) to seek or not to oppose dismissal of other charges or not to prosecute potential charges against the defendant if he enters a plea of guilty or nolo contendere to one or more of the charges against him.

#### RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Comments, Plea Bargaining: A Necessary Evil?, 2 U. Ark. Little Rock L.J. 381.

### **Rule 25.2. Relationship between defense counsel and defendant.**

Defense counsel shall conclude a plea agreement only with the consent of the defendant and shall ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant.

#### Comment to Rule 25.2

To aid the defendant in reaching a decision, defense counsel, after appropriate investigation of both the law and the facts, shall advise

the defendant of the alternatives available and of the considerations he deems important.

#### 1987 Unofficial Supplementary Commentary to Rule 25.2

For cases discussing the right to post-conviction relief where a plea agreement is alleged to have been offered by the state but not communicated by defense counsel to peti-

tioner, see *Scott v. State*, 286 Ark. 339, 691 S.W.2d 859 (1985); *Elmore v. State*, 285 Ark. 42, 684 S.W.2d 263 (1985); and *Rasmussen v. State*, 280 Ark. 472, 658 S.W.2d 867 (1983).

#### RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Comments, Plea Bargaining: A Necessary Evil?, 2 U. Ark. Little Rock L.J. 381.

#### CASE NOTES

##### **Duty of Defense Counsel.**

A plea agreement is an agreement between the accused and the prosecutor, not between the defense counsel and the prosecutor; as such, counsel has the duty to advise his client of an offer of a negotiated plea. *Rasmussen v. State*, 280 Ark. 472, 658 S.W.2d 867 (1983).

Under this rule the decision to enter a guilty plea ultimately rests with the defendant; thus, it would have been plainly contrary to this rule for the defense counsel to have resisted the plea which the defendant wanted to make. *Campbell v. State*, 283 Ark. 12, 670 S.W.2d 800 (1984).



A plea agreement is an agreement between the accused and the prosecutor, not an agreement between counsel and the prosecutor. Counsel has the duty to advise his client of an offer of a negotiated plea, but before the

Supreme Court will order an evidentiary hearing in circuit court, the petitioner must allege that he would have accepted the plea had he known of it. *Elmore v. State*, 285 Ark. 42, 684 S.W.2d 263 (1985).

### **Rule 25.3. Responsibilities of the trial judge.**

- (a) The judge shall not participate in plea discussions.
- (b) If a plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that the charge or charges will be reduced, that other charges will be dismissed, or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate whether he will concur in the proposed disposition. If, after the judge has indicated his concurrence with a plea agreement and the defendant has entered a plea of guilty or nolo contendere, but before sentencing, the judge decides that the disposition should not include the charge or sentence concessions contemplated by the agreement, he shall so advise the parties and then in open court call upon the defendant to either affirm or withdraw his plea.
- (c) If the parties have not sought the concurrence of the trial judge in a plea agreement or if the judge has declined to indicate whether he will concur in the agreement, he shall advise the defendant in open court at the time the agreement is stated that:
  - (i) the agreement is not binding on the court; and
  - (ii) if the defendant pleads guilty or nolo contendere the disposition may be different from that contemplated by the agreement.
- (d) A verbatim record of all proceedings had in open court pursuant to subsections (b) and (c) of this rule shall be made and preserved by the court.

#### **1987 Unofficial Supplementary Commentary to Rule 25.3**

In *Mabry v. Johnson*, 467 U.S. 504, 104 S. Ct. 2557, 81 L. Ed. 2d 437 (1984), the defendant was offered a 21 year sentence to be served concurrently with sentences for other offenses. He accepted the offer, but was then told that because of a mistake the offer was withdrawn. It was replaced by a second offer involving a recommendation that the sentence be served consecutively with his other sentences. This offer was rejected, and he stood trial. After a mistrial, he accepted the second offer and received a 21 year consecutive sentence. The defendant then attacked the sentence by filing a habeas corpus petition

in a federal district court, which denied the petition. The Eighth Circuit Court of Appeals reversed in a decision holding that fairness precluded the prosecution's withdrawal of the plea proposal after the defendant had accepted it. The United States Supreme Court reversed, holding that the defendant's inability to enforce the terms of the prosecutor's offer was without constitutional significance, since the defendant clearly entered a plea of guilty voluntarily and intelligently, knowing that he would receive precisely the sentence meted out.

#### **RESEARCH REFERENCES**

**ALR.** Propriety of sentencing judge's imposition of harsher sentence than offered in connection with plea bargain rejected or withdrawn plea by defendant-State cases. 11 ALR 6th 237.

**Ark. L. Rev.** Impeachment, Address and the Removal of Judges in Arkansas: An Historical Perspective, 32 Ark. L. Rev. 253.

## CASE NOTES

## ANALYSIS

Advice to defendant.  
Nonbinding agreements.  
Plea bargain.  
Recommended sentence.  
Scope of authority.

**Advice to Defendant.**

In a prosecution for attempted robbery, the trial court's failure to determine whether defendant's guilty pleas were the result of a plea agreement raised the possibility of prejudice; thus, defendant's sentence on the attempted robbery conviction would be modified on appeal to conform with an alleged plea bargaining agreement. *McGee v. State*, 262 Ark. 473, 557 S.W.2d 885 (1977).

Where a plea agreement was made whereby a defendant would receive a five year sentence in return for his guilty plea and the court did not advise the defendant that such an agreement was not binding on the court and did not inquire in open court as to such agreement, the 20 year sentence pronounced by the trial court would be reduced to five years if acceptable to the state, or, if the reduction was not acceptable to the state, then the defendant would be permitted to plead anew. *Marshall v. State*, 262 Ark. 726, 561 S.W.2d 76 (1978).

In the context of an entry of a guilty plea pursuant to a plea agreement and the requirement that the trial court advise defendant of the right to either affirm or withdraw a guilty plea, compliance with subsection (b) of this rule is mandatory; although defendant pled guilty and was sentenced in open court, because he was not advised by the trial court of his right to affirm or withdraw his earlier guilty plea at the resentencing hearing, the trial court judgment was reversed. *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003).

**Nonbinding Agreements.**

The trial court is not required to accept a plea agreement signed only by defendant and his counsel. *Kilgore v. State*, 313 Ark. 198, 852 S.W.2d 810 (1993).

**Plea Bargain.**

A defendant's acceptance of a prosecutor's proposed plea bargain does not create a constitutional right to have the bargain specifically enforced. *Mabry v. Johnson*, 467 U.S. 504, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984).

Defendant did not demonstrate error under subsection (b) of this rule because the concessions were no longer applicable when defendant failed to abide by his duty under the plea agreement to make restitution within seven days. *Folk v. State*, 96 Ark. App. 73, 238 S.W.3d 640 (2006).

**Recommended Sentence.**

Under Arkansas law, there is no entitlement to have the trial court impose a recommended sentence since a negotiated sentence recommendation does not bind the court; there is a critical difference between an entitlement and a mere hope or expectation that the trial court will follow the prosecutor's recommendation. *Mabry v. Johnson*, 467 U.S. 504, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984).

**Scope of Authority.**

This rule does not authorize a circuit judge to reduce a charge to a lesser included offense; nor does it permit pleading to another charge that the judge believes to be appropriate. *State v. Knight*, 318 Ark. 158, 884 S.W.2d 258 (1994).

Where defendant pled guilty to possession with the intent to deliver, and should have been sentenced to at least ten years imprisonment without probation under § 5-64-401(a)(1)(i), the trial judge had no authority to order probation based on the judge's sua sponte reduction of the charge to mere possession. *State v. Knight*, 318 Ark. 158, 884 S.W.2d 258 (1994).

The trial court violated this rule by dismissing a count against the defendant without first calling upon him in open court to affirm or withdraw the plea. *State v. Vasquez-Aerreola*, 327 Ark. 617, 940 S.W.2d 451 (1997).

**Cited:** *United States v. Wallace*, 578 F.2d 735 (8th Cir. 1978), cert. denied 439 U.S. 898, 99 S. Ct. 263, 58 L. Ed. 2 246 (1978); *Varnedare v. State*, 264 Ark. 596, 573 S.W.2d 57 (1978), questioned by *Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992), questioned by *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986), questioned by *Pharo v. State*, 30 Ark. App. 94, 783 S.W.2d 64 (1990), questioned by *Hayes v. Lockhart*, 852 F.2d 339 (8th Cir. 1988); *Abdullah v. State*, 281 Ark. 239, 663 S.W.2d 166 (1984); *State v. Gaddy*, 313 Ark. 677, 858 S.W.2d 81 (1993).

**Rule 25.4. Discussions, agreements, statements, pleas and judgments not admissible.**

(a) No evidence of any discussion between the parties, of any statement made by the defendant, or of the fact that the parties engaged in plea



discussions shall be admissible in any criminal, civil, or administrative proceeding, except in a proceeding to:

- (i) terminate or modify such an agreement;
- (ii) secure concurrence in a plea agreement;
- (iii) secure acceptance of a plea;
- (iv) secure withdrawal of a plea; or
- (v) cause a judgment based upon a plea to be reversed or held invalid.

(b) Irrespective of whether a plea of guilty or nolo contendere is the result of a plea agreement, if it is not accepted or is withdrawn, or results in a judgment which is reversed or held invalid on direct or collateral review, neither the plea nor any judgment resulting therefrom, nor any statement by the defendant in connection with the making or acceptance of the plea or as a basis for sentence or other disposition thereon, is admissible in evidence against the defendant in any criminal, civil, or administrative proceeding.

#### CASE NOTES

##### **In General.**

Evidence Rule 410 is essentially the same in purpose and effect as this rule. *Gooden v. State*, 295 Ark. 385, 749 S.W.2d 657 (1988).

**Cited:** *Bohnsack v. Employers Ins.*, 708 F.2d 1361 (8th Cir. 1983); *Brown v. State*, 288 Ark. 517, 707 S.W.2d 313 (1986).

### RULE 26. PLEA WITHDRAWAL

#### CASE NOTES

##### **In General.**

A trial court can treat an untimely motion under this rule as a Rule 37 motion. *Rowe v.*

*State*, 318 Ark. 25, 883 S.W.2d 804 (1994).

#### **Rule 26.1. Plea withdrawal.**

(a) A defendant may withdraw his or her plea of guilty or nolo contendere as a matter of right before it has been accepted by the court. A defendant may not withdraw his or her plea of guilty or nolo contendere as a matter of right after it has been accepted by the court; however, before entry of judgment, the court in its discretion may allow the defendant to withdraw his or her plea to correct a manifest injustice if it is fair and just to do so, giving due consideration to the reasons advanced by the defendant in support of his or her motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea. A plea of guilty or nolo contendere may not be withdrawn under this rule after entry of judgment.

(b) Withdrawal of a plea of guilty or nolo contendere shall be deemed to be necessary to correct a manifest injustice if the defendant proves to the satisfaction of the court that:

- (i) he or she was denied the effective assistance of counsel;
- (ii) the plea was not entered or ratified by the defendant or a person authorized to do so in his or her behalf;
- (iii) the plea was involuntary, or was entered without knowledge of the nature of the charge or that the sentence imposed could be imposed;
- (iv) he or she did not receive the charge or sentence concessions contemplated by a plea agreement and the prosecuting attorney failed to seek or not to oppose the concessions as promised in the plea agreement; or

(v) he or she did not receive the charge or sentence concessions contemplated by a plea agreement in which the trial court had indicated its concurrence and the defendant did not affirm the plea after receiving advice that the court had withdrawn its indicated concurrence and after an opportunity to either affirm or withdraw the plea.

(c) The defendant may move to withdraw his or her plea of guilty or nolo contendere to correct a manifest injustice without alleging that he or she is innocent of the charge to which the plea was entered. (Amended October 29, 1990, effective January 1, 1991; amended May 21, 1998, effective May 21, 1998.)

**Reporter's Notes, 1998 Amendment:** Paragraphs (a) and (e) were amended and combined as new paragraph (a). It now provides that prior to acceptance of the plea by the court, the defendant may withdraw his or her plea as a matter of right. After acceptance and before entry of judgment, the court in its discretion may allow a plea withdrawal upon proof that it is necessary to correct a manifest injustice. After entry of the written judgment, the plea may not be withdrawn under this rule. Paragraph (b) was deleted and the remaining paragraphs were redesignated.

These changes were made to clarify when a plea could be withdrawn under this rule [i.e., after acceptance of the plea, after pronouncement of sentence, after entry of judgment, see *Johninson v. State*, 330 Ark. 381 (1997), *Scalco v. City of Russellville*, 318 Ark. 65, 883 S.W.2d 813 (1993)], and under what standard; and also to clarify when a motion to withdraw a plea was proper under this rule as opposed to Rule 37 of these rules. Under Rule 26.1, a motion to withdraw a plea must be filed prior to entry of the written judgment.

### 1987 Unofficial Supplementary Commentary to Rule 26.1

#### Manifest Injustice.

The fact that circumstances beyond the control of the trial court and prosecutor prevent a defendant from getting the benefit of sentence concessions does not constitute "manifest injustice" allowing plea withdrawal under Rule 26.1. In *Ellis v. State*, 288 Ark. 186, 703 S.W.2d 452 (1986), petitioner entered a guilty plea and received a 10 year sentence pursuant to plea negotiations where it was agreed that he would begin serving a federal sentence and receive credit for time served against the 10 year state sentence. Federal authorities refused to accept petitioner. The Arkansas Supreme Court found that because the prosecuting attorney actually sought the concessions and because the trial court did everything it could to persuade federal authorities to accept petitioner, Rule 26.1(c)(iv) was not violated. The Court found that "appellant gambled on the cooperation of the federal authorities and lost," *id.* at 189, 703 S.W.2d at 454, and that appellant was not entitled to withdraw his guilty plea.

#### Timeliness of Motion Geared to Sentencing.

In *Shipman v. State*, 261 Ark. 559, 550 S.W.2d 424 (1977), the Arkansas Supreme Court ruled that a motion to withdraw a guilty plea was timely only if filed before sentencing. A motion under Rule 37 is necessary after a sentence has been carried into execution. *Shipman* has been consistently fol-

lowed. See, for example, *Pennington v. State*, 286 Ark. 503, 697 S.W.2d 85 (1985).

#### Mandatory Plea Withdrawal.

The court must allow the defendant to withdraw a guilty plea where the prosecutor fails to follow through with his end of the bargain, notwithstanding the trial judge's advice that the court is not bound by the plea agreement. *Williams v. State*, 272 Ark. 207, 613 S.W.2d 94 (1981) (where appellant entered guilty plea but failed to appear for sentencing, prompting prosecutor to withdraw recommendation of 30 year suspended sentence, the judge should have permitted appellant to withdraw his plea of guilty). See, also, *Zoller v. State*, 282 Ark. 380, 669 S.W.2d 434 (1984). And, where the prosecutor seeks sentence concessions according to a plea agreement, the defendant is not entitled to withdraw the plea under Rule 26.1 on grounds that the judge failed to sentence according to the agreement. *Tolley v. State*, 1 Ark. App. 1, 611 S.W.2d 798 (1981). See, also, *Ellis v. State*, 288 Ark. 186, 703 S.W.2d 452 (1986).

#### Undisclosed Threats Not Appearing of Record.

In *Stanley v. State*, 280 Ark. 245, 657 S.W.2d 205 (1983) the Court refused to overturn the trial court's finding on the record in a Rule 37 proceeding that appellant was not entitled to withdraw his guilty plea despite his contention that he entered the plea invol-



untarily as a result of prosecutorial threats to prosecute his wife first. The Court credulously observed that the record did not demonstrate any such threat, though the gist of appellant's

petition was that he capitulated in the face of coercion and, as might be expected, did not disclose this for fear that disclosure would lead to the threat being carried out.

### RESEARCH REFERENCES

**ALR.** Presentence withdrawal of plea of nolo contendere or non vult contendere under state law — Awareness of collateral consequences of plea, and competency to enter plea. 10 ALR 6th 265.

Propriety of sentencing judge's imposition of harsher sentence than offered in connection with plea bargain rejected or withdrawn plea by defendant — State cases. 11 ALR 6th 237.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law — Assertion or finding of innocence and defendant's knowledge or waiver of other particular rights at time of plea. 12 ALR 6th 389.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state

law — Particular circumstances as constituting grounds for withdrawal, excluding issues of knowledge, factual basis, competency, evidence, defenses, sentencing and punishment, and ineffective assistance of counsel. 13 ALR 6th 603.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law — Newly discovered or available evidence, and possible defense. 14 ALR 6th 517.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law — Sentencing and punishment issues; ineffective assistance of counsel. 15 ALR 6th 173.

### CASE NOTES

#### ANALYSIS

Purpose.

Acceptance of plea.

Benefit of bargain.

Burden of proof.

Denial of motion to withdraw.

Failure of one party to honor plea bargain.

Failure to honor plea bargain.

Failure to seek concessions.

Findings.

Grounds for withdrawal.

Grounds for withdrawal not shown.

Jurisdiction of court.

Motion untimely.

Perjury.

Provisions mandatory.

Time for motion.

Waiver of defenses.

#### Purpose.

In adopting this rule, the Arkansas Supreme Court sought to avoid any problem that might arise as a result of the different times for the conviction and sentence and sanctioned a plea withdrawal only prior to pronouncement of sentence. *Scalco v. City of Russellville*, 318 Ark. 61, 883 S.W.2d 471 (1994).

There are sound public policy reasons for treating a defendant's motion to withdraw a guilty plea differently when the request is made before sentencing rather than afterward. *Scalco v. City of Russellville*, 318 Ark. 61, 883 S.W.2d 471 (1994).

#### Acceptance of Plea.

Trial court did not err under subsection (a) of this rule in denying defendant's motion to withdraw a guilty plea to residential burglary, kidnapping, and attempted first-degree murder because the trial court had in fact accepted the plea; it was implicit in the colloquy between the trial court and defendant that the trial court had accepted the plea. *Drake v. State*, 103 Ark. App. 87, 286 S.W.3d 728 (2008).

Subsection (a) of this rule includes no requirement that a court accept a guilty or nolo contendere plea by express words. *Drake v. State*, 103 Ark. App. 87, 286 S.W.3d 728 (2008).

#### Benefit of Bargain.

No accused is guaranteed that he will actually receive the benefit of his plea bargain, but he is guaranteed that the prosecutor will seek or not oppose the concessions promised. *Ellis v. State*, 288 Ark. 186, 703 S.W.2d 452 (1986).

#### Burden of Proof.

Counsel is presumed competent, and the burden of overcoming that presumption rests with the petitioner. *Stobaugh v. State*, 298 Ark. 577, 769 S.W.2d 26 (1989).

Denial of defendant's motion to withdraw his guilty plea was appropriate because he failed to prove that he did not receive the sentence contemplated by the plea agreement. The guilty-plea statement he signed showed the range of sentences that the circuit court might impose, which included imprison-

ment within the range that defendant received. *McDaniels v. State*, 2009 Ark. App. 824, — S.W.3d —, 2009 Ark. App. LEXIS 1054 (2009).

#### **Denial of Motion to Withdraw.**

Where a defendant entered a guilty plea and stated at that time that no one had compelled such plea and that he was satisfied with his attorney and where, a few days thereafter, the defendant asked to withdraw his plea on the ground that his original attorney had threatened to walk out on him if he did not enter the guilty plea, such plea would not be set aside. *Pettigrew v. State*, 262 Ark. 359, 556 S.W.2d 880 (1977).

Court did not abuse its discretion in denying request to withdraw guilty plea. *Cockrum v. State*, 299 Ark. 321, 772 S.W.2d 341 (1989).

Denial of defendant's pro se motion to withdraw his guilty plea was proper where there was insufficient evidence presented by the defendant to support his claim of ineffective assistance of counsel. *Duncan v. State*, 304 Ark. 311, 802 S.W.2d 917 (1991).

Trial judge was not required to accept repudiation of earlier statements regarding the voluntariness of the defendant's pleas. *Hall v. State*, 51 Ark. App. 1, 906 S.W.2d 692 (1995).

Where defendant alleged error by the circuit court in failing to appoint him counsel and in failing to set a hearing on his motion to withdraw his guilty plea, he was not appealing or attacking the plea itself and, thus, defendant had a right to appeal the denial of his motion. *Green v. State*, 362 Ark. 459, 209 S.W.3d 339 (2005).

Trial court did not violate defendant's absolute right to withdraw his guilty plea pursuant to subsection (a) of this rule because it was clear from the hearing transcript that the trial court expressly accepted the guilty plea during the week prior to the attempted withdrawal. *Brown v. State*, 2010 Ark. App. 148, — S.W.3d —, 2010 Ark. App. LEXIS 158 (Feb. 17, 2010).

#### **Failure of One Party to Honor Plea Bargain.**

Where the proof was sufficient that the defendant in a drug prosecution did not receive the sentence concession contemplated by the plea agreement and in which the court had indicated its concurrence, and it was furthermore apparent that the prosecuting attorney failed to seek the first offender treatment the defendant had been promised, the defendant should have been allowed to withdraw his plea of nolo contendere when he realized that he was not going to be sentenced according to the plea agreement in which the judge had indicated concurrence. *Zoller v. State*, 282 Ark. 380, 669 S.W.2d 434 (1984).

#### **Failure to Honor Plea Bargain.**

Where prosecutor withdrew recommended suspended sentence because of failure of defendant to appear for sentencing but defendant had fully complied with his portion of the plea bargain, the judge could not, under this rule, refuse to allow defendant to withdraw his guilty plea, since this rule contemplates that the trial judge will either hold both parties to a plea bargain or release both. *Williams v. State*, 272 Ark. 207, 613 S.W.2d 94 (1981).

#### **Failure to Seek Concessions.**

Where state and defendant reached plea bargain agreement whereby defendant would receive a 30-year suspended sentence in return for a plea of guilty and providing truthful information about another crime, court informed defendant that it would not be bound by the agreement, and defendant pled guilty, but failed to appear at scheduled sentencing, state could not withdraw its recommendation, since this rule requires the prosecution to seek the concessions agreed to and there is no implied bargain that the defendant be on good behavior until judgment and sentence are entered. *Williams v. State*, 272 Ark. 207, 613 S.W.2d 94 (1981).

Where defendant in open court indicated that he understood that the judge did not have to give him the sentence which had been negotiated with the prosecuting attorney, and the trial court indicated that it would allow defendant to withdraw his guilty plea when it decided not to accept the negotiated sentence, but then withdrew that offer when the prosecutor advised it that the trial had been set for that day and that all witnesses were present, there was no indirect breach under this rule by the state of its plea agreement by not actively seeking the concessions agreed upon, since the state merely objected to a delay in defendant's decision regarding a plea or trial since it was the day of trial and this was in no way a failure of the prosecutor to seek the concessions agreed upon. *Tolley v. State*, 1 Ark. App. 1, 611 S.W.2d 798 (1981).

#### **Findings.**

Although both ARCrP 26 and ARCrP 37 are in the nature of post-conviction relief, the latter is designed to allow attacks on constitutionality, jurisdiction and excess sentences and other collateral attacks, and requires written findings; whereas the former is designed to correct manifest injustices, and requires no such findings. *Rawls v. State*, 265 Ark. 334, 576 S.W.2d 191 (1979).

Since post-conviction petitions which raise grounds for relief cognizable under ARCrP 37 are considered petitions to proceed under ARCrP 37, regardless of the label given them by the petitioner, trial court could simply have dismissed the petition under this rule to



withdraw guilty pleas as being a subsequent ARCrP 37 petition. *Walker v. State*, 283 Ark. 339, 676 S.W.2d 460 (1984).

#### **Grounds for Withdrawal.**

The fact that defendant hoped for, or even expected, a lighter sentence than he received is not grounds to allow the plea to be withdrawn. *Rawls v. State*, 265 Ark. 334, 576 S.W.2d 191 (1979).

Where the record showed defendant's attorney explained the charges to him, that the defendant never mentioned coercion or threat, and that the court advised the defendant as to his plea to which he replied he wanted to plead guilty, the defendant knowingly, intelligently, and voluntarily entered a plea of guilty, and he was not entitled to withdraw his guilty plea on the ground that his plea was made involuntarily because the prosecuting attorney threatened to put his wife, a codefendant, on trial first and the defendant feared that she might receive a substantial sentence. *Stanley v. State*, 280 Ark. 245, 657 S.W.2d 205 (1983).

Defendant was not entitled to withdrawal of his guilty plea which was negotiated on the basis of an agreement that his state sentence would run concurrently with his federal sentence where, after sentencing, the federal authorities refused to take him, as no "manifest injustice" had occurred as defined in this rule. *Ellis v. State*, 288 Ark. 186, 703 S.W.2d 452 (1986).

Where no pressure was exerted by the court or the prosecutor on defendant to plea guilty, but he argued that the anguish demonstrated by his son testifying against him created a coercive pressure on him, although the circumstance caused a wrenching experience for the defendant, it did not constitute the sort of coercion necessary to withdraw a guilty plea entered knowingly and in strict adherence to the Rules of Criminal Procedure. *Wilmoth v. State*, 291 Ark. 233, 724 S.W.2d 148 (1987).

Motion to withdraw guilty plea denied where defendant received a greater punishment than he expected, and claimed that the pleas were therefore not voluntarily and intelligently made. *Seek v. State*, 330 Ark. 833, 957 S.W.2d 709 (1997).

Trial court did not err in refusing to permit defendant to withdraw his no-contest plea; defendant's no-contest plea had been accepted, but he failed to comply with the terms of the recommendation in that he did not pay restitution within seven days and, thus, there was no manifest injustice. *Folk v. State*, 96 Ark. App. 73, 238 S.W.3d 640 (2006).

#### **Grounds for Withdrawal Not Shown.**

Withdrawal of defendant's guilty plea to prevent a manifest injustice, pursuant to subdivision (b)(iv) of this rule, was not appropriate because the transcript of the plea hearing

showed that defendant was well-advised that his recommended sentence was ten years' imprisonment; he received the sentence concession contemplated by his plea agreement and the prosecuting attorney sought that same sentence. *Brown v. State*, 2010 Ark. App. 148, — S.W.3d —, 2010 Ark. App. LEXIS 158 (Feb. 17, 2010).

#### **Jurisdiction of Court.**

Where a motion to vacate a judgment was filed after the sentencing of the defendant, the trial judge could not consider the motion unless it was amended so as to be treated under ARCrP 37; however, since a valid sentence had been put into execution, the trial court was without jurisdiction to modify, amend or revise it in any event. *Shipman v. State*, 261 Ark. 559, 550 S.W.2d 424 (1977); *Redding v. State*, 293 Ark. 411, 738 S.W.2d 410 (1987).

Motion to withdraw a plea pursuant to this rule must be made and acted on before the sentence is placed into execution, and where the sentence had been imposed, the commitment order issued, and the appellant transported to the department of correction before the motion was acted on, the trial court was without jurisdiction to set aside the sentence. *Wooten v. State*, 32 Ark. App. 194, 799 S.W.2d 555 (1990).

Because defendant was in custody when the trial court ultimately disposed of his motion to withdraw and because his motion was otherwise timely under this rule and ARCrP 37.2, the trial court had jurisdiction to consider the merits of his ARCrP 37 motion. *State v. Herred*, 332 Ark. 241, 964 S.W.2d 391 (1998).

#### **Motion Untimely.**

Where the defendant filed a motion for post-conviction relief pursuant to ARCrP 37.1(d), seeking to set aside two guilty pleas he had made to a charge of rape and a charge of possession of stolen property, on the ground of ineffective assistance of counsel, the petition was a backhanded attempt to withdraw the guilty pleas and not a timely presentation within this rule. *Jones v. State*, 267 Ark. 79, 589 S.W.2d 16 (1979).

Because sentencing had already transpired and judgment entered when the defendant petitioned to withdraw his guilty plea, the trial court was correct to treat the petition as one for postconviction relief under ARCrP 37. *McCuen v. State*, 328 Ark. 46, 941 S.W.2d 397 (1997).

#### **Perjury.**

Ark. R. Evid. 410 and subsection (b) of this rule did not apply to prevent a state trial court from admitting the transcript of a federal plea hearing in defendant's perjury trial because those rules only applied when a guilty plea had been withdrawn or set aside,

and the rules were not intended to bar perjury charges. *Stewart v. State*, 2010 Ark. App. 323, — S.W.3d —, 2010 Ark. App. LEXIS 340 (Apr. 14, 2010).

### Provisions Mandatory.

The language of this rule is mandatory in that it provides that the withdrawal of the plea shall be deemed to be necessary when any of the enumerated factors are present. *Zoller v. State*, 282 Ark. 380, 669 S.W.2d 434 (1984).

A guilty plea may be set aside before sentencing; however, once the guilty plea has been accepted, and the sentencing has taken place, the trial court is without jurisdiction to set aside a plea of guilty, unless there was some kind of stay of the sentence. *Scalco v. City of Russellville*, 318 Ark. 61, 883 S.W.2d 471 (1994).

### Time for Motion.

A motion pursuant to this rule must be made prior to sentencing. *Rawls v. State*, 264 Ark. 954, 581 S.W.2d 311 (1979); *Carter v. State*, 285 Ark. 256, 685 S.W.2d 812 (1985); *Travis v. State*, 286 Ark. 26, 688 S.W.2d 935 (1985); *Pennington v. State*, 286 Ark. 503, 697 S.W.2d 85 (1985); *Brown v. State*, 290 Ark. 289, 718 S.W.2d 937 (1986); *Malone v. State*, 294 Ark. 376, 742 S.W.2d 945 (1988).

Guilty pleas may not be directly withdrawn after the sentence is put into execution; at this state of the proceeding a withdrawal of plea can be had only after a successful collateral attack on the conviction under a Rule 37 proceeding. *Woods v. State*, 278 Ark. 271, 644 S.W.2d 937 (1983).

Motion to withdraw guilty plea was untimely. *Redding v. State*, 22 Ark. App. 81, 733 S.W.2d 424, rev'd 738 S.W.2d 410 (1987); *Malone v. State*, 294 Ark. 376, 742 S.W.2d 945 (1988).

A motion to withdraw a plea of guilty is untimely after the sentence is placed into execution. *Rowe v. State*, 318 Ark. 25, 883 S.W.2d 804 (1994); *McCuen v. State*, 328 Ark. 46, 941 S.W.2d 397 (1997).

If a sentence has been entered and placed in execution prior to the filing of a motion to withdraw the guilty plea upon which it was based, the motion must be treated as having been made pursuant to ARCrP 37, not this rule, and the provisions of ARCrP 37 govern the timeliness of the motion. *Johninson v.*

*State*, 330 Ark. 381, 953 S.W.2d 883 (1997), questioned *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003).

Trial court properly denied defendant's oral motion to withdraw his guilty plea to first-degree murder and battery because the motion was made three days after the judgment and commitment orders were entered; hence, it was untimely. *Webb v. State*, 365 Ark. 22, 223 S.W.3d 796 (2006).

When a motion to withdraw a guilty plea is untimely, a court reviews it on appeal as a motion for postconviction relief under Ark. R. Crim. P. 37. *Webb v. State*, 365 Ark. 22, 223 S.W.3d 796 (2006).

Defendant's oral motion to withdraw a guilty plea made after the trial court announced defendant's sentence for domestic battery but prior to the entry of a written judgment was sufficient under this rule. The trial court erred in requiring defendant to file a written motion and entering judgment before he could do so. *Hagen v. State*, 2010 Ark. 54, — S.W.3d —, 2010 Ark. LEXIS 69 (Feb. 4, 2010).

### Waiver of Defenses.

If a plea of guilty is entered voluntarily and is not the result of ineffective assistance of counsel, any other possible defenses, except for jurisdictional defects, are waived. *Zoller v. State*, 282 Ark. 380, 669 S.W.2d 434 (1984).

**Cited:** *Simmons v. State*, 265 Ark. 48, 578 S.W.2d 12 (1979); *Cason v. State*, 271 Ark. 803, 610 S.W.2d 891 (1981); *Brown v. State*, 288 Ark. 517, 707 S.W.2d 313 (1986); *Peterson v. State*, 289 Ark. 452, 711 S.W.2d 830 (1986); *Porter v. State*, 289 Ark. 475, 712 S.W.2d 304 (1986); *Brundage v. State*, 298 Ark. 606, 770 S.W.2d 122 (1989); *Renshaw v. State*, 303 Ark. 244, 795 S.W.2d 925 (1990); *Thompson v. State*, 307 Ark. 492, 821 S.W.2d 37 (1991); *Fox v. State*, 309 Ark. 619, 832 S.W.2d 244 (1992), overruled *Cherry v. State*, 918 S.W.2d 125 (1996), criticized *Easter v. Endell*, 37 F.3d 1343 (8th Cir. Ark. 1994); *State v. Pylant*, 319 Ark. 34, 891 S.W.2d 28 (1994); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996); *State v. Vasquez-Aerreola*, 327 Ark. 617, 940 S.W.2d 451 (1997); *Tabor v. State*, 333 Ark. 429, 971 S.W.2d 227 (1998); *Propst v. State*, 335 Ark. 448, 983 S.W.2d 405 (1998); *Swopes v. State*, 338 Ark. 217, 992 S.W.2d 109 (1999); *Mangrum v. State*, 70 Ark. App. 46, 14 S.W.3d 889 (2000); *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003); *Hewitt v. State*, 362 Ark. 369, 208 S.W.3d 185 (2005).

## ARTICLE VIII. SPEEDY TRIAL

### Commentary to Article VIII

In considering ways to alleviate problems arising from universal docket congestion, sev-

eral types of approaches readily suggest themselves. These cover a wide spectrum



ranging from efforts by social scientists to identify and eradicate the causes of criminal conduct to attempts to increase the efficiency and effectiveness of the criminal justice process itself.

The focus of the following rules, like that of their counterparts in ABA *Standards, Speedy Trial*, is different. "The emphasis ... is not upon techniques for improving the efficiency of the criminal process. Rather, the concern here is with how the interest of defendants and the public in prompt trial should be defined and protected. Implicit in these standards is the notion that, either by improved efficiency or increased resources, every jurisdiction should be able to afford all defendants a speedy trial, as that right is defined herein." ABA *Standards, Speedy Trial* (Approved Draft: 1968) at 2. (This volume is hereafter cited as *Standards, Speedy Trial*.)

Although the Federal Constitution and Article 2, § 10 of the Arkansas Constitution provide that an accused shall enjoy the right to a speedy trial, what constitutes a "speedy trial" has not been defined with any precision either by constitutional provision, statute, or case law at the federal or state level. Existing case law in Arkansas makes it apparent that Ark. Stat. Ann. §§ 43-1708, 43-1709 (Repl. 1964) go only so far as to set out what periods of delay will be countenanced before absolute discharge will be granted.

The proposed provisions respecting speedy trial take the form of four rules. The first, Rule 27, concerns the trial calendar. It regulates calendar scheduling practices and explicitly imposes certain priorities with regard to scheduling trials of criminal cases.

Rule 27.1 embodies a recognition that the interest of the public in the prompt disposition of criminal cases is as important as a defendant's right to a speedy trial. The rule adopts the substance of what were heretofore Rules 2 and 3 of the Rules for Criminal Procedure, promulgated by the Arkansas Supreme Court as *per curiam* order dated June 28, 1971. The fact that the Supreme Court of Arkansas felt a clear and unambiguous statement respecting speedy trial to be necessary underscores the importance of this rule. The *Comment* to the rule strongly advocates elimination of the practice of scheduling trials by mere designation of the period of time, in some instances weeks, within which designated cases are subject to call.

Rule 27.2 is intended to preclude prosecutorial control of the criminal docket, in as much as such control might give the prosecutor an unfair advantage over a particular defendant or defendants generally. The rule

differs from its analogue in *Standards, Speedy Trial* only in that the rule does not require the prosecutor to file periodic reports with the court setting forth reasons for delay as to each case concerning which he has not requested trial within some prescribed time after the charge was filed.

Rule 27.3 attends to continuances, expressing the notion that the need for prompt disposition of criminal cases transcends the desires of the immediate participants in such proceedings. Consequently, the trial court is obliged to make an independent determination as to whether there is in fact good cause for a continuance and to grant a continuance only for so long as necessary under the circumstances at hand.

Ark. Stat. Ann. § 43-1705 (Repl. 1964) currently provides that a trial court has discretion to grant a continuance for "sufficient cause." See, *Perez v. State*, 236 Ark. 921, 370 S.W.2d 613 (1963). The proposed rule refines existing Arkansas authority by explicitly setting out the factors to be weighed in making the determination.

Rule 28 sets out with specificity the time limitations on bringing a defendant to trial. Because the judicial system in Arkansas is presently grounded on legislation providing for terms of court, the Commission felt constrained to incorporate into the provisions of Rule 28 the concept of "terms of court" for purposes of calculating time limitations. It is hoped that the Arkansas judiciary will eventually be unified and that this will result in the abandonment of the circuit riding practices necessitated by the term of court structure. When this occurs, it will be possible to express speedy trial provisions in terms of fixed periods of time running from specified events.

Arkansas statutory authority dealing with limitations is found at Ark. Stat. Ann. §§ 43-1708, 43-1709 (Repl. 1964). Rule 28.1(a) closely parallels § 43-1708; 28.1(b) tracks § 43-1709. Both Rule 28.1(a) and (b) differ from present statutory authority in that they refer to a different rule which indicates when time for trial begins to run. Rule 28.1(a) differs from § 43-1708 in that it sets out an absolute limit of nine months within which a defendant must be tried, subject to the provisions of Rule 30.

Rule 28.2 is *Standards, Speedy Trial* § 2.2 almost verbatim. Under 28.2 time commences to run irrespective of whether the defendant demands to be brought to trial. In so providing, the rule is in accord with recent Arkansas authority construing §§ 43-1708, 43-1709

(Repl. 1964), at least in situations where the defendant is not incarcerated in another state. *See, Holland v. State*, 252 Ark. 730, 480 S.W.2d 597 (1972); *State v. Davidson*, 254 Ark. 172, 492 S.W.2d 246 (1973). In rejecting the "demand-waiver" approach under these circumstances, the provision is in compliance with *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

By specifying when time begins to run following a mistrial, the granting of a motion for a new trial, or a successful appeal or collateral attack, Rule 28.2(c) fills a virtual void in Arkansas law. For decisional authority with respect to commencement of the running of time subsequent to a mistrial, *see, Montgomery v. State*, 251 Ark. 645, 473 S.W.2d 885 (1971).

Rule 28.3 is another example of an explicit adoption of an ABA *Standard: Speedy Trial* § 2.3. The present Arkansas statutory scheme has no correlative provision excluding particular kinds of delay from consideration in computing the time for trial.

Rule 29 confronts the problem of providing speedy trials to persons already imprisoned in Arkansas, other jurisdictions, or in federal prisons.

Rule 29.1 restates current law requiring a prosecutor to undertake to obtain the presence of a prisoner for trial where the prisoner is jailed in Arkansas. For recent authority in

this area, *see, Davidson, supra; Merritt v. State*, 244 Ark. 921, 428 S.W.2d 66 (1968).

Rule 29.1(b) complements Ark. Stat. Ann. § 43-3201 (Supp. 1973) by adding the requirement that a prosecutor promptly cause a detainer to be filed with an appropriate official.

Rule 29.1(c) requires that "[u]pon receipt from a prisoner of a demand for trial upon a pending charge, the prosecuting attorney shall promptly seek to obtain the presence of the prisoner for trial." In so doing, the rule does not change Arkansas law.

Rule 30 is concerned with the consequences flowing from a denial of a speedy trial. The provisions reflect a departure from present law: failure to commence trial of an incarcerated person within the time set out by Rule 28 results not in absolute discharge of the defendant but instead in termination of continued custody. Subsequently, for limitation purposes, he is treated, under Rule 28.1(b), like a defendant set at liberty at the outset. In so providing, the rule follows *Standards, Speedy Trial* § 4.2.

Rule 30.2 recognizes the doctrine of waiver. The requirement that a defendant move for a dismissal prior to trial or plea of guilty or nolo contendere is apparently now acknowledged in all jurisdictions. *See, Annot.*, 57 A.L.R.2d 302 (1958).

## RULE 27. THE TRIAL CALENDAR

### Rule 27.1. Priorities in scheduling criminal cases.

All courts of this state having jurisdiction of criminal offenses shall:

(a) except for extraordinary circumstances, give precedence to the trials of criminal felony offenses over other matters before said court; and

(b) in the absence of unusual or exceptional conditions requiring the expeditious trial of an accused person free on bail, or otherwise lawfully set at liberty, give precedence to the trials of those criminal offenses in which the accused person is incarcerated, whether such incarceration be for the offense awaiting trial or for conviction of another offense. (Amended June 30, 1980, effective July 1, 1980.)

#### Comment to Rule 27.1

Absent extraordinary circumstances, the trial of a criminal cause should be set for a date certain.

Calendar scheduling practices which require that attorneys, defendants, and witnesses hold themselves available over extended periods of time to appear for trial

produce unnecessary inconvenience and, consequently, do not advance the interests of justice generally or the expeditious disposition of criminal causes, in particular.

Accordingly, practices of this nature should be eliminated to the maximum extent possible.



## RESEARCH REFERENCES

**Ark. L. Rev. Note**, Speedy Trial and Excludable Delays Under the Arkansas Rules of Criminal Procedure: Norton v. State, 35 Ark. L. Rev. 591.

**U. Ark. Little Rock L.J.** Holt, Survey of Criminal Procedure, 3 U. Ark. Little Rock L.J. 198.

## CASE NOTES

**Speedy Trial.**

Where there was no finding that giving precedence to criminal cases was a practice followed by the civil divisions of Crittenden County Circuit Court — a legal responsibility of these divisions, as well as the criminal division — and where there was no finding the congestion was greater than before, or that relief was sought by asking for additional judges, the trial court's findings, entered only

after a motion to dismiss was filed, did not constitute sufficient grounds to exclude any term of court, in considering whether speedy trial rule had been violated. *Harkness v. Harrison*, 266 Ark. 59, 585 S.W.2d 10 (1979).

**Cited:** *State v. Washington*, 273 Ark. 82, 617 S.W.2d 3 (1981); *Glover v. State*, 287 Ark. 19, 695 S.W.2d 829 (1985); *Keys v. State*, 23 Ark. App. 219, 745 S.W.2d 628 (1988).

**Rule 27.2. Assignment of cases.**

The court shall control the trial calendar and shall provide for the scheduling of cases upon the calendar. (Amended June 30, 1980, effective July 1, 1980.)

**Publisher's Notes.** This rule was set out in the per curiam order of the Supreme Court

of Arkansas issued on June 30, 1980, but no change was made in the rule.

## CASE NOTES

**Change of Date.**

The setting of the trial calendar and the scheduling of cases upon the calendar, is tantamount to a direct order of the court, and attorneys do not have the authority to vary a

trial date set by the court. *Rischar v. State*, 307 Ark. 429, 821 S.W.2d 25 (1991).

**Cited:** *Perroni v. State*, 358 Ark. 17, 186 S.W.3d 206 (2004), cert. denied 543 U.S. 1150, 125 S. Ct. 1317, 161 L. Ed. 2d 112 (2005).

**Rule 27.3. Continuances.**

The court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case. (Amended June 30, 1980, effective July 1, 1980.)

**Publisher's Notes.** This rule was set out in the per curiam order of the Supreme Court

of Arkansas issued on June 30, 1980, but no change was made in the rule.

**1987 Unofficial Supplementary Commentary to Rule 27.3****Motion for Continuance Based on Firing of Attorney.**

The Arkansas Court of Appeals has decided that where an incarcerated defendant dismisses his lawyer on the morning of trial and asks for a continuance,

[s]ome of the factors to be considered [by the trial court] include whether there was

adequate opportunity for the defendant to employ counsel; whether other continuances have been requested and granted; the length of the requested delay; whether the requested delay is for legitimate reasons; whether the motion for a continuance was timely filed; whether the defendant contributed to the circumstances giving rise to the

request for continuance; whether the reason for the discharge of existing counsel was solely for the purpose of obtaining a continuance; whether the request is consistent with the fair, efficient and effective administration of justice; whether denying the continuance resulted in identifiable prejudice to the defendant's case of a material or substantial nature; and in the case of a *pro se* proceeding, where a proper waiver of counsel existed, whether the accused had sufficient time to prepare for his defense.

*Parker v. State*, 18 Ark. App. 252, 258-59, 715 S.W.2d 210, 213 (1986), relying on *Thorne v. State*, 269 Ark. 556, 601 S.W.2d 886 (1980). See, also, *Pickens v. State*, 6 Ark. App. 58, 638 S.W.2d 682 (1982).

#### **Standard of Review: Discretion of Court.**

It is now well settled that it is within the sound discretion of the trial court to grant or deny a continuance. The trial court's decision will not be overturned absent a showing of a clear abuse of discretion. In the absence of a showing of prejudice, the reviewing court will not find the refusal of a continuance erroneous. *Jared v. State*, 17 Ark. App. 223, 707 S.W.2d 325 (1986).

#### **Motion for Continuance Based upon Missing Witness.**

In *Vann v. State*, 14 Ark. App. 1, 684 S.W.2d 265 (1985), the Arkansas Court of Appeals upheld the trial court's refusal to grant a continuance to permit defense counsel to search for a missing witness who appeared in court early in the day but left, ostensibly to go to a job interview and to take his sick wife to a doctor.

*Vann* supplies the following test for such circumstances:

Factors which must be considered by a trial court in exercising its discretion in granting or denying a motion for continuance are the probable effect of the testimony or evidence, the likelihood of procuring the evidence, and the relevance of the testimony or evidence.

*Id.* at 4, 684 S.W.2d at 267.

In *Golden v. State*, 265 Ark. 99, 576 S.W.2d 955 (1979), the Arkansas Supreme Court upheld the conviction of appellant at a trial at which the trial court refused to grant a continuance when a physician who examined the victim of a battery and who was subpoenaed by appellant failed to appear at trial. Appel-

lant's attorney had not spoken to the physician and had only third-hand information about his anticipated testimony. The decision might have been different if counsel had been able to state with more certainty what the witness would have said.

In *Christian v. State*, 6 Ark. App. 138, 639 S.W.2d 78 (1982), the Arkansas Court of Appeals upheld the trial court's refusal to grant a continuance asked for by appellant when his co-defendant did not appear for trial, his argument being that the co-defendant would have testified that appellant did not participate in the crime. The court of appeals was greatly influenced by appellant's written statement introduced into evidence admitting that he was with the co-defendant at the time and place of the crime, though it is by no means clear from the majority's description of the statement that it was as inculpatory as the majority found.

#### **Motion for Continuance Based on Amendment of Information.**

The Arkansas Supreme Court has held that where the information charging an offense is amended shortly before trial, it is not an abuse of discretion on the part of the trial court to deny a motion for continuance so long as the amendment is a minor one such as substituting a different date of the alleged offense charged. *Payne v. State*, 224 Ark. 309, 272 S.W.2d 829 (1954). But where the trial court permits an amendment to the information under Ark. Stat. Ann. § 41-2202(1) (Repl. 1977) (consolidation of theft offenses), and the amendment is such that additional witnesses not essential to the original charge are required by the defense, then the trial court's refusal to grant the continuance is an abuse of discretion. *Prokos v. State*, 266 Ark. 50, 582 S.W.2d 36 (1979). See, also, *Robinson v. State*, 11 Ark. App. 18, 665 S.W.2d 890 (1984); *Jones v. State*, 275 Ark. 12, 627 S.W.2d 6 (1982).

#### **Lack of Due Diligence.**

Failure to exercise due diligence is a ground for denying a motion for a continuance. See *Walls v. State*, 280 Ark. 291, 658 S.W.2d 362 (1983), where the Arkansas Supreme Court upheld the trial court's denial of a motion for a continuance based upon the unavailability of a defense witness, affirming a 3-3 decision of the Arkansas Court of Appeals in which three judges dissented on the continuance issue.

### **CASE NOTES**

#### **ANALYSIS**

In general.  
Construction.  
Affidavit.  
Appellate review.

Burden of proof.  
Discretion of court.  
Factors considered.  
Grant or denial.  
Lack of preparedness.



Stipulation to evidence.

### **In General.**

Trial court's refusal to reopen suppression hearing can be likened to a denial of a motion for continuance. *Oliver v. State*, 322 Ark. 8, 907 S.W.2d 706 (1995).

### **Construction.**

Continuances are governed in part by this rule, which requires good cause and a consideration of the public's interest in a prompt disposition of cases, and by § 16-63-402(a), which requires a showing of the materiality of the evidence expected to be obtained, and if the motion is for an absent witness, what facts the witness will prove; the courts have further required that the movant for a continuance show by affidavit the likelihood of procuring the absent witnesses. *Landreth v. State*, 331 Ark. 12, 960 S.W.2d 434 (1998).

### **Affidavit.**

Where a party has missing witnesses or other absence of evidence, and moves for a continuance pursuant to this rule, the filing of an affidavit by the movant is required under § 16-63-402(a). *Wilson v. State*, 320 Ark. 142, 895 S.W.2d 524 (1995).

Section 16-63-402(a) mandates an affidavit to justify a continuance due to a missing witness when the state objects to the continuance. *Wilson v. State*, 320 Ark. 142, 895 S.W.2d 524 (1995).

### **Appellate Review.**

The burden of proving an abuse of discretion due to resulting prejudice in denying a continuance is upon the movant/appellant; prejudice is not presumed in this context, but, instead, the appellant must demonstrate prejudice before an appellate court will consider a trial court's denial of a continuance to be an abuse of discretion. *Verdict v. State*, 315 Ark. 436, 868 S.W.2d 443 (1993).

Trial court abused its discretion in denying defendant's request for a continuance based on the unavailability of a witness because the denial deprived him of the opportunity to present relevant, exculpatory, and noncumulative evidence that the State failed to make available to him, and therefore his conviction of second-degree sexual assault was reversed. Defendant was diligent in that his request was made 64 days before trial was to begin, he subpoenaed the investigator, and repeatedly and thoroughly informed the trial court of the substance of her expected testimony; defendant was prejudiced because the investigator would have testified that the daughter had previously falsified the same charge against defendant based on the same conduct; the State conceded that it would not have been prejudiced by a continuance. *Brown v. State*, 100 Ark. App. 172, 265 S.W.3d 772 (2007).

### **Burden of Proof.**

The burden is on the movant to show good cause for a continuance. *David v. State*, 295 Ark. 131, 748 S.W.2d 117 (1988).

The burden is on the movant to show good cause for a continuance; a mere assertion of error is not sufficient to warrant reversal. *Verdict v. State*, 315 Ark. 436, 868 S.W.2d 443 (1993).

The burden is on the movant to show good cause for a continuance. *King v. State*, 317 Ark. 293, 877 S.W.2d 583 (1994).

### **Discretion of Court.**

The matter of continuances is addressed to the sound judicial discretion of the trial court, and its action will not be reversed on appeal in the absence of such a clear abuse of that discretion as to amount to a denial of justice, and the burden of demonstrating that there has been an abuse rests upon appellant. *Russell v. State*, 262 Ark. 447, 559 S.W.2d 7 (1977); *Parker v. State*, 18 Ark. App. 252, 715 S.W.2d 210 (1986), overruled *Ferrell v. State*, 810 S.W.2d 29 (1991), overruled *Burns v. State*, 780 S.W.2d 23 (1989); *Mincy v. State*, 19 Ark. App. 80, 717 S.W.2d 213 (1986); *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987); *David v. State*, 295 Ark. 131, 748 S.W.2d 117 (1988).

The grant or denial of a continuance is a matter within the trial court's discretion. *Golden v. State*, 265 Ark. 99, 576 S.W.2d 955 (1979).

Granting or failing to grant a continuance is within the discretion of the court, and the burden is on the appellant to show that there has been an abuse of that discretion. *Cotton v. State*, 265 Ark. 375, 578 S.W.2d 235 (1979); *Harris v. State*, 12 Ark. App. 181, 672 S.W.2d 905, rev'd on other grounds, 284 Ark. 247, 681 S.W.2d 334 (1984).

In order to show that the trial judge was wrong in refusing to grant a continuance it must be proved that there was a clear abuse of discretion and that the ruling of the court prejudiced the defendant, and where there was no record of a hearing on the motion for continuance and, based on the bare motion and affidavit that were filed, it cannot be said that the court abused its discretion. *McCree v. State*, 266 Ark. 465, 585 S.W.2d 938 (1979).

In considering on appeal whether a defendant's motion for continuance should have been granted, the trial court's action will not be reversed absent a clear abuse of discretion amounting to a denial of justice and the burden is on the defendant to demonstrate such abuse. The matter is within the discretion of the trial court and not every denial of a request for a continuance violates due process, even if the party is compelled to defend without counsel. *Brown v. State*, 5 Ark. App. 181, 636 S.W.2d 286 (1982).

A motion for continuance is addressed to

the sound discretion of the trial judge and his or her judgment will not be reversed on appeal in the absence of clear abuse. *Simmons v. State*, 314 Ark. 310, 862 S.W.2d 245 (1993).

The denial of a continuance when the motion is not in substantial compliance with § 16-63-402(a) is not an abuse of the trial court's discretion. *Wilson v. State*, 320 Ark. 142, 895 S.W.2d 524 (1995).

The trial court did not abuse its discretion in finding that testimony by an unavailable psychologist would be cumulative and in denying the defendant's motion for a continuance where the defendant did not file his motion until one day before trial and where 4 other mental health experts had examined the defendant and all of the experts, including the unavailable expert, agreed that the defendant lacked the requisite mental intent to commit the charged offense. *Morgan v. State*, 333 Ark. 294, 971 S.W.2d 219 (1998).

Murder defendant failed to show that denial of a continuance for him to procure a pathologist as a witness was an abuse of discretion where the motion came only two days before trial and defendant had five months to procure him, defendant did not state what the pathologist would testify to, and defendant had opportunity to cross-examine and discredit the state's expert. *Cherry v. State*, 347 Ark. 606, 66 S.W.3d 605 (2002).

Court could not say that the circuit court abused its discretion by not finding good cause to grant the motion for continuance under this rule and that defendant did not establish that prejudice amounting to a denial of justice had occurred by the denial. *Jackson v. State*, 2009 Ark. 336, 321 S.W.3d 260 (2009).

### Factors Considered.

A motion for continuance shall be granted only upon a showing of good cause and the trial judge shall take into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case. *Prokos v. State*, 266 Ark. 50, 582 S.W.2d 36 (1979).

If the defendant's request for a change of counsel would require the postponement of trial because of inadequate time for a new attorney to properly prepare the defendant's case, the motion for a change of counsel is viewed as a motion for a continuance, and in denying or granting the change, the court may consider such factors as the reasons for the change, whether other counsel has already been identified, whether the defendant has acted diligently in seeking the change, and whether the denial is likely to result in any prejudice to defendant. *Pickens v. State*, 6 Ark. App. 58, 638 S.W.2d 682 (1982), *aff'd* 652 S.W.2d 626 (1983).

Factors which must be considered by a trial court in exercising its discretion in granting

or denying a motion for continuance are the probable effect of the testimony or evidence, the likelihood of procuring the evidence and the relevance of the testimony or evidence. *Vann v. State*, 14 Ark. App. 1, 684 S.W.2d 265 (1985).

When making its decision whether to grant the continuance, the court must look at the particular circumstances of each case, considering the request for a change of counsel in the context of the public's interest in the prompt dispensation of justice. *Mincy v. State*, 19 Ark. App. 80, 717 S.W.2d 213 (1986).

Several factors to be considered by a trial court in deciding a continuance motion are: (1) the diligence of the movant; (2) the probable effect of the testimony at trial; (3) the likelihood of procuring the attendance of the witness in the event of a postponement; and (4) the filing of an affidavit, stating not only what facts the witness would prove, but also that the appellant believes them to be true. *Wilson v. State*, 320 Ark. 142, 895 S.W.2d 524 (1995).

Continuance denied even though psychiatric report had not been filed in strict compliance with § 5-2-305(d) where defendant failed to show any prejudice. *Turner v. State*, 326 Ark. 115, 931 S.W.2d 86 (1996).

In defendant's murder case, the circuit court did not abuse its discretion when it refused to grant the defense a continuance so that it could consult an expert regarding autopsy photographs allegedly given to the defense one working day before trial because defendant made no argument as to how the inability to consult an expert prejudiced him, and defendant had four days in which he could have e-mailed the photographs to an expert he had already consulted with on other issues in the case. *Navarro v. State*, 371 Ark. 179, 264 S.W.3d 530 (2007).

Revocation of defendant's suspended imposition of sentence was appropriate because the trial court did not abuse its discretion in granting the state's motion for a short continuance. Even though lack of diligence was sufficient to deny a request for continuance, it did not require a denial of the request. *Dotson v. State*, 2011 Ark. App. 731, — S.W.3d —, 2011 Ark. App. LEXIS 779 (Nov. 30, 2011).

### Grant or Denial.

Motion for continuance properly denied. *Russell v. State*, 262 Ark. 447, 559 S.W.2d 7 (1977); *Daigger v. State*, 268 Ark. 249, 595 S.W.2d 653 (1980); *Pickens v. State*, 6 Ark. App. 58, 638 S.W.2d 682 (1982), *aff'd* 652 S.W.2d 626 (1983); *Christian v. State*, 6 Ark. App. 138, 639 S.W.2d 78 (1982); *Walls v. State*, 280 Ark. 291, 658 S.W.2d 362 (1983); *Wade v. State*, 290 Ark. 16, 716 S.W.2d 194 (1986); *Clay v. State*, 290 Ark. 54, 716 S.W.2d 751 (1986); *Jared v. State*, 17 Ark. App. 223, 707 S.W.2d 325 (1986); *Mincy v. State*, 19 Ark.



App. 80, 717 S.W.2d 213 (1986); *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987); *Oliver v. State*, 312 Ark. 466, 851 S.W.2d 415 (1993); *King v. State*, 314 Ark. 205, 862 S.W.2d 229 (1993).

Where the amendment of the information, although it did not change the nature or the degree of the offense charged, was of great enough significance that the conduct of defendant's defense was prejudiced by lack of fair notice, the denial of the defendant's motion for a continuance was an abuse of the trial court's discretion. *Prokos v. State*, 266 Ark. 50, 582 S.W.2d 36 (1979).

There is no error in the denial of a motion for a continuance to obtain evidence that is not material and not relevant. *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987).

Trial court properly denied the motion for a continuance finding there was nothing to show either that the unavailable witness was a material witness or that there would be any assurance she would be found and produced if the trial were delayed. *Ray v. State*, 304 Ark. 489, 803 S.W.2d 894, cert. denied 501 U.S. 1222, 111 S. Ct. 2837, 115 L. Ed. 2d 1005 (1991).

Denial of continuance was proper where defendant charged as accomplice to murder moved for a continuance the day before the trial on the basis that the actual perpetrator of the bludgeoning, according to the defendant, was undergoing a mental evaluation and was unavailable to testify. *Weaver v. State*, 305 Ark. 180, 806 S.W.2d 615 (1991).

Where the state objected to the continuance, and defendant filed no affidavit or verified motion in support of his motion to postpone the trial, defendant's motion failed. *Hill v. State*, 321 Ark. 354, 902 S.W.2d 229 (1995).

Trial court had the discretion to deny defendant's request for postponement notwithstanding defendant's contention that alibi witness's testimony had become more important where defendant offered no evidence or likelihood such witness could be procured even if a continuance was given. *Wilkins v. State*, 324 Ark. 60, 918 S.W.2d 702 (1996).

Where the witness's arrival would delay the court only a few hours and, under the circumstances, a bare stipulation would not be a genuine substitute for the live testimony of a pivotal witness, the trial court abused its discretion by refusing the request for a brief recess. *Rankin v. State*, 57 Ark. App. 125, 942 S.W.2d 867 (1997).

Upon escaping from prison, defendant committed felonies in two different counties, and where defendant was given all the discovery materials relating to the crimes in both counties months before trial, and where the state amended the information a week before trial to include all the charges in a trial in one

county, defendant's motions to continue were properly denied for lack of diligence as defendant had ample opportunity to interview certain local witnesses whose names and proposed testimony was contained in the discovery materials. *Green v. State*, 354 Ark. 210, 118 S.W.3d 563 (2003).

Where eight days before trial the state amended the information against defendants reducing the charge from rape to sexual assault in the first degree, notwithstanding that the proof under the two charges was not the same, defendants were not prejudiced as to their defense based on the totality of the circumstances test and the fact they waited until the day before trial to file their motion for continuance was further grounds for denying same. *Murphy v. State*, 83 Ark. App. 72, 117 S.W.3d 627 (2003).

Trial court did not abuse its discretion by denying defendant's motion for continuance, based on defense counsel's difficulty in finding a witness, as defendant failed to demonstrate how he was prejudiced by the denial of his motion since the matter defendant sought to introduce into evidence was introduced through the testimony of another witness; the fact that the other witness testified for the state was not of consequence. *Stenhouse v. State*, 362 Ark. 480, 209 S.W.3d 352 (2005).

Court did not abuse its discretion in denying defendant's motion for a continuance after he found out during his case-in-chief that the prosecutor had released the detectives that both parties planned to call as witnesses because defendant was not entitled to rely on the state's witness list for his own defense; defendant also failed to show that he was prejudiced by the denial of the continuance. *Lagrone v. State*, 90 Ark. App. 183, 204 S.W.3d 568 (2005).

In a capital murder case, the denial of a continuance did not prejudice defendant because the trial date had been established eight months in advance, there was no objection by defendant at that time concerning his counsel's other obligations, and defendant did not provide any evidence that he did not receive effective assistance of counsel or that he was not adequately represented. There was also no evidence that the trial testimony of an unavailable witness would differ from his testimony given in a pretrial hearing. *Thomas v. State*, 370 Ark. 70, 257 S.W.3d 92 (2007), rehearing denied — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 397 (June 21, 2007), cert. denied 552 U.S. 1025, 128 S. Ct. 620, 169 L. Ed. 2d 399 (2007).

In a rape case, requests for a continuance under this rule and for the appointment of additional experts were properly denied because a court-ordered mental evaluation complied with § 5-2-305(d), defendant had several months to secure a deoxyribonucleic acid

expert, and it was unlikely that he could have procured an alibi witness. *Creed v. State*, 372 Ark. 221, 273 S.W.3d 494 (2008), rehearing denied — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 157 (Mar. 6, 2008), cert. denied — U.S. —, 129 S. Ct. 130, 172 L. Ed. 2d 37 (2008).

Because the jury had before it ample evidence that the victim previously made claims of sexual abuse that no one believed, defendant was not prejudiced during his trial for sexual assault by the trial court's denial of his motion for a continuance to provide an investigator who could testify as to the victim's inconsistencies and untruths. *Brown v. State*, 374 Ark. 341, 288 S.W.3d 226 (2008).

Where defendant was charged with negligent homicide and second offense driving while intoxicated, his trial date had been set for over a month and the trial court had already granted defendant four continuances; when defendant announced on the morning of trial that he had discharged his attorney, the trial court did not abuse its discretion for not allowing him another continuance under this rule so that he could obtain another attorney. Proceeding pro se, defendant obtained an acquittal on the most serious charge of negligent homicide, and the jury convicted him of lesser-included offenses on two other charges; defendant did not suffer a denial of justice. *Hayes v. State*, 2009 Ark. App. 663, — S.W.3d —, 2009 Ark. App. LEXIS 816 (2009).

Circuit court did not err in denying a continuance when defendants' two main witnesses did not appear at trial because the subpoena was not valid, and even if a male witness had been present, the witness's testimony would have been excluded by the rape-shield statute. *Riddell v. State*, 2011 Ark. 21, — S.W.3d —, 2011 Ark. LEXIS 21 (Jan. 27, 2011).

There was no abuse of discretion in the denial of defendant's motion for a continuance, as defendant effectively delayed sentencing by absconding while the jury was deliberating and when defendant fired the trial attorney familiar with defendant's case. *Hayes v. State*, 2011 Ark. App. 79, — S.W.3d —, 2011 Ark. App. LEXIS 98 (Feb. 2, 2011).

Trial court did not abuse its discretion in denying a motion for continuance, as, arguably, remarks from defendant and counsel showed that they did exercise some diligence in attempting to locate a missing witness, but defendant made the motion just before trial was set to begin (as opposed to days before), and there was nothing in the record to suggest that defendant or counsel would have been able to procure the missing witness's testimony; both defendant and counsel stated before the court that they were otherwise

ready for trial. *Smith v. State*, 2011 Ark. App. 110, — S.W.3d —, 2011 Ark. App. LEXIS 115 (Feb. 9, 2011).

#### **Lack of Preparedness.**

The remedy for a party's lack of preparedness would not be the exclusion of the evidence at the trial but more time to prepare his defense by use of a timely request for a continuance at trial. *Baldrige v. State*, 32 Ark. App. 160, 798 S.W.2d 127 (1990).

Where defendant's counsel argued generally that he lacked time to prepare for trial, but the only specific given was that he did not receive the discovery materials until 10 days before trial, counsel did not show how he was prejudiced, and a continuance was properly denied. *Davis v. State*, 318 Ark. 212, 885 S.W.2d 292 (1994).

Lack of diligence in securing appearance of witnesses is a legitimate ground for denying a motion for continuance. *Nelson v. State*, 324 Ark. 404, 921 S.W.2d 593 (1996).

Continuance denied where defendant was not diligent in attempting to secure the necessary information on which to build a defense of mental disease or defect. *Miller v. State*, 328 Ark. 121, 942 S.W.2d 825 (1997).

The court properly denied a continuance sought by the defendant because he had failed to communicate with his attorney in order to prepare for trial where the record showed that the trial court had previously granted a continuance motion because the defendant was unprepared to present his defense. *Goodman v. State*, 74 Ark. App. 1, 45 S.W.3d 399 (2001).

Denial of a continuance to a defendant did not violate due process; although the information was amended the day before trial from a charge of rape of someone less than 14 years old by forcible compulsion to rape by forcible compulsion in violation of § 5-14-103(a)(1), the nature of the crime charged did not change, pursuant to § 16-85-407(b). *Green v. State*, 2012 Ark. 19, — S.W.3d —, 2012 Ark. LEXIS 31 (Jan. 26, 2012).

#### **Stipulation to Evidence.**

Motion for continuance, by attorney who claimed that had he had more time, he would have subpoenaed two witnesses who would have testified regarding test results from the crime scene that might tend to exculpate the defendant, denied where the State agreed to stipulate to their reports. *Lee v. State*, 326 Ark. 529, 932 S.W.2d 756 (1996).

**Cited:** *Thomerson v. State*, 274 Ark. 17, 621 S.W.2d 690 (1981), criticized *Mayfield v. State*, 293 Ark. 216, 736 S.W.2d 12 (1987); *Cloird v. State*, 314 Ark. 296, 862 S.W.2d 211 (1993); *Baumgarner v. State*, 316 Ark. 373, 872 S.W.2d 380 (1994); *Byrum v. State*, 318 Ark. 87, 884 S.W.2d 248 (1994); *Cagle v. State*, 47 Ark. App. 1, 882 S.W.2d 674 (1994).



## RULE 28. LIMITATIONS, EXCLUDED PERIODS AND CONSEQUENCES

### **Rule 28.1. Limitations and consequences.**

(a) Any defendant charged with an offense and incarcerated in a city or county jail in this state pending trial shall be released on his own recognizance if not brought to trial within nine (9) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

(b) Any defendant charged with an offense and incarcerated in prison in this state pursuant to conviction of another offense shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

(c) Any defendant charged with an offense and held to bail, or otherwise lawfully set at liberty, including released from incarceration pursuant to subsection (a) hereof, shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

(d) Any defendant who is charged with an offense in circuit court, including a defendant who appeals a district court conviction to circuit court, and who is entitled to a dismissal of the charge because not brought to trial in the circuit court as provided in subsection (b) or (c) hereof may move the circuit court for dismissal of the charge. If the circuit court denies the motion to dismiss, the defendant may raise the denial in a posttrial appeal of a conviction as grounds for reversing the conviction and dismissing the charge. The defendant whose motion is denied by the circuit court shall not be entitled to seek interlocutory review of the denial by appeal or by petition for writ of prohibition, but the defendant may, in appropriate cases, seek interlocutory review by petition for writ of certiorari. The failure of a defendant to seek interlocutory review by petition for writ of certiorari shall not constitute a waiver of the defendant's right to raise the denial of rights under subsection (b) or (c) hereof in a posttrial appeal.

(e) Any defendant charged with an offense in district court who is entitled to dismissal of the charge because not brought to trial in the district court as provided in subsection (b) or (c) may move the district court for dismissal of the charge. If the district court denies the motion for dismissal, there shall be no right to interlocutory review of the denial, but the defendant who appeals a district court conviction to the circuit court may move the circuit court for dismissal of the charge because not brought to trial in the district court as provided in subsection (b) or (c) hereof. If the circuit court denies the motion for dismissal, there shall be no right to interlocutory review of the denial except by writ of certiorari as provided in subsection (d) hereof, but the defendant who appeals a conviction in the circuit court may raise the denial as grounds for reversing the conviction and dismissing a charge.

(f) The dismissal of a charge pursuant to subsection (b) or (c) hereof shall also be an absolute bar to prosecution for any other offense required to be joined with the charge dismissed.

(g)(1) If the district court denies a defendant's motion to dismiss because not brought to trial in the district court as provided in subsection (b) and (c) hereof, the defendant may thereafter enter a plea of guilty in district court without waiving the right to move the circuit court for dismissal of the charge because the defendant was not brought to trial in the district court as provided in subsection (b) or (c) hereof.

(2) If the circuit court denies a defendant's motion to dismiss because not brought to trial in either the circuit court or the district court as provided in subsection (b) or (c) hereof, the defendant may enter a conditional plea of guilty in the circuit court as provided in Rule 24.3(b).

(3) Failure of a defendant to move for dismissal of a charge pursuant to subsection (b) or (c) hereof prior to a plea of guilty or trial shall constitute a waiver of rights under this rule.

(h) This rule shall have no effect in those cases which are expressly governed by the "Interstate Agreement on Detainers Act" (Act 705 of 1971). (Amended June 30, 1980, effective July 1, 1980; amended July 13, 1987, effective October 1, 1987; corrected February 23, 1988; amended April 9, 2009, effective June 1, 2009.)

#### 1987 Unofficial Supplementary Commentary to Rule 28.1

##### Scope of Commentary.

The following commentary discusses only cursorily problems that arose under the pre-1980 version of this Rule and that have been eliminated by the 1980 and 1981 amendments. See, *In The Matter of Rules of Criminal Procedure, Amendment of Article VIII Speedy Trial, Per Curiam*, June 30, 1980 (269 Ark. 988) and *Re: Amendment to Rule 28.3(f) of the Arkansas Rules of Criminal Procedure, Per Curiam*, June 8, 1981, 273 Ark. 551.

Rules 28.1 to 28.3 are interrelated. Cases interpreting these provisions are discussed in the commentary to Rules 28.2 and 28.3 as well as in the commentary to Rule 28.1.

##### History.

Defining speedy trial rights by using terms of court rather than more clearly defined periods of time engendered a good deal of confusion, resulting in the 1980 amendments to this rule. The uncertainty (and, in some cases, unfairness) was especially acute when it was necessary to resolve compliance issues in jurisdictions having circuit courts with multiple divisions having overlapping terms. See *State v. Messer*, 269 Ark. 431, 601 S.W.2d 857 (1980), where the Court, pointing out problems created by lack of uniformity, observed:

The inequity it sometimes creates is emphatically illustrated by our decisions in *Alexander v. State, supra*, finding a speedy trial violation when a defendant was brought to trial within 7 months, and *Matthews v. State*, 268 Ark. 484, 598 S.W.2d 58 (1980), finding no violation when a defendant was not brought to trial within 18 months.

269 Ark. 433-34, 601 S.W.2d at 858.

Issues of Byzantine complexity were frequently encountered. For instance, the issue in *Messer* was posed by the Court as follows:

"The issue we now must determine is whether an overlapping term of a division should be excluded when a term which is substantially contemporaneous with it is excluded in another division because of a requested continuance."

269 Ark. at 434, 601 S.W.2d at 858.

The dissatisfaction culminating in amendment of Rule 28 is evinced in cases such as *Williams v. State*, 275 Ark. 8, 627 S.W.2d 4 (1982), where a three judge dissent observed: "This decision marks the end of any pretense that this Court may have posed regarding enforcement of the speedy trial provisions of the Rules of Criminal Procedure." 275 Ark. at 11, 627 S.W.2d at 5 (1982).

##### Burden of Proof.

Where a prima facie violation of the speedy trial rules emerges from the evidence — for example, when the trial takes place more than 18 months from the date of arrest — it devolves on the state to show good cause for the delay. *Glover v. State*, 287 Ark. 19, 695 S.W.2d 829 (1985); *Walker v. State*, 288 Ark. 52, 701 S.W.2d 372 (1986).

##### Incarceration on Other Charges.

Disposition of offenders jailed pending trial on other charges or pursuant to previous convictions is explicitly dealt with in Rules 28.1(a) and (b). See, also, *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983).

##### Incarceration in Jail Followed by Incarceration in Prison.

When a defendant is charged, incarcerated in jail pending trial, and then incarcerated in



prison pursuant to conviction of another offense, the time for trial is governed by the site of the latest incarceration under Rules 28.1(b) and 28.2(a). *Foyt v. State*, 280 Ark. 226, 656 S.W.2d 701 (1983).

### **Speedy Trial Rights Not Waived by Plea of Guilty.**

The Arkansas Supreme Court has held that failure to file a timely speedy trial motion constitutes ineffective assistance of counsel. *Clark v. State*, 274 Ark. 81, 621 S.W.2d 857 (1981). The Court is not of one mind on whether a plea of guilty should be deemed a waiver of the requirements of the speedy trial rule. See, for example, *Hall v. State*, 281 Ark. 282, 663 S.W.2d 926 (1984), where the Court held that appellant was entitled to a dismissal where he pleaded guilty after more than 12 months' incarceration and, as a result of ineffective assistance of counsel, did not knowingly and intelligently waive his right to a speedy trial.

A three judge dissent argued that a guilty plea is a waiver and that a defendant who waives his remedies and admits guilt assumes the risk of error in his or counsel's assessment of the law and facts. The dissent also called for the overruling of *Clark v. State*, which related the rights to speedy trial and to effective assistance of counsel as follows:

If, in the original trial, the defendant knowingly and intelligently waived his speedy trial rights he cannot raise that argument in a post-conviction proceeding. Questions which might have been raised at the original trial are not permissible issues at a Rule 37 proceeding. ... However, if the defendant did not knowingly and understandingly waive his speedy trial rights he is entitled to seek post-conviction relief on the basis of ineffective assistance of counsel.

274 Ark. at 84, 85, 621 S.W.2d at 859.

### **Trial Delays Arising from Attorney's Conflicts of Interests.**

The Arkansas Supreme Court held that an excludable period of delay should be charged to appellant under Rules 28.1 and 29.3(h) where a continuance was necessitated by designation of defense counsel as a deputy prosecutor and by appointment of a special prosecutor on motion of appellant to avoid the appearance of a conflict. *Divanovich v. State*, 273 Ark. 117, 617 S.W.2d 345 (1981). *Divanovich* was distinguished by the Court from *Norton v. State*, 273 Ark. 289, 618 S.W.2d 164 (1981), where the state unsuccessfully argued that there was good cause for delay when a deputy prosecutor, who was previously an attorney for appellant's co-defendant, recused on motion of appellant. The Court opined that it was not appellant's fault that the prosecutor in the judicial district

hired co-defendant's counsel to serve as a deputy prosecutor on his staff.

### **Trial of Incarcerated Defendants.**

Before the 1980 amendments, Rule 28.1(a) dealt with defendants committed to a "jail or prison." Strained constructions of the rule were required where defendants incarcerated in the penitentiary and charged with felonies were not brought to trial within the time specified in Rule 28.1(a). The relief provided under such circumstances is release on recognizance or on order to appear pursuant to Rule 30.1(b), a remedy obviously not available to an inmate serving a prison sentence for another felony conviction. See *Matthews v. State*, 268 Ark. 484, 598 S.W.2d 58 (1980). The 1980 amendments to Rule 28.1 solved this problem.

### **Remedy for Violation of Rule 28.1(a).**

Even though Rule 28.1(a) is on its face mandatory, the Arkansas Supreme Court has consistently held that prosecution of a defendant incarcerated for more than nine months, is not barred, the Rule 30.1(b) remedy not being available in these cases. *Jackson v. State*, 290 Ark. 375, 720 S.W.2d 282 (1986) (appellant concededly incarcerated for 284 days in violation of Rule 28.1(a) not entitled to dismissal). See, also, *Orsini v. State*, 281 Ark. 348, 665 S.W.2d 245 (1984) (failure to set bond does not violate an otherwise valid conviction).

### **Application to De Novo Trials in Misdemeanor Cases.**

The Arkansas Court of Appeals has decided that the time within which the defendant must be brought to trial after appeal of a misdemeanor conviction begins running under Rule 28.1(c) and 28.2 on the day a case is appealed to circuit court. *Shaw v. State*, 18 Ark. App. 243, 712 S.W.2d 338 (1986). In *Shaw*, appellant was convicted in municipal court of driving while intoxicated on August 4, 1983. He appealed his conviction to circuit court on August 17, 1983, but the case was not set for trial until July 10, 1985. A trial followed on November 15, 1985. The Court held that time for trial began running on August 17 and that the trial court should have dismissed the charge because appellant's 1985 trial occurred more than 18 months after August 17, 1983.

The Court also observed that Rules 28.3(b), (c), and (i) require that the trial judge make certain docket entries. Where, because of the Court's failure to make entries, the record does not disclose whether periods of time should be deemed excluded, a later ruling by the trial judge not supported by the court docket that excluded periods exist will not be upheld.

**Cross References.** As to the right to a speedy trial in city court, see § 16-96-108.

**Publisher's Notes.** The introductory paragraph of the per curiam order of the Supreme Court of Arkansas issued on June 30, 1980 read: "Article VIII is amended by this restatement of the article which shall become effective on July 1, 1980. The time for trial of all defendants that has commenced to run pursuant to Rule 28.2 prior to July 1, 1980, shall continue to be governed by Article VIII as it existed prior to this amendment, but the time for trial of all defendants that commences to run pursuant to Rule 28.2 (not changed by this amendment) on July 1, 1980, or thereafter, shall be governed by this amendment of Article VIII."

**Reporter's Notes to 2009 Amendments:** The 2009 amendments deleted references to the "circuit court" in subsections (a), (b), and (c) of this rule. The supreme court had previously held that the speedy trial requirements of the rule applied to a proceeding in municipal court, the predecessor of the district court. *Stephens v. State*, 295 Ark. 541, 750 S.W.2d 52 (1988); *Whittle v. Washington County Circuit Court*, 325 Ark. 136, 925 S.W.2d 383 (1996).

Prior to the change, a defendant whose speedy trial motion was denied by the circuit court could seek interlocutory supreme court review of the decision by filing a writ of prohibition. See former Rule 28.1(d). Similarly, the defendant in district court could file a petition for writ of prohibition in the circuit court, and if the circuit court also denied the speedy trial motion, the defendant could seek supreme court review by writ of prohibition. Cf. *Prine v. State*, 370 Ark. 232, 258 S.W.3d 347 (2007); *McFarland v. Lindsey*, 338 Ark. 588, 2 S.W.3d 48 (1999). As a result of such interlocutory review, a rule designed to encourage prompt disposition of criminal cases often resulted in lengthy delays in the trial of such cases.

The 2009 amendments substantially limit the defendant's right to seek interlocutory review of an adverse ruling on a speedy trial motion. Subsection (e) makes it clear that there is no right to interlocutory review of a district court's denial of a speedy trial motion. Under revised subsection (d), a circuit court's denial of a speedy trial motion is not reviewable prior to trial except by writ of certiorari.

It is anticipated that a writ of certiorari will be issued to a circuit court only in extraordinary cases where the record clearly demon-

strates that the circuit court has grossly abused its discretion by denying the defendant's speedy trial motion. The standards for determining the propriety of a writ of certiorari are set out in numerous recent supreme court opinions:

1. A writ of certiorari is extraordinary relief.

2. The appellate court will not look beyond the face of the record to ascertain the actual merits of a controversy, or to control discretion, or to review a finding of fact, or to reverse a trial court's discretionary authority.

3. A writ of certiorari lies only where it is apparent on the face of the record that there has been a plain, manifest, clear, and gross abuse of discretion, or that there is a lack of jurisdiction, an act in excess of jurisdiction on the face of the record, or the proceedings are erroneous on the face of the record.

4. Certiorari is available in the exercise of the supreme court's review of a tribunal that is proceeding illegally where no other mode of review has been provided.

5. There can be no other adequate remedy but for the writ of certiorari. See *Evans v. Blankenship*, 374 Ark. 104, — S.W.3d — (2008); *Helena-West Helena Sch. Dist. #2 of Phillips County v. Phillips County Circuit Court*, 368 Ark. 549, 247 S.W.3d 823 (2007); *Ark. Game & Fish Comm'n v. Herndon*, 365 Ark. 180, 226 S.W.3d 776 (2006); *Ark. Dep't of Human Servs. v. Collier*, 351 Ark. 506, 95 S.W.3d 772 (2003) (writ of certiorari granted when trial court made a decision that was contrary to the plain language of a statute); *Cooper Communities, Inc. v. Benton County Circuit Court*, 336 Ark. 136, 984 S.W.2d 429 (1999); and *Oliver v. Pulaski County Circuit Court*, 340 Ark. 681, 13 S.W.3d 156 (2000).

Prior to the 2009 amendments, a guilty plea waived the defendant's right to raise an alleged denial of speedy trial. Revised subsection(g)(1) makes it clear that a defendant whose speedy trial motion is denied by the district court may thereafter plead guilty in the district court, file an appeal with the circuit court, and renew the speedy trial motion in the circuit court. A similar procedure does not apply in circuit court, but revised subsection(g)(2) does permit the defendant whose speedy trial motion is denied by the circuit court to enter a conditional plea of guilty and still appeal the speedy trial issue to an appellate court provided the requirements of Rule 24.3(b) are otherwise satisfied.

## RESEARCH REFERENCES

**ALR.** Construction and Application of Speedy Trial Act, 18 USCS §§ 3161 to 3174 - United States Supreme Court Cases. 46 ALR Fed. 2d 129.

**Ark. L. Rev. Note,** Speedy Trial and Excludable Delays Under the Arkansas Rules of Criminal Procedure: *Norton v. State*, 35 Ark. L. Rev. 591.



**U. Ark. Little Rock L.J.** Survey of Arkansas Law, Criminal Law, 1 U. Ark. Little Rock L.J. 153.

Stockburger, Survey of Arkansas Law: Criminal Procedure, 2 U. Ark. Little Rock L.J. 217.

Holt, Survey of Criminal Procedure, 3 U. Ark. Little Rock L.J. 198.

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## CASE NOTES

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### Constitutionality.

This rule, as applied to deny a motion to dismiss brought by a defendant who had resisted every attempt to bring him to trial, was not unconstitutional under Ark. Const., Art. 2, § 10 guaranteeing a right to speedy trial. *Faulk v. State*, 261 Ark. 543, 551 S.W.2d 194, appeal dismissed 434 U.S. 804, 98 S. Ct. 33, 54 L. Ed. 2d 62 (1977).

The 18 (now 12) month period set by subsection (c) of this rule for a speedy trial is

reasonable and is consistent with constitutional standards. *Jennings v. State*, 276 Ark. 217, 633 S.W.2d 373, cert. denied 459 U.S. 862, 103 S. Ct. 137, 74 L. Ed. 2d 117 (1982).

### In General.

It is plain from the provisions of this rule and ARCrP 28.2 and ARCrP 28.3 that the drafters recognized that an accused who is incarcerated on pending charges, or on different charges, is at a disadvantage simply by virtue of his confinement. Hence, for such defendants, shorter periods for trial are provided by the speedy trial rule. *Miller v. Langston*, 296 Ark. 486, 757 S.W.2d 562 (1988).

### Purpose.

This rule was adopted for the purpose of enforcing the constitutional provisions requiring a speedy trial. *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983); *Davis v. State*, 319 Ark. 171, 889 S.W.2d 769 (1994).

An accused, the victim, and the public are entitled to have criminal trials promptly held; in order to ensure compliance, the speedy trial rules provide that an accused, if not promptly tried, will be absolutely discharged. *Chandler v. State*, 284 Ark. 560, 683 S.W.2d 928 (1985).

One purpose of the speedy trial rule is to protect the accused, but that rule is also to protect the victim of the crime and, perhaps above all, to serve the interests of the public. *Weaver v. State*, 313 Ark. 55, 852 S.W.2d 130 (1993).

The concept of the prompt and speedy trial is based upon sound public policy; the only meaningful way to ensure that the public policy is effectuated is to discharge an accused who is not promptly tried, which is the purpose of subsection (c) of this rule. *Weaver v. State*, 313 Ark. 55, 852 S.W.2d 130 (1993).

### Applicability.

Because subsection (c) of this rule, as amended, is procedural it can be validly applied to all criminal trials commencing on or after July 1, 1980 (now October 1, 1987). *Jennings v. State*, 276 Ark. 217, 633 S.W.2d 373, cert. denied 459 U.S. 862, 103 S. Ct. 137, 74 L. Ed. 2d 117 (1982).

Speedy trial rules are not substantive law, they are procedural law, and the rule in effect at the time of trial applies. *Jennings v. State*, 276 Ark. 217, 633 S.W.2d 373, cert. denied 459 U.S. 862, 103 S. Ct. 137, 74 L. Ed. 2d 117 (1982).

The present wording of subsection (c) of this rule was adopted by amendment on July 13, 1987, and expressly provides that the change applies to defendants charged after October 1, 1987. *Kain v. State*, 296 Ark. 123, 752 S.W.2d 265 (1988); *Roberts v. State*, 302 Ark. 4, 786 S.W.2d 568 (1990).

Subsection (b) of this rule is applicable only while a defendant is charged with one crime and is incarcerated in prison pursuant to conviction of another crime. It does not apply while a defendant is at liberty on bond. *Cooper v. Langston*, 296 Ark. 306, 756 S.W.2d 896 (1988).

A municipal court speedy trial violation motion to dismiss pursuant to ARCrP 30.1(a) may be raised in the de novo circuit court proceeding even though this rule only refers to trial in a circuit court. *Whittle v. Washington County Circuit Court*, 325 Ark. 136, 925 S.W.2d 383 (1996).

Although a probation revocation hearing must be held within a reasonable time, there is no absolute right, as in criminal prosecutions, to be heard within twelve months. *Dority v. State*, 329 Ark. 631, 951 S.W.2d 559 (1997).

### Appeal.

There is no authority for an interlocutory appeal of the denial of a motion to dismiss for lack of a speedy trial. *Gammel v. State*, 318 Ark. 880, 890 S.W.2d 240 (1994).

A pretrial detainee may seek a writ of habeas corpus in the Supreme Court, following an adverse ruling below, for the purpose of determining whether he or she is being detained in violation of the rule. *Simpson v. Sheriff of Dallas County*, 333 Ark. 277, 968 S.W.2d 614 (1998).

There is no authority for an interlocutory appeal of the denial of a motion for dismissal on speedy trial grounds; the proper method for bringing a denial of a speedy trial motion to the attention of the Supreme Court is by petition for writ of prohibition. *Richards v. State*, 338 Ark. 801, 2 S.W.3d 766 (1999).

Because delay for good cause is allowed to be excluded under speedy trial rules, state was allowed to have the time in which it appealed the trial court's grant of a new trial on defendant's motion excluded from defendant's speedy trial calculation. *Cherry v. State*, 347 Ark. 606, 66 S.W.3d 605 (2002).

Defendant's speedy-trial issue was not preserved for appellate review where he filed a general speedy-trial motion that asserted only that 781 total days had elapsed since he was arrested, he did not contemporaneously

object to any of the excluded periods announced by the court, and, thus, he did not inform the court of the reason for his disagreement with its proposed action prior to or at the time it ruled on the matter. *Killian v. State*, 96 Ark. App. 92, 238 S.W.3d 629 (2006).

### Burden of Proof.

Where a defendant's trial was held after allowable period had passed, the trial court erred in not granting a motion to dismiss pursuant to this rule, since the state did not carry its burden of proving the excludable periods of time under Rule 28.3 by merely alleging that its witness, a deputy, had been admitted to the hospital on the date of the hearing for an emergency, but failing to show that the unavailability of that witness was for amount of time alleged. *Van Sandt v. State*, 274 Ark. 7, 621 S.W.2d 681 (1981) (decision based on rule prior to 1980 amendment).

The burden is upon the state to prove good cause for any delay in the trial or that it was legally justified. *Williams v. State*, 275 Ark. 8, 627 S.W.2d 4 (1982).

The burden is upon the state to show good cause for an untimely delay in the trial. *Chandler v. State*, 284 Ark. 560, 683 S.W.2d 928 (1985).

Where the speedy trial rules have been prima facie violated, the burden is upon the State to show good cause for the untimely delay. *Glover v. State*, 287 Ark. 19, 695 S.W.2d 829 (1985); *Lowe v. State*, 290 Ark. 403, 720 S.W.2d 293 (1986), overruled *Richards v. State*, 2 S.W.3d 766 (1999); *Meine v. State*, 309 Ark. 124, 827 S.W.2d 151 (1992); *Henson v. State*, 38 Ark. App. 155, 832 S.W.2d 269 (1992).

Once the defendant has moved for dismissal and has shown that the trial was being or was going to be held after the speedy trial period expired, the prosecutor has the burden of showing the delay beyond the speedy trial period was the result of the defendant's conduct. *Walker v. State*, 288 Ark. 52, 701 S.W.2d 372 (1986).

When the time allowed by the speedy trial rule under subsection (c) of this rule has been exceeded, the prosecution has the burden of proving that the delay was legally justified. *Harwood v. Lofton*, 288 Ark. 173, 702 S.W.2d 805 (1986); *Williams v. State*, 290 Ark. 286, 718 S.W.2d 935 (1986), cert. denied 481 U.S. 1068, 107 S. Ct. 2460, 95 L. Ed 2d 869 (1987); *Horn v. State*, 294 Ark. 464, 743 S.W.2d 814 (1988); *Stephens v. State*, 295 Ark. 541, 750 S.W.2d 52 (1988); *Keys v. State*, 23 Ark. App. 219, 745 S.W.2d 628 (1988); *Woods v. State*, 26 Ark. App. 109, 760 S.W.2d 392 (1988); *Campbell v. State*, 26 Ark. App. 133, 761 S.W.2d 613 (1988).

Burden is on courts and state to assure a defendant receives a speedy trial. *Novak v. State*, 294 Ark. 120, 741 S.W.2d 243 (1987).



Once it is shown that the trial was scheduled to be held after the speedy trial period had expired, the state has the burden of showing that any delay was the result of the defendant's conduct or was otherwise legally justified. *McConaughy v. State*, 301 Ark. 446, 784 S.W.2d 768 (1990); *Glover v. State*, 307 Ark. 1, 817 S.W.2d 409 (1991); *Scroggins v. State*, 312 Ark. 106, 848 S.W.2d 400 (1993); *Tanner v. State*, 324 Ark. 37, 918 S.W.2d 166 (1996).

The state failed to carry its burden in showing that the delay in bringing defendant to trial was legally justified. *Towe v. State*, 303 Ark. 441, 798 S.W.2d 56 (1990).

Once the trial court found that the delay was not attributable to the defendant personally, the burden shifted back to the state to come forward with an explanation to have the time waiting for the exam excluded. *Brawley v. State*, 306 Ark. 609, 819 S.W.2d 704 (1991); *Foster v. State*, 38 Ark. App. 245, 832 S.W.2d 293 (1992).

Although defendant established a prima facie case that a speedy-trial violation occurred, the state met its burden of showing that the delay was the result of the defendant's conduct or was otherwise legally justified. *Jones v. State*, 323 Ark. 655, 916 S.W.2d 736 (1996).

Where twenty-six months passed from the date the information was filed until the date defendant filed his motion to dismiss, defendant presented a prima facie case that the speedy-trial rule was violated. *Lively v. State*, 326 Ark. 398, 930 S.W.2d 339 (1996).

Because defendant presented a prima facie case of a speedy-trial violation, the burden shifted to the State to show that the delay resulted from defendant's conduct or was otherwise justified. *Miller v. State*, 100 Ark. App. 391, 269 S.W.3d 400 (2007).

#### Calculation of Period.

For cases discussing calculation of court terms under rule prior to 1980 amendment, see *Wade v. State*, 264 Ark. 320, 571 S.W.2d 231 (1978); *State v. Lewis*, 268 Ark. 359, 596 S.W.2d 697 (1980); *Alexander v. State*, 268 Ark. 384, 598 S.W.2d 395 (1980); *State v. Messer*, 269 Ark. 431, 601 S.W.2d 857 (1980); *Archer v. State*, 271 Ark. 365, 609 S.W.2d 91 (1980); *Hayes v. State*, 274 Ark. 440, 625 S.W.2d 498 (1981), cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Where state filed nolle prosequi order and later refiled charges of first-degree battery, the period between the order and the refile could not be excluded under subsection (f) of ARCrP 28.3, in calculating the period under this rule since the action by the state of entering a nolle prosequi or dismissing with leave to refile does not toll the running of the

speedy trial provisions under subsection (f) of ARCrP 28.3 absent a showing of good cause for the period of delay nor is the state relieved of the speedy trial limitation merely because the defendant is permitted absolute release pending disposition of the charges. *State v. Washington*, 273 Ark. 82, 617 S.W.2d 3 (1981) (decision based on rule prior to 1980 amendment).

Where the defendant is at liberty when arrested on other charges, the time for trial should commence running when the accused is deprived of his liberty. *Miller v. Langston*, 296 Ark. 486, 757 S.W.2d 562 (1988).

The date the charges are filed is the beginning for the calculation of the time for a speedy trial. *Keys v. State*, 23 Ark. App. 219, 745 S.W.2d 628 (1988).

Time limitations for trial begin running on the date the charge is filed; there is no requirement that a defendant be arrested before the 12-month time period for speedy trial begins to run. *Nettles v. State*, 303 Ark. 8, 791 S.W.2d 702 (1990).

Trial court did not clearly err by excluding the 30 days during which defendant's motion to suppress was under advisement. *Smith v. State*, 303 Ark. 524, 798 S.W.2d 94 (1990).

Where defendant was in prison in another state, for a different crime, and was extradited to Arkansas to stand trial, he would have had to affirmatively request a trial in order to activate the speedy trial rule, and where defendant did not, his right to a speedy trial did not begin to run until his actual return to the state. *Gillie v. State*, 305 Ark. 296, 808 S.W.2d 320 (1991).

The period of delay resulting from an examination and hearing on the competency of the defendant was excludable from the 12-month period. *Hubbard v. State*, 306 Ark. 153, 812 S.W.2d 107 (1991).

The period of delay, due to the appointment of new defense counsel, was not excludable as a delay for good cause, because the defendant did nothing to cause his trial to be delayed beyond the time for a speedy trial. *Glover v. State*, 307 Ark. 1, 817 S.W.2d 409 (1991).

When the defendant is scheduled for trial within the time for speedy trial and the trial is postponed because of the defendant, that is "good cause" to exclude the time attributable to the delay. *Lewis v. State*, 307 Ark. 260, 819 S.W.2d 689 (1991).

The time for trial commenced running anew on the date the mandate was issued by the Supreme Court Clerk. *Clements v. State*, 312 Ark. 528, 851 S.W.2d 422 (1993).

Where the state charge against defendant was dropped in favor of a federal indictment, which was never pursued, the time between the nolle prosequi and the refile of the state charges was not excludable because the state

failed to show good cause. *Caulkins v. Crabtree*, 319 Ark. 686, 894 S.W.2d 138 (1995).

Speedy trial period on defendant's trial de novo appeal from municipal court decision began to run on the date the city attorney became aware of the appeal. *McClung v. State*, 53 Ark. App. 196, 920 S.W.2d 867 (1996).

The time it took defendant to obtain a mental capacity report from the state hospital was excluded in calculating the one-year period prescribed by this rule. *Hulsey v. Smitherman*, 328 Ark. 234, 943 S.W.2d 568 (1997).

The entry of a guilty plea for manufacturing a controlled substance, ephedrine, and its later withdrawal had the effect of restarting the time for speedy trial on an amended information charging the manufacturing of a controlled substance, methcathinone, at the time of the withdrawal of the guilty plea. *Kelch v. Erwin*, 333 Ark. 567, 970 S.W.2d 255 (1998).

By establishing a period of delay beyond 12 months from the date of the charge, petitioner made a prima facie case for a speedy-trial violation; however, there was no violation of the speedy-trial rule because, after attributing excludable time periods to petitioner and the state pursuant to ARCrP 28.3, the time charged to the state was less than 12 months. *Doby v. Jefferson County Circuit Court*, 350 Ark. 505, 88 S.W.3d 824 (2002).

Defendant's right to a speedy trial was not violated because he was brought to trial within 12 months after several excludable time periods were subtracted from a 464-day period; therefore, defendant's motion to dismiss several drug and weapons charges was properly denied. *Gondolfi v. Clinger*, 352 Ark. 156, 98 S.W.3d 812 (2003).

Trial court did not err in excluding any of the four periods from the speedy-trial time calculation because defendant was tried within the 12 months as required by subsection (b) of this rule; defendant requested the continuances and did not object to the orders or their exclusion from the speedy trial calculation under Ark. R. Crim. P. 28.3, and excluded periods without a written order or docket entry have been upheld where the record demonstrated that the delays were attributable to defendant or legally justified for "good cause" under Rule 28.3(h). *Autrey v. State*, 90 Ark. App. 131, 204 S.W.3d 84 (2005).

Defendant's right to speedy trial was not violated because he was brought to trial within the time required under this rule; the state met its burden to show that there were 414 days that were permissibly excluded pursuant to Ark. R. Crim. P. 28.3, which included a continuance requested by defendant, discovery, an unavailable witness, and a joint mo-

tion to investigate new evidence. *May v. State*, 94 Ark. App. 202, 228 S.W.3d 517 (2006).

In a stalking and terroristic threats case, denial of defendant's motion to dismiss on speedy-trial grounds was proper because subtracting the nol pros and continuance periods from the overall 426-day period between his arrest and the day his speedy-trial motion was filed left 347 days, well within the one-year period of this rule. *Branning v. State*, 371 Ark. 433, 267 S.W.3d 599 (2007).

Where petitioner's speedy trial argument was based solely upon the time that elapsed between his arrest and his guilty plea and failed to consider excludable periods resulting from his requests for a psychological evaluation and a continuance, no speedy trial violation occurred, counsel was not ineffective for failing to raise the issue, and petitioner was not entitled to postconviction relief. *Johnson v. State*, 2009 Ark. 553, — S.W.3d —, 2009 Ark. LEXIS 711 (2009).

While defendant made a prima facie case of a speedy-trial violation under this rule, as continuances filed by defendant and a codefendant were excluded by Ark. R. Crim. P. 28.3, and as defendant's severance motion did not comply with Ark. R. Crim. P. 22.3(b)(i), less than 365 days expired between his arrest and trial; therefore, his motion to dismiss was properly denied. *Raymond v. State*, 2011 Ark. App. 179, — S.W.3d —, 2011 Ark. App. LEXIS 194 (Mar. 2, 2011).

### **Continuance.**

Motions for continuance made after speedy trial deadline had passed did not constitute acquiescence in delay. *Duncan v. State*, 294 Ark. 105, 740 S.W.2d 923 (1987).

The record of the trial judge's finding that a continuance should be granted, which was agreed to by defendant, is sufficient to satisfy the requirements of ARCrP 28.3(i). *Key v. State*, 300 Ark. 66, 776 S.W.2d 820 (1989).

Where continuances were requested by defense counsel, defendant's right to a speedy trial was not violated. *Roark v. State*, 46 Ark. App. 49, 876 S.W.2d 596 (1994).

A 212-day continuance was chargeable to the defendant, notwithstanding that the continuance was caused by the unavailability of a witness for the state, where the court specifically stated that it was granting defense counsel's motion for a continuance and no objection was made at the time of the ruling. *Dean v. State*, 339 Ark. 105, 3 S.W.3d 228 (1999).

Where defendant was granted a continuance of over four months, this time period was not counted for speedy trial purposes and there was no violation of the speedy trial requirement. *George v. State*, 84 Ark. App. 275, 140 S.W.3d 492 (2003), rev'd 189 S.W.3d 28 (2004).

In a child pornography case, defendant's



speedy trial rights were not violated where he was arrested on March 28, 2001, and his trial began on May 15, 2002, because defendant moved for a continuance on January 10, 2002, and the trial court granted the continuance until May 15, 2002; the additional 48 days beyond the 12 month period were during that continuance, and all of the time from January 10, 2002, until May 15, 2002, was properly excluded from the calculation of the speedy-trial period. *George v. State*, 358 Ark. 269, 189 S.W.3d 28 (2004), cert. denied 543 U.S. 1163, 125 S. Ct. 1329, 161 L. Ed. 2d 136 (2005).

Defendant's right to a speedy trial was violated where defendant was not brought to trial within 12 months. The State failed to present sufficient evidence to make an 84-day continuance attributable to defendant; the associated docket sheet was neither part of the transcript submitted to the circuit court nor independently verified and certified by the clerk of the district court. *Rhoden v. State*, 98 Ark. App. 425, 256 S.W.3d 506 (2007).

Defendant was timely brought to trial because the case was passed from November 17, 2005, through January 5, 2006 at the request of the defendant, it was again passed at defendant's request from March 2, 2006, through May 4, 2006, and defendant failed to appear on May 4, 2006, and next appeared 28 days later on June 1, 2006. *Layton v. State*, 2009 Ark. App. 96, 302 S.W.3d 610 (2009).

Trial court did not err in denying defendant's motion to dismiss for lack of a speedy trial under subsection (c) of this rule and Ark. R. Crim. P. 28.2(a) because each of the three delays in defendant's trial dates were a result of defendant's own motions for continuances, which, pursuant to Ark. R. Crim. P. 28.3(c), were time that was properly excluded in calculating the time for trial. *Wade v. State*, 2009 Ark. App. 346, 308 S.W.3d 178 (2009).

#### **Date of Arrest.**

This rule changed former statute by providing that the time for trial runs from the date of arrest and not from the filing of the information. *Bakri v. State*, 261 Ark. 765, 551 S.W.2d 215 (1977).

Where the defendant was tried 19 months after the charges were filed and nine months after his arrest, the defendant was not denied his right to a speedy trial because the time did not begin to run until the date of arrest. *Coleman v. Lofton*, 289 Ark. 573, 715 S.W.2d 435 (1986).

The period for determining defendant's right to a speedy trial commenced on the day defendant was arrested, not when the original indictment was filed four days later. *Birmingham v. State*, 346 Ark. 78, 57 S.W.3d 118 (2001).

Where defendant was charged with a felony, as opposed to a misdemeanor, the time for speedy trial commenced on November 26,

2001, the date that defendant was arrested, and not March 1, 2001, the date that the affidavit for probable cause to obtain an arrest warrant was filed in district court; while an affidavit for an arrest warrant may have been a sufficient charging instrument for filing a misdemeanor charge, it was not sufficient for filing a felony charge. *Watson v. State*, 358 Ark. 212, 188 S.W.3d 921 (2004).

#### **Defendant in Foreign Jurisdiction.**

Where a defendant was incarcerated in Arkansas, then voluntarily surrendered to Oklahoma authorities and was incarcerated there and resisted every effort to bring him to trial in Arkansas, he was not denied his constitutional right to a speedy trial and was not entitled to a dismissal of all charges. *Faulk v. State*, 261 Ark. 543, 551 S.W.2d 194, appeal dismissed 434 U.S. 804, 98 S. Ct. 33, 54 L. Ed. 2d 62 (1977).

Where defendant was on bail for the present charges and was also incarcerated out of state in a federal institution, and made no demand for a speedy trial, the three term requirements of subsection (b) of this rule applied. *Williams v. State*, 271 Ark. 435, 609 S.W.2d 37 (1980) (decision based on rule prior to 1980 amendment).

An accused in prison in another state, for a different crime, must affirmatively request trial in order to activate the speedy trial rule. *White v. State*, 310 Ark. 200, 833 S.W.2d 771 (1992).

Appellant's speedy trial period did not begin to run until he waived extradition, therefore, his trial was well within the 12-month speedy trial period. *White v. State*, 310 Ark. 200, 833 S.W.2d 771 (1992).

Where defendant was arrested in Texas, the one year time for the purposes of subsection (c) of this rule began to run from when he waived extradition from Texas, not from the arrest date. *Caulkins v. Crabtree*, 319 Ark. 686, 894 S.W.2d 138 (1995).

The defendant's right to a speedy trial was not denied where (1) he failed to appear for trial, which was set for a date 18 days before the expiration of the period allowed for his trial, and (2) after he was arrested out-of-state and returned for trial, trial was next set for 118 days later, which was the next available trial date. Once the defendant was arrested and returned to Arkansas, he was not entitled to a trial within 18 days, as that would have had the effect of disrupting the trial court's entire docket. *Osborn v. State*, 340 Ark. 444, 11 S.W.3d 528 (2000).

Because defendant did not affirmatively request a trial while in custody in a different state, the speedy trial period did not begin to run until defendant waived extradition; therefore, defendant's motion to dismiss sev-

eral drug and weapons charges was properly denied. *Gondolfi v. Clinger*, 352 Ark. 156, 98 S.W.3d 812 (2003).

Because the authorities took the proper steps to procure defendant's presence in court for trial by putting a "hold" on him while he was in custody in another county, the disputed period of time was properly excluded under Ark. R. Crim. P. 28.3(a); therefore, the speedy-trial rule in this rule was not violated. *Arnold v. State*, 2011 Ark. App. 452, — S.W.3d —, 2011 Ark. App. LEXIS 475 (June 22, 2011).

#### **Defendant Under Sentence.**

A situation in which the defendant is serving a sentence and not being held in jail on a pending charge is the equivalent of the defendant being held to bail or at liberty, since his confinement was not under the pending charge. *Jones v. State*, 266 Ark. 855, 586 S.W.2d 258 (1979).

Although the State claimed that defendant's whereabouts were unknown because there was no way the Faulkner County prosecutor could have known that defendant was serving time in a state prison on charges that originated in Pulaski County, the period between the time the information was filed and the denial of defendant's motion to dismiss was not excludable where there was no proof that there was an attempt to serve the warrant. *Lively v. State*, 326 Ark. 398, 930 S.W.2d 339 (1996).

#### **Defendant's Obligation.**

The defendant has an affirmative obligation to offer proof that any delay was not at his insistence. *Roberts v. City of Conway*, 266 Ark. 825, 586 S.W.2d 13 (1979).

Where in prosecution for rape, the defendant was free on bond, and the trial was held within the 18 (now 12) month limit prescribed by subsection (c) of this rule, the defendant failed to prove that the delay in his trial caused the loss of some physical evidence taken during the alleged victim's medical examination, because he did not explain the manner in which his cross-examination of the physician who took the evidence would have been enhanced had the evidence been available. *Timmons v. State*, 290 Ark. 121, 717 S.W.2d 208 (1986) (decision based on rule prior to 1987 amendment).

The petitioner was not entitled to be released in accordance with the rule since he remained within the 9-month-period that commenced on his arrest as he had filed numerous pretrial motions, many of which were still under advisement, and, therefore, much of the period since the arrest was chargeable to him. *Simpson v. Sheriff of Dallas County*, 333 Ark. 277, 968 S.W.2d 614 (1998).

#### **Delay.**

Where defendant was not tried within nine months after his arrest and incarceration, that delay did not entitle him to an absolute discharge, at most, he was entitled to be released and then to be tried within the time allowed by this rule, which is ordinarily within the third full term of court, not counting the term in which he was arrested. *Bell v. State*, 270 Ark. 1, 603 S.W.2d 397 (1980) (decision based on rule prior to 1980 amendment).

Where, in the circuit court in which defendant was tried, no speedy trial right violation could occur before the expiration of 18 (now 12) months since the court had only two six-month terms a year and where defendant conceded that at least three and one-half and possibly eight and one-half months of this 19 and one-half month trial delay could be properly excluded, he obviously was brought to trial within the time limitation established by the Rules of Criminal Procedure; although defendant may have been entitled to pre-trial release at the end of nine months, as opposed to absolute discharge, such entitlement did not affect his convictions. *Wallace v. State*, 270 Ark. 17, 603 S.W.2d 399 (1980) (decision based on rule prior to 1980 and 1987 amendments).

Actions by defendant did not amount to delays chargeable to defendant. *Horn v. State*, 294 Ark. 464, 743 S.W.2d 814 (1988); *Woods v. State*, 26 Ark. App. 109, 760 S.W.2d 392 (1988).

Failure of the record to specifically set out the state's reasons for the delay of defendant's trial made it necessary to grant defendant permission to apply to the trial court for an evidentiary hearing limited to the issue of whether counsel could have made a successful motion to dismiss the charges for failure to hold trial within the time limits set by this rule. *Spivey v. State*, 299 Ark. 412, 773 S.W.2d 446 (1989).

When a case is delayed by the accused and that delaying act is memorialized by a record taken at the time it occurred, that record may be sufficient to satisfy the requirements of ARCrP 28.3(i). *Key v. State*, 300 Ark. 66, 776 S.W.2d 820 (1989).

Where the record itself demonstrated that the delays were attributable to the accused and were memorialized in the proceedings at the time of occurrence, delays were excludable under the rationale that defendant cannot agree with a ruling by the trial court and then attack that ruling on appeal. *Hudson v. State*, 303 Ark. 637, 799 S.W.2d 529 (1990).

Where the failure to effectuate service on a witness for a date on which trial was set was unexplained, in spite of the fact that the state was approaching the end of the speedy trial period, and the state failed to inquire of the



witness to ascertain a good date prior to scheduling the trial and released the witness without first obtaining his deposition, lack of diligence on the part of the prosecution was clear. *Meine v. State*, 309 Ark. 124, 827 S.W.2d 151 (1992).

The state met its burden of showing cause for delay. *Lynch v. State*, 315 Ark. 47, 863 S.W.2d 834 (1993).

Defendant's speedy-trial right was not violated and the trial court did not err when it denied his motion to dismiss because the trial was postponed due to the need for the appointment of new counsel, which was excludable for good cause pursuant to Ark. R. Crim. P. 28.3(h), and due to defendant's pretrial motions, including his motions for a polygraph examination, to admit certain evidence under the Rape Shield law, to compel discovery, and for a mental evaluation, which was excludable under Ark. R. Crim. P. 28.3(a). *Parker v. State*, 93 Ark. App. 472, 220 S.W.3d 238 (2005).

Defendant's speedy trial rights were not violated because the arraignment had to be rescheduled due to defendant's failure to appear and subsequent late arrival. It was clear that the delay was defendant's fault, and therefore the State met its burden of showing that the delay was the result of defendant's conduct or was otherwise justified and that the circuit court was correct in excluding that twelve-day period from its speedy-trial calculations. *Yarbrough v. State*, 370 Ark. 31, 257 S.W.3d 50 (2007).

Defendant was afforded a speedy trial, and the trial court properly denied his motion to dismiss because although he made a prima facie case of a speedy-trial violation, the state identified an additional time period charged against him that put his trial within the required twelve-month period contained in this rule; the delay was properly charged against defendant, he made no objection, and that excludable period put his trial within twelve months of his arrest as calculated under Ark. R. Crim. P. 28. *Barber v. State*, 2010 Ark. App. 210, — S.W.3d —, 2010 Ark. App. LEXIS 177 (Mar. 3, 2010).

#### —Necessary.

Where delay in bringing petition for revocation of suspended sentences did not exceed time allowed by this rule and there was nothing in the record to show that the actual delay amounted to a denial of due process, argument that revocation petition should have been dismissed must fail. *Walker v. State*, 263 Ark. 485, 565 S.W.2d 605 (1978).

Where a case was set for trial well within the time allowed by this rule but was delayed to allow the defendant to obtain new counsel after his assault on his original counsel led them to withdraw, there was no denial of a

speedy trial. *Foxworth v. State*, 263 Ark. 549, 566 S.W.2d 151 (1978).

Where defendant's trial began 109 days after the 12 month period for speedy trial had run, but the delay was due in part to a continuance on defendant's motion and in larger part because the state was granted a continuance under ARCrP 28.3(d)(1) while awaiting scientific lab results that were material to the case, defendant was not denied his right to a speedy trial. *Miles v. State*, 348 Ark. 544, 75 S.W.3d 677 (2002).

#### —Reasons.

If a case is continued beyond the time provided by the rule, the record should timely show the reasons for such delay. Findings of the trial court entered after a motion to dismiss has been filed are not valid grounds for excluding a term of court in applying this rule. *Archer v. State*, 271 Ark. 365, 609 S.W.2d 91 (1980) (decision based on rule prior to 1980 amendment).

Where the prosecutor could not remember why the case had been continued, leaving the possibility that the delay might have been excludable even though requested by defense counsel, and she failed to make certain that the docket entry reflected which side was responsible for the delay, the prosecution failed to sustain its burden of proving that the trial delay was legally justified. *Harwood v. Lofton*, 288 Ark. 173, 702 S.W.2d 805 (1986).

Where the record did not contain any written order or docket entry setting forth the excluded periods or the number of days in each period, and there was neither an order continuing the case nor an order setting forth the "exceptional circumstances" necessitating the delay, the trial judge failed to comply with subsections (b), (c), and (i) of ARCrP 28.3, and the defendant's conviction was reversed and dismissed. *Shaw v. State*, 18 Ark. App. 243, 712 S.W.2d 338 (1986).

Where it was apparent that defendant's trial was held outside of the applicable speedy-trial period found in this rule, the State failed to meet its burden to show that the delay was the result of the defendant's conduct or otherwise justified. *Bradford v. State*, 329 Ark. 620, 953 S.W.2d 549 (1997).

A 104-day delay for a mental examination of the defendant was chargeable to the defendant where he requested such examination, notwithstanding his contention that the delay in obtaining the examination was caused by the state's failure to promptly forward the order for a mental examination to the state hospital. *Scott v. State*, 337 Ark. 320, 989 S.W.2d 891 (1999).

As the state had good cause to seek the nolle prosequi of a felony controlled substance charge pursuant to a plea negotiation, as there was no indication that the state was merely trying to evade the speedy-trial re-

quirement, and as the time period during which the felony charge was nol-prossed was permissibly excluded under Ark. R. Crim. P. 28.3, denial of defendant's motion to dismiss the refiled felony controlled substance charge on speedy-trial grounds was proper. Subtracting the nolle prosequi time period from the overall time period left 183 days, which was well within the one-year period of the speedy-trial requirement under this rule. *State v. Crawford*, 373 Ark. 95, 281 S.W.3d 736 (2008).

#### **Docket Error.**

Where one discovers a docket error which affects his speedy trial rights, he must either notify the court of the error, or affirmatively request trial, in order to activate the statute and avail himself of its protection, and where the docket error is later corrected the court must be supplied the reason, in order to rule on whether the time should be included or excluded. *Anderson v. Hargraves*, 272 Ark. 259, 613 S.W.2d 587 (1981).

Where the term in which the defendant was charged with public servant bribery was excluded under ARCrP 28.2, the two succeeding terms were excluded under ARCrP, 28.3, because of continuances granted at defendant's request, and the prosecutor was granted a continuance in the next following term which was incorrectly recorded on the docket as being granted to defendant, defendant was not entitled to have charges against him dismissed on speedy trial grounds since he failed to notify court of docket error prior to bringing motion to dismiss. *Anderson v. Hargraves*, 272 Ark. 259, 613 S.W.2d 587 (1981) (decision based on rule prior to 1980 amendment).

Where "pocket docket" entry, excluding period of time from calculation of speedy trial, was made several months after the delay occurred, 2 months after the 12-month period had elapsed, and 6 weeks after defendant filed his motion to dismiss, it was untimely and ineffectual. *Reed v. State*, 35 Ark. App. 161, 814 S.W.2d 560 (1991).

#### **Effect of Amendment.**

Present revised subsection (c) of this rule permits a defendant to be brought to trial within 18 (now 12) months after arrest and eliminates the complications occasioned by the old rule which computed time by court terms. *Archer v. State*, 271 Ark. 365, 609 S.W.2d 91 (1980).

#### **Effective Assistance of Counsel.**

Where defendant was entitled to have the prosecution barred because of lapse of more than 12 months from filing of charge, where counsel at the time of entering guilty plea offered no testimony of trial strategy or other reason for the failure to assert the right to a speedy trial and where defendant did not knowingly and intelligently waive his right to a speedy trial, the defendant did not receive

effective assistance of counsel and, as a result, suffered prejudice. *Hall v. State*, 281 Ark. 282, 663 S.W.2d 926 (1984).

Where the defendant made a motion for an omnibus hearing pursuant to ARCrP 20 and then waived that motion 55 days later, no trial date was set until almost a year after the defendant waived the hearing, and the defendant was tried more than 18 (now 12) months after being charged, the delay beyond the speedy trial period was not the result of defendant's conduct. Therefore, the failure of defendant's counsel to make a dismissal motion pursuant to this rule was ineffective assistance of counsel, and defendant's conviction was reversed. *Walker v. State*, 288 Ark. 52, 701 S.W.2d 372 (1986).

In light of the Arkansas Supreme Court denying his state speedy trial claim, appellant surely could neither claim that the state claim was a "winnable" speedy trial claim, nor that his counsel was ineffective for advising him to abandon the state claim and take the plea. The district court found that counsel's advice to forego the appeal of the motion to dismiss and accept the plea offer was a reasonable tactical decision. *Cox v. Lockhart*, 970 F.2d 448 (8th Cir. 1992).

Where speedy-trial question hinged on whether the trial court erred in denying defendant's motion to dismiss his trial counsel and to proceed pro se, there was no indication that defendant's court-appointed counsel was not competent and defendant could not manipulate that right for the purpose of delaying the trial or playing "cat-and-mouse" with the trial court; thus, defendant was not denied his right to a speedy trial. *Wilson v. State*, 88 Ark. App. 158, 196 S.W.3d 511 (2004).

Pro se post-conviction relief petitioner's ineffective assistance of counsel claim was rejected because, although petitioner alleged that his counsel failed to object to a violation of the speedy-trial rule, petitioner did not assert that the two periods during which the running of the period under this rule was tolled were not properly excluded but merely stated that his attorney should have objected at trial on the basis of the rule. *Shipman v. State*, 2010 Ark. 499, — S.W.3d —, 2010 Ark. LEXIS 597 (Dec. 16, 2010).

#### **Equal Protection.**

Defendant in capital felony murder case was not denied equal protection of the law on ground that the speedy trial provisions of ARCrP 28.1 — 30.2 distinguish between persons serving a term of imprisonment on another conviction while awaiting trial on the principal charge and persons incarcerated as a result of the principal charge to be tried, since neither was entitled to absolute discharge until after 18 (now 12) months under ARCrP 30; furthermore, defendant failed to show any prejudice resulting from his incar-



ceration prior to trial. *Hayes v. State*, 278 Ark. 211, 645 S.W.2d 662, cert. denied 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983).

#### **Failure to Preserve for Appeal.**

While defendant claimed that the circuit court did not properly explain the basis upon which it granted five orders of continuance that tolled the speedy trial time period of this rule, defendant failed to make a contemporaneous objection or to move for dismissal; thus, the issue was not preserved for appeal. *Barrow v. State*, 2010 Ark. App. 589, — S.W.3d —, 2010 Ark. App. LEXIS 637 (Sept. 15, 2010).

#### **Federal Court Review.**

Generally, a claim that a state has violated its own speedy trial rules presents a question of state law for determination by state courts; a federal court's review of such a claim is limited to whether the state's violation of its own speedy trial rules was so fundamentally unfair and prejudicial to petitioner as to deny him due process. *Wallace v. Lockhart*, 701 F.2d 719 (8th Cir. 1983), cert. denied 464 U.S. 934, 104 S. Ct. 340, 78 L. Ed. 2d 308 (1983).

A federal habeas corpus petitioner failed to demonstrate that a 19½-month delay between his arrest and his trial violated his Sixth Amendment right to a speedy trial where he had not established any improper reason for the delay, had not alleged that he asserted his right to a speedy trial, and had not shown that he was materially prejudiced because of the delay. *Wallace v. Lockhart*, 701 F.2d 719 (8th Cir. 1983), cert. denied 464 U.S. 934, 104 S. Ct. 340, 78 L. Ed. 2d 308 (1983).

#### **Jurisdiction.**

This rule is jurisdictional inasmuch as it requires a defendant to be brought to trial within twelve months or it be absolutely discharged pursuant to Ark. R. Crim. P. 30.1(a). *Turbyfill v. State*, 312 Ark. 1, 846 S.W.2d 646 (1993); *Rhodes v. Capeheart*, 313 Ark. 16, 852 S.W.2d 118 (1993).

#### **Presumption of Timeliness.**

There may be a denial of one's constitutional right to a speedy trial after a period of delay shorter than those permitted under ARCrP 28 and ARCrP 30, but a strong showing of prejudice would be necessary to overcome the presumption that a time within the prescribed limits of these rules meets constitutional requirements. *Matthews v. State*, 268 Ark. 484, 598 S.W.2d 58 (1980).

The rules of criminal procedure requiring trial within a specified period are the outer limits of time to bring a defendant to trial, and trials occurring within those limits are not presumptively prejudicial. *Coleman v. Lofton*, 289 Ark. 573, 715 S.W.2d 435 (1986).

Presumption that a trial occurring within time limits set out in this rule meets constitutional requirements was not overcome

where appellant did not show any prejudice. *Halfacre v. State*, 292 Ark. 329, 731 S.W.2d 182 (1987); *Halfacre v. State*, 292 Ark. 331, 731 S.W.2d 179 (1987).

#### **Probation Revocation.**

The constitutional right to a speedy trial does not apply to probation revocation hearings. *White v. State*, 330 Ark. 720, 957 S.W.2d 683 (1997).

#### **Prompt Presence at Trial.**

Where defendant was arrested for burglary in July, 1978, convicted of unrelated offenses and sentenced in February, 1979, and trial on the burglary charges were set for November, 1979, which was within three terms of court as required by this rule, and ARCrP 28.2, defendant could not, in the absence of proof of prejudice or testimony in support of his motion to dismiss, show that state failed to "promptly" seek his presence at trial as required by ARCrP 29.1. *Miller v. Lofton*, 272 Ark. 164, 612 S.W.2d 732 (1981) (decision based on rule prior to 1980 amendment).

#### **Review.**

Trial court's determination was not subject to appeal, where the trial court conducted a hearing, made a factual determination based on the pleadings and representations of the parties, and concluded that charges against defendant should be dropped because his right to a speedy trial had been violated. This determination was well within the trial court's discretion and did not require an interpretation of the court's rules, but merely its application to the facts at hand. *State v. Edwards*, 310 Ark. 516, 838 S.W.2d 356 (1992).

#### **Right to Speedy Trial.**

Where defendant was tried within the time allowed by this rule, and the defendant was in the penitentiary rather than in jail, and no prejudice was shown to have resulted to the defendant from the delay of five months, after which time his attorney asked for a continuance, the defendant was not denied his constitutional right to a speedy trial. *Woods v. State*, 260 Ark. 882, 545 S.W.2d 912 (1977) (decision based on rule prior to 1980 amendment).

A writ of prohibition is the proper remedy where a petitioner is brought to trial after three full terms of court have expired since the date the petitioner was released on bond. *Callender v. State*, 263 Ark. 217, 563 S.W.2d 467 (1978) (decision based on rule prior to 1980 amendment).

Subsection (a) of this rule is mandatory, but if a judge refuses to release a defendant after nine months as provided in the rule, the remedy is to seek a writ of mandamus from the Supreme Court. *Jackson v. State*, 290 Ark. 375, 720 S.W.2d 282 (1986).

Right to speedy trial held not to have been denied. *Townsend v. State*, 292 Ark. 157, 728 S.W.2d 516 (1987).

There are four basic factors to be considered in determining whether a defendant's right to a speedy trial has been violated. These are: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his rights, and (4) the prejudice to the defendant. *Stephens v. State*, 295 Ark. 541, 750 S.W.2d 52 (1988); *Cox v. Lockhart*, 970 F.2d 448 (8th Cir. 1992).

Where speedy trial issue was never raised in the trial court, it cannot be raised for the first time on appeal. The appellant's remedy is to challenge the adequacy of his attorney's representation in a petition for post-conviction relief under ARCrP 37. *Spivey v. State*, 25 Ark. App. 269, 757 S.W.2d 186 (1988); *Jurney v. State*, 298 Ark. 91, 766 S.W.2d 1 (1989).

Defendant's right to a speedy trial was violated where defendant was first tried on a murder charge and then on a charge of possession with intent to distribute, which occurred 83 days after the 12-month period required. *Raglin v. State*, 35 Ark. App. 181, 816 S.W.2d 618 (1991).

Charges dismissed where defendant presented a prima facie case of violation of her right to a speedy trial by establishing that 483 days had passed since her arrest, and the State did not meet their burden of establishing legally justified excludable periods of time in excess of 118 days. *Webb v. Ford*, 340 Ark. 281, 9 S.W.3d 504 (2000).

There was no violation of the right to a speedy trial where defendant established a prima facie case because 483 days had elapsed since his arrest, but the state was able to show excludable periods of delay attributable to defendant for hearings on pre-trial motions under Rule 28.3(a). *Gwin v. State*, 340 Ark. 302, 9 S.W.3d 501 (2000).

Basic rule regarding speedy trial was that any defendant in circuit court who was not brought to trial within 12 months from the date of his arrest was entitled to have the charges dismissed with an absolute bar to prosecution. *Jones v. State*, 347 Ark. 455, 65 S.W.3d 402 (2002), cert. denied 536 U.S. 909, 122 S. Ct. 2366, 153 L. Ed 2d 187 (2002).

Trial court properly excluded time to hear motions filed by defendant, to complete a mental examination requested by defendant, to honor continuances requested by defendant, and for the state to obtain a witness who was unavailable to testify from the 12-month period which the state had to try defendant, who was charged with capital murder, aggravated robbery, and theft of property. *Romes v. State*, 356 Ark. 26, 144 S.W.3d 750 (2004).

Defendant's argument that the charge of theft by receiving the second vehicle should have been dismissed as having arisen out of

the same criminal episode when the charge of breaking and entering the first vehicle was dismissed for violation of the speedy-trial rule failed because the charges involved different vehicles, different locations and different victims, and the time for speedy trial consideration commenced to run on the date of arrest for the theft by receiving the second vehicle, August 18, 2001, and the trial conducted on that charge in July 2002 was timely for speedy trial purposes. *Yancy v. State*, 85 Ark. App. 53, 146 S.W.3d 375 (2004).

Defendant's motion pursuant to this rule to dismiss for lack of a speedy trial was improper because it was made after defendant had been tried and convicted on theft of property charges but before defendant's sentencing. *State v. Richardson*, 2010 Ark. 207, — S.W.3d —, 2010 Ark. LEXIS 248 (May 6, 2010).

As a juvenile's objection to the failure to have an extended juvenile jurisdiction hearing within 90 days was untimely, as the juvenile waived the right to insist on a timely hearing, and as the juvenile cited no authority as to what principle of fundamental fairness had been violated, there was no penalty for noncompliance with this rule under § 9-27-503(a). *D.B. v. State*, 2011 Ark. App. 151, — S.W.3d —, 2011 Ark. App. LEXIS 165 (Feb. 23, 2011).

### **Speedy Trial Rights Not Violated.**

Because defendant's trial did not occur until 639 days after defendant was arrested, defendant made a prima facie case that his right to a speedy trial was violated, but because only 146 days were chargeable to the state, the trial court did not err in denying defendant's motion to dismiss for lack of speedy trial; defendant's attorney filed a motion for continuance, stating that the speedy trial requirement was waived, and defendant was bound by the acts of his attorney. *Block v. State*, 2010 Ark. App. 603, — S.W.3d —, 2010 Ark. App. LEXIS 634 (Sept. 15, 2010).

Defense counsel was not ineffective for failing to file a motion to dismiss based on speedy trial violations; four periods of time, when excluded from the 442-day period between arrest and trial, left 287 days, which was well within the one-year period for a speedy trial in subsection (c) of this rule. *Rueda v. State*, 2012 Ark. 144, — S.W.3d —, 2012 Ark. LEXIS 164 (Apr. 5, 2012).

Although defendant's retrial commenced 491 days after a mistrial, subtracting a 168-day continuance from 491 days meant that defendant's trial commenced on day 323; because defendant was brought to trial within one year from the date of the mistrial, there was no violation of defendant's right to a speedy trial under subsection (c) of this rule. *Eubanks v. State*, 2012 Ark. 142, — S.W.3d —, 2012 Ark. LEXIS 162 (Apr. 5, 2012).



Defendant's right to a speedy trial was not violated because periods of time were excludable due to defendant's injuries from a car accident, defendant's conduct in failing to appear for trial, and defendant's extradition to Texas to serve a sentence there on other charges. *Sullivan v. State*, 2012 Ark. 74, — S.W.3d —, 2012 Ark. LEXIS 93 (Feb. 23, 2012).

#### **Supersession of Statutes.**

Former statute concerning length of time accused could be jailed prior to trial was superseded by this rule. *Cassell v. State*, 273 Ark. 59, 616 S.W.2d 485 (1981).

Former statute concerning the time for which an accused may be held to bail was superseded by this rule. *Jennings v. State*, 276 Ark. 217, 633 S.W.2d 373, cert. denied 459 U.S. 862, 103 S. Ct. 137, 74 L. Ed. 2d 117 (1982).

#### **Trial.**

##### **—Absolute Discharge.**

Where the record revealed no reason for the approximately six and one-half month delay in defendant's trial, and more than three full terms of court expired before his trial, he was discharged for violation of his speedy trial right. *Alexander v. State*, 268 Ark. 384, 598 S.W.2d 395 (1980) (decision based on rule prior to 1980 amendment).

An incarcerated defendant not brought to trial before the running of time is not entitled to absolute discharge, instead he is entitled to be recognized and released on order to appear, and the time for his trial is then computed pursuant to subsection (b) of this rule and ARCrP 28.2. *Matthews v. State*, 268 Ark. 484, 598 S.W.2d 58 (1980).

In a prosecution for murder, a three-year delay in bringing the defendant to trial caused by the failure of the municipal court to forward a copy of defendant's bond to the circuit court necessitated the defendant's absolute discharge. The failure of the State to check the available court records or otherwise demonstrate any diligence in locating the accused over a two-and-one half year period could not be excused. *Chandler v. State*, 284 Ark. 560, 683 S.W.2d 928 (1985).

Defendant was absolutely discharged by a writ of prohibition where he was not tried within 18 (now 12) months from the date of his arrest, no alias warrant was ever issued, and there was no evidence that defendant was unavailable or that he was notified of a court setting and failed to appear. *Glover v. State*, 287 Ark. 19, 695 S.W.2d 829 (1985) (decision based on rule prior to 1987 amendment).

A person held in violation of the rule is only entitled to release on his or her own recognition, not dismissal of the charges or absolute discharge. *Simpson v. Sheriff of Dallas County*, 333 Ark. 277, 968 S.W.2d 614 (1998).

##### **—Not Timely Held.**

Where the accused made a motion to dismiss for lack of speedy trial on October 3, 1979, the fact that the accused had been granted a continuance in August of 1979 did not affect the timeliness of his dismissal motion, because the accused asserted, and the State did not contest the assertion, that the third term of court after the date the accused was arrested and charged expired May 9, 1979, and the accused did not waive his right to a speedy trial under ARCrP 30.2 because he did not plead guilty and his motion was made before he was tried. *Garrison v. State*, 270 Ark. 426, 605 S.W.2d 467 (1980) (decision based on rule prior to 1980 amendment).

Where three full terms of court passed before defendant was tried and no good cause was shown for the delay, the speedy trial rules were not complied with, and it was error not to dismiss the charges. *Cash v. State*, 271 Ark. 881, 611 S.W.2d 510 (1981) (decision based on rule prior to 1980 amendment).

Where state in second term after defendant's arrest intended to try defendant on a certain date but cancelled the trial because the lead investigating officer intended to attend a law enforcement conference on that date and there was no request for a continuance, such explanation for not trying defendant was not a valid reason to pass the case for a full term of court. *Cash v. State*, 271 Ark. 881, 611 S.W.2d 510 (1981) (decision based on rule prior to 1980 amendment).

Where defendant was in custody on January 1, 1979, and trial was not set until October 8, 1980, in the fourth term of court, he was entitled to dismissal of the charges under ARCrP 30.1, because the state had not carried its burden of showing that certain time periods should be excluded under ARCrP 28.3. The period between recusal of the prosecuting attorney, who had been counsel to defendant's codefendant, and the filing of the appeal, could not be excluded since trial court did not immediately appoint a substitute state's attorney, and since it was not defendant's fault that the prosecutor hired the codefendant's counsel or that defendant had not been granted a severance, so that there was not good cause for exclusion of the period under subsection (h) of Rule 28.3. *Norton v. State*, 273 Ark. 289, 618 S.W.2d 164 (1981), overruled *Richards v. State*, 2 S.W.3d 766 (1999) (decision based on rule prior to 1980 amendment).

Where the time for trial commenced running on the date defendant was incarcerated in jail to await trial on the charge, and defendant remained in jail awaiting trial for five months until he was incarcerated in prison pursuant to conviction on another charge, but was not tried on the first charge until 14 months and 26 days from the date the time

commenced to run, and where the state failed to show any authorized cause for delay, the conviction had to be reversed and dismissed. *Floyd v. State*, 280 Ark. 226, 656 S.W.2d 701 (1983).

Resetting of defendant's trial from its original date to a date more than 1 year after charges were filed, without appropriate orders or docket entries, violated the speedy trial rule because it fell outside the 1 year period provided in subsection (b) of this rule to perfect trial. *Turbyfill v. State*, 312 Ark. 1, 846 S.W.2d 646 (1993).

Alleged violation of subsection (a) of this rule is not a basis for reversal. *Matthews v. State*, 313 Ark. 327, 854 S.W.2d 339 (1993).

Since the record reflects that defendant was not tried within the allowable time, the trial court refused to settle the record, the Attorney General was left with no choice other than to confess error and recognize that defendant's conviction must be reversed and dismissed. *Dupree v. State*, 316 Ark. 324, 871 S.W.2d 570 (1994).

The state's speedy trial rules patently barred the defendant's prosecution; even though the state's time to bring the defendant to trial was legally extended from his date of arrest by 505 days (giving the state allowance for its appeal and delays due to defendant's pretrial trial motions after remand), the state still failed to meet the required 12-month speedy trial deadline provided under this rule. *Thornton v. State*, 317 Ark. 257, 878 S.W.2d 378 (1994).

Speedy trial violation shown. *Durbin v. State*, 59 Ark. App. 207, 955 S.W.2d 912 (1997).

Appellant's right to a speedy trial was violated when his trial commenced on the 600th day following his arrest where only 168 days of delay were excludable as attributed to appellant and the state failed to show cause for the additional 70 days of delay. *Zangerl v. State*, 352 Ark. 278, 100 S.W.3d 695 (2003).

Defendant successfully showed, and the state conceded, that defendant's prosecution was 113 days over the 12-month limit for speedy trial purposes; therefore, defendant's motion to dismiss should have been granted. *Berry v. Henry*, 364 Ark. 26, 216 S.W.3d 93 (2005).

#### —Timely Held.

Where defendant was arrested in January, 1977, during the October, 1976 term of court, charged by information a month later during the next term of court, had trial set for about 9 weeks after the charge and had an attorney appointed for him, had a hearing on the date set for trial at which his appointed attorney was relieved and he was given 10 days to find an attorney, and finally the trial was held some 53 weeks after the initial arrest, the case was tried within the time provided in

these rules, after the continuance, and was not a violation of his right to speedy trial since the delay was at his request and not prejudicial. *Campbell v. State*, 264 Ark. 372, 571 S.W.2d 597 (1978) (decision based on rule prior to 1980 amendment).

Since defendant was brought to trial within the first full term of the county circuit court following his arrest, he was not denied his constitutional right to a speedy trial. *Wright v. State*, 267 Ark. 264, 590 S.W.2d 15 (1979), cert. denied, 498 U.S. 1126, 111 S. Ct. 1089, 112 L. Ed. 2d 1193 (1991) (decision based on rule prior to 1980 amendment).

Where four terms of court expired in 1979 before defendant who was charged in October, 1978, was brought to trial but one 1979 term was excluded because of unavailability of court facilities and one 1979 term and two 1978 terms were excluded because of defendant's request for a continuance, defendant's right to speedy trial was not violated. *State v. Messer*, 269 Ark. 431, 601 S.W.2d 857 (1980) (decision based on rule prior to 1980 amendment).

The term in which a defendant is charged is not counted in computing the terms and the expiration of full terms is required; thus, where the first full term after defendant's arrest on November 10, was the term commencing in March, 1979, and the second was that commencing in September, 1979, defendant's trial, being in October, 1979, was well within the statutory limit. *Wright v. State*, 270 Ark. 78, 603 S.W.2d 408 (1980) (decision based on rule prior to 1980 amendment).

Regardless of the number of judges, there are but two terms of court in Jefferson County in any one-year period — the one term that begins in March and the one that begins in October; therefore, where the first term that was counted began March 5, 1979, the second term began October 1, 1979, and the third term began March 3, 1980, and where the case was set for trial on April 21, 1980, and the third full term of court did not end until October 6, 1980, there was no denial of a speedy trial. *Kemp v. State*, 270 Ark. 835, 606 S.W.2d 573 (1980) (decision based on rule prior to 1980 amendment).

Where defendant was not tried until 31 days after the third term of court had expired following his arrest, there was good cause for two delays under subsection (h) of ARCrP 28.3, since, after defendant's trial was set for April 3, defendant's counsel was relieved of his appointment because he was named deputy prosecuting attorney and a replacement was named on May 14, and then further delay occurred where, on defendant's motion, the prosecuting attorney was disqualified on the ground that his professional association with defendant's first attorney created a conflict of interest and the delay continued until a spe-



cial prosecutor was appointed on August 18; thus defendant was not entitled to discharge under this rule. *Divanovich v. State*, 273 Ark. 117, 617 S.W.2d 345 (1981) (decision based on rule prior to 1980 amendment).

Where defendant was arrested in November 1978, the next four terms of court began on January 1, April 1, July 1 and October 1, and the judge found that there had been a period of excusable delay, defendant was not entitled to dismissal when the case was set for trial in September, within three terms as provided by this rule and ARCrP 30.1; even if there was no excusable delay, defendant would only have been entitled to a release on his own recognizance under ARCrP 30.1, not absolute discharge. *Cassell v. State*, 273 Ark. 59, 616 S.W.2d 485 (1981) (decision based on rule prior to 1980 amendment).

Where a period of only four and one-half months had elapsed between the date of the defendant's arrest and his trial for burglary, the defendant was brought to trial well within the time period required in this state by this rule, and the fact that the defendant was not brought to trial within the time frame of the federal act governing federal criminal trials was irrelevant, since the federal act did not purport to preempt this area of state law. *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982).

Where approximately one year elapsed between defendant's arrest in California and commencement of trial in Arkansas, but arrest was for parole violation as well as for avoiding prosecution for murder, and parole was revoked while defendant still had time to serve on former sentence, it could be concluded that defendant, who was extradited to Arkansas one month after arrest, was being held in prison in Arkansas for conviction of another crime for nine of the 11 months between his return to Arkansas and commencement of murder trial; accordingly, defendant was not entitled to relief pursuant to this rule. *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983).

The period of delay resulting from the absence of a defendant is excludable under ARCrP 28.3(e); accordingly, where defendant fled the state and disappeared for ten months, the trial which was held within 21 months of the date on which he was charged, was held within the required 18 (now 12) months when the ten-month absence was excluded. *Wilson v. State*, 10 Ark. App. 176, 662 S.W.2d 204 (1983).

Where the defendant's trial began four months after his last mistrial was declared and his case was speedily processed from its inception, the defendant was not denied a speedy trial simply because just over nine months elapsed from the time the defendant

was charged until he was ultimately convicted. *Glenn v. State*, 281 Ark. 454, 664 S.W.2d 868 (1984).

When excludable periods were added, defendant was tried within statutory period of time. *Allen v. State*, 294 Ark. 209, 742 S.W.2d 886 (1988); *Foster v. State*, 38 Ark. App. 245, 832 S.W.2d 293 (1992).

Where trial was originally delayed due to the defendant's unavailability, the trial court's giving defendant the first available date, which was five days after the time for speedy trial expired, was one of the "exceptional circumstances" contemplated by ARCrP 28.3. *Henson v. State*, 38 Ark. App. 155, 832 S.W.2d 269 (1992).

No violation of this rule shown where there were any number of excludable periods including defendant's delay in hiring counsel, his filing of a motion to suppress evidence, and his waiver and then withdrawal of his right to a jury trial. *Cupples v. State*, 326 Ark. 31, 929 S.W.2d 150 (1996).

Although defendant was tried on a date eighty-two days beyond the twelve-month constraint of this rule, his constitutional right to a speedy trial was not violated where there were 127 days of "excludable time" under this ARCrP 28.3(c). *Jones v. State*, 329 Ark. 603, 951 S.W.2d 308 (1997).

In a sexual abuse case, the court did not err by denying defendant's motion to dismiss on speedy trial grounds where the trial court stated on the record that it was continuing the rape-shield hearing until March 25, and all attorneys agreed to that date; further, the court entered its February 14, 2002, order stating that a hearing on the rape shield motions and all other motions filed herein would be heard on March 25, 2002, at 11:00 a.m., and the matter was set for trial on May 22, 2002, and that memorialization of the delay and the reasons therefore satisfied the requirements of Ark. R. Crim. P. 28.3. *Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004).

Trial court did not err in denying defendant's motion to dismiss because of a speedy-trial violation as 505 days were properly excluded and the state was only required to account for 493 days. *Dodson v. State*, 358 Ark. 372, 191 S.W.3d 511 (2004).

Defendant was not deprived of his right to a speedy trial where he was arrested for the rape of his step-daughter on April 8, 2004, and tried on September 29, 2004, because the fact that defendant had been arrested in September 2003 for the charge of rape of his step-daughter in a different county had no bearing on the speedy trial calculations in this case as the time began to run with the arrest in this case. *Anderson v. State*, 93 Ark. App. 454, 220 S.W.3d 225 (2005).

**Violation Shown.**

Appellant's speedy trial rights were violated because he was not brought to trial within 365 days of his arrest, even though several days were excluded under Ark. R. Crim. P. 28.3(d)(1) where a continuance was granted due to the fact that a witness was unable to appear after suffering complications from surgery. Moreover, although the time a competency exam was ordered stopped the speedy trial clock, it should have been restarted when the report was filed, and the state did not demonstrate that a pretrial motion filed by appellant caused any delay in the trial. *Eagle v. State*, 2012 Ark. App. 187, — S.W.3d —, 2012 Ark. App. LEXIS 284 (Feb. 29, 2012).

**Waiver.**

Where defendant did not raise his motion to dismiss revocation petition for lack of a speedy hearing before the hearing, he waived his rights. *Summers v. State*, 292 Ark. 237, 729 S.W.2d 147 (1987), decided prior to 1987 amendment.

A defendant, by plea of guilty, waives a number of significant rights, including the right to a speedy trial. *Kennedy v. State*, 297 Ark. 488, 763 S.W.2d 648 (1989); *Nettles v. State*, 303 Ark. 8, 791 S.W.2d 702 (1990).

Where an accused is offered a speedy trial but requests that the case be tried at a later date, and that delaying act is memorialized by a record taken at the time it occurred, he cannot complain that his right to speedy trial was denied. *Jenkins v. State*, 301 Ark. 586, 786 S.W.2d 566 (1990).

Defendant did not waive his right to a speedy trial where his motion for dismissal was made well in advance of his trial and was thus timely raised. *Hicks v. State*, 305 Ark. 393, 808 S.W.2d 348 (1991), questioned *Bowen v. State*, 42 S.W.3d 579 (2001).

Defendant was not required to object to the delay of his second trial, caused by holding the murder trial first and, thereby, did not lose his right to contend that the delay violated his right to a speedy trial. *Raglin v. State*, 35 Ark. App. 181, 816 S.W.2d 618 (1991).

The State has a right to be notified prior to the hearing that a defendant will raise a speedy-hearing objection; defendant waived his objection by failing to move for dismissal of the petition prior to the hearing. *Wilkerson v. State*, 53 Ark. App. 52, 920 S.W.2d 15 (1996).

The defendant effectively waived his right to speedy trial where he affirmatively waived his right well within the 12-month-period for speedy trial and attached no conditions or limitations to his waiver. *Eubanks v. Humphrey*, 334 Ark. 21, 972 S.W.2d 234 (1998).

The defendant revoked his waiver of his right to speedy trial when his counsel ap-

prised the trial court that he no longer wished to waive the right; the fact that counsel did not convey this message through a formal motion does not change the character of the message itself. *Eubanks v. Humphrey*, 334 Ark. 21, 972 S.W.2d 234 (1998).

**Witness Unavailable.**

Where the trial court found that certain state witnesses were unavailable for the third term of court because of previous court commitments, the third term was properly excluded under ARCrP 28.3, in calculating the three terms within which the case must be tried; thus, the court did not err in denying the defendant's motion to dismiss for failure to try the case within three terms. *Roleson v. State*, 272 Ark. 346, 614 S.W.2d 656 (1981), questioned *Wingfield v. State*, 303 Ark. 291, 796 S.W.2d 574 (1990) (decision based on rule prior to 1980 amendment).

Where defendant's employment was known, then even though he had moved to a new residence and had his telephone disconnected, he was not absent or unavailable. *Caulkins v. Crabtree*, 319 Ark. 686, 894 S.W.2d 138 (1995).

**Writ of Prohibition.**

Petition for a writ of prohibition, seeking to prevent a trial in violation of speedy-trial limits, denied without addressing the merits of the petition, where defendant failed to produce a record that demonstrated that the writ was warranted. *Sherwood v. Glover*, 331 Ark. 124, 958 S.W.2d 526 (1998).

Where a criminal information was filed charging defendant with rape on January 5, 2005, he filed a motion to dismiss for denial of a speedy trial on February 2, 2007; the trial court denied the motion. The state supreme court declined to address defendant's speedy-trial argument during the interlocutory appeal; the proper method for addressing the denial of a motion to dismiss for a speedy-trial violation under this rule was by a petition for writ of prohibition. *Williams v. State*, 371 Ark. 550, 268 S.W.3d 868 (2007).

**Cited:** *Grooms v. State*, 260 Ark. 879, 545 S.W.2d 610 (1977); *Walker v. State*, 262 Ark. 331, 556 S.W.2d 655 (1977); *Callender v. State*, 263 Ark. 217, 563 S.W.2d 467 (1978); *Bosnick v. State*, 275 Ark. 52, 627 S.W.2d 23 (1982); *Hall v. State*, 279 Ark. 265, 650 S.W.2d 587 (1983); *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648 (1983), cert. denied 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed 2d 726 (1984); *Hall v. State*, 281 Ark. 282, 663 S.W.2d 926 (1984); *Loane v. State*, 12 Ark. App. 374, 677 S.W.2d 864 (1984), overruled in part *Cunningham v. State*, 14 S.W.3d 869 (2000); *Williams v. Lockhart*, 772 F.2d 475 (8th Cir. 1985); *Scott v. State*, 286 Ark. 339, 691 S.W.2d 859 (1985); *Ellison v. Langston*, 290 Ark. 238, 718 S.W.2d 446 (1986); *Lowe v. State*, 290 Ark. 403, 720



S.W.2d 293 (1986), overruled *Richards v. State*, 2 S.W.3d 766 (1999); *Wilmoth v. State*, 291 Ark. 233, 724 S.W.2d 148 (1987); *Howard v. State*, 291 Ark. 633, 727 S.W.2d 830 (1987); *Gooden v. State*, 295 Ark. 385, 749 S.W.2d 657 (1988); *Nelson v. State*, 297 Ark. 58, 759 S.W.2d 215 (1988); *Hardcastle v. State*, 25 Ark. App. 157, 755 S.W.2d 228 (1988); *McBride v. State*, 297 Ark. 410, 762 S.W.2d 785 (1989); *Stanley v. State*, 297 Ark. 586, 764 S.W.2d 426 (1989); *Scott v. State*, 298 Ark. 31, 764 S.W.2d 616 (1989); *Cox v. State*, 299 Ark. 312, 772 S.W.2d 336 (1989); *Asher v. State*, 300 Ark. 57, 776 S.W.2d 816 (1989), criticized *Key v. State*, 300 Ark. 66, 776 S.W.2d 820 (1989); *State v. Tipton*, 300 Ark. 211, 779 S.W.2d 138 (1989); *White v. State*, 301 Ark. 74, 781 S.W.2d 478 (1989); *Johnson v. State*, 27 Ark. App. 217, 769 S.W.2d 37 (1989); *Casoli v. State*, 302 Ark. 412, 790 S.W.2d 165 (1990); *Towe v. State*, 304 Ark. 239, 801 S.W.2d 42 (1990); *Washington v. State*, 31 Ark. App. 62, 787 S.W.2d 254 (1990); *Lukehart v. State*, 32 Ark. App. 152, 798 S.W.2d 117 (1990); *J.B. v. State*, 309 Ark. 70, 827 S.W.2d 144 (1992); *Cash v. State*, 40 Ark. App. 40, 842 S.W.2d 440 (1992); *Dokes v. Lockhart*, 992 F.2d 833 (8th Cir. 1993), cert. denied 513 U.S. 968, 115 S. Ct. 437, 130 L. Ed. 2d 348 (1994); *Green v. State*, 313 Ark. 87, 852 S.W.2d 110 (1993); *Smith v. State*, 313 Ark. 93, 852 S.W.2d 109 (1993); *Hufford v. State*, 314 Ark. 181, 861 S.W.2d 108 (1993); *Beasley v. Graves*, 315 Ark. 663, 869 S.W.2d 20 (1994); *Archer v. Benton County Circuit Court*, 316 Ark. 477, 872 S.W.2d 397 (1994); *Thornton v. State*, 317 Ark. 257, 878 S.W.2d 378 (1994); *Cranford v. Crabtree*, 324 Ark. 234, 919 S.W.2d 514 (1996); *Davis v. State*, 325 Ark. 36, 924 S.W.2d 452 (1996); *Byrd v. State*, 326 Ark. 10, 929 S.W.2d 151 (1996); *Cupples v. State*, 326 Ark. 31, 929 S.W.2d 150 (1996); *Goston v. State*, 326 Ark. 106, 930 S.W.2d 332 (1996); *Goston v. State*, 55 Ark. App. 17, 930 S.W.2d 387 (1996); *White v. State*, 329 Ark. 487, 951 S.W.2d 556 (1997); *Akins v. State*, 330 Ark. 228, 955 S.W.2d 483 (1997); *White v. State*, 330 Ark. 813, 958 S.W.2d 519 (1997); *Peete v. State*, 59 Ark. App. 186, 955 S.W.2d 708 (1997); *Dean v. Plegge*, 331 Ark. 141, 958 S.W.2d 5 (1998); *Strickland v. State*, 331 Ark. 402, 962 S.W.2d 769 (1998); *Marks v. State*, 332 Ark. 374, 965 S.W.2d 764 (1998); *Jackson v. State*, 334 Ark. 406, 976 S.W.2d 370 (1998); *Huddleston v. State*, 339 Ark. 266, 5 S.W.3d 46 (1999); *McDole v. State*, 339 Ark. 391, 6 S.W.3d 74 (1999); *Ibsen v. Plegge*, 341 Ark. 225, 15 S.W.3d 686 (2000); *Worley v. State*, 71 Ark. App. 80, 26 S.W.3d 142 (2000); *Ballard v. State*, 75 Ark. App. 15, 53 S.W.3d 53 (2001); *Cherry v. State*, 347 Ark. 606, 66 S.W.3d 605 (2002).

## **Rule 28.2. When time commences to run.**

(a) The time for trial shall commence running from the date of arrest or service of summons.

(b) When the charge is dismissed upon motion of the defendant and subsequently the dismissed charge is reinstated, or the defendant is arrested or charged with the same offense, the time for trial shall commence running from the date the dismissed charge is reinstated or the defendant is subsequently arrested or charged, whichever is earlier; and when the charge is dismissed upon motion of the defendant and subsequently the charge is reinstated following an appeal, the time for trial shall commence running from the date the mandate is issued by the appellate court.

(c) If the defendant is to be retried following a mistrial, the time for trial shall commence running from the date of mistrial.

(d) If the defendant is to be retried following an order by the trial court granting a new trial, the time for trial shall commence running from the date of the order granting a new trial, unless the state appeals the order granting a new trial, in which case the time for trial shall commence running from the date the mandate is issued by the appellate court.

(e) If the defendant is to be retried following an appeal of a conviction, the time for trial shall commence running from the date the mandate is issued by the appellate court.

(f) If the defendant is to be retried following a collateral attack of a conviction, the time for trial shall commence running from the date of the order invalidating the conviction, unless the state appeals the order invalidating the conviction, in which case the time for trial shall commence

running on the date of remand by the appellate court. (Amended June 30, 1980, effective July 1, 1980; amended February 19, 1996; amended September 26, 2002; amended April 26, 2007.)

**Court's Notes, 1996 Amendment:** Subsection (b) was amended to address situations where the defendant successfully moves to have charges dismissed but charges are subsequently reinstated by the trial court or on appeal. See *Thornton v. State*, 317 Ark. 257, 878 S.W.2d 378 (1994).

**Reporter's Notes, 2002 Amendment:** Prior to the amendment, subsection (c) applied to retrials following a mistrial, retrials following an order granting a new trial, retrials following an appeal, and retrials following a collateral attack. The amendments split these various proceedings into new separate subsections.

The amendments also change the rule regarding a retrial following an appeal of an order granting a new trial. Under new subsection (d), the time for retrial begins running when the appellate court returns the case to the trial court. This changes the rule applied, but not the result reached in *Cherry v. State*, 347 Ark. 606, 66 S.W. 3d 605 (2002) (time for retrial started running when the trial court entered order granting a new trial but the period during which the new trial order was on appeal treated as an excluded period under Ark. R. Crim. P. 28.3).

The amendments were not intended to change the rule that time for trial begins to run without demand by the defendant.

**Addition to Reporter's Notes, 2007 Amendment:** Prior to the 2007 amendment, this rule provided that the time for trial began to run on the date the charge was filed, except when the defendant was held in custody or on bail prior to the filing of the charge, in which case the time for trial began to run on the date of arrest. The 2007 amendment changed the speedy trial start date to the date of arrest, whether the charge is filed before or after that date. The reference to "service of summons" applies to those cases in which the defendant is brought before the court via a summons, rather than an arrest. See Rule 6 — Issuance of Summons in Lieu of Arrest Warrant.

The 2007 amendment applies to prosecutions initiated after the effective date of the amendment. If a person was charged with an offense before the effective date of the amendment, but arrested after the effective date of the amendment, the time for trial commences on the date the charge was filed.

### 1987 Unofficial Supplementary Commentary to Rule 28.2

#### Scope of Commentary.

The following commentary discusses only cursorily problems that arose under the pre-1980 version of this Rule and that have been eliminated by the 1980 and 1981 amendments. See, *In The Matter of Rules of Criminal Procedure, Amendment of Article VIII Speedy Trial, Per Curiam*, June 30, 1980 (269 Ark. 988) and *Re: Amendment to Rule 28.3(f) of the Arkansas Rules of Criminal Procedure, Per Curiam*, June 8, 1981, 273 Ark. 551.

Rules 28.1 and 28.3 are interrelated. Cases interpreting these provisions are discussed in the commentary to Rules 28.1 and 28.3 as well as in the commentary to Rule 28.2.

#### When Time Begins to Run.

Though there is language in recent cases to the contrary, time begins to run under Rule 28.2 from the date a charge is filed in circuit court, unless the defendant has been arrested and is in custody, out on bail, or has been lawfully set at liberty, in which case time runs from date of arrest. Compare *Coleman v. Lofton*, 289 Ark. 573, 715 S.W.2d 435 (1986) (time runs from the date of arrest, not from the date charges are filed) with *Hall v. State*, 281 Ark. 282, 663 S.W.2d 926 (1984) and

*Walker v. State*, 288 Ark. 52, 701 S.W.2d 372 (1986) (time runs from date charge is filed). In most cases, defendants are not charged in circuit court until after they are arrested either without a warrant or pursuant to a warrant issued by an inferior court. Where a defendant whose whereabouts are unknown is charged in circuit court, the delay resulting from his absence or unavailability is excludable under Rule 28.3(e).

In *Coleman*, 19 months passed between the date arrest warrants were issued and the date of appellant's trial. The decision does not explicitly say whether the arrest warrants were issued pursuant to an information filed in circuit court or, alternatively, by an inferior court. If the latter was the case, there was no genuine issue relating to the lapse of time following the "charge," because, when Rule 28.2 is read in conjunction with Rule 28.1, it is reasonably clear that Rule 28.2 is geared to charges filed in *circuit court*.

In any event, though the Court has consistently held that when speedy trial rules have been prima facie violated the burden is upon the state to show good cause for the delay — see, e.g., *Glover v. State*, 287 Ark. 19, 20, 695



S.W.2d 829, 830 (1985) — the Court in *Coleman* did not hold the prosecution to this standard, remarking instead that “any delay between the time the charge is made and the arrest, unless deliberately intended to prejudice the defendant, is not a consideration when determining if his constitutional rights have been violated.” 289 Ark. at 576, 715 S.W.2d at 436-37. For this proposition, the Court relied on *United States v. Marion*, 404 U.S. 307, 30 L.Ed.2d 468 (1971). *Marion* dealt with prejudice claimed to flow from the delay between the criminal conduct charged and the indictment, not the delay between indictment and arrest or trial, however. Also, the *Coleman* Court’s reliance on the *Glover* decision is puzzling in that *Glover* was a case in which the defendant was arrested and set at liberty, clearly requiring that the time for trial be calculated from the date of arrest under Rule 28.2(a). *Walker v. State*, 288 Ark. 52, 701 S.W.2d 372 (1986), the other case relied upon in *Coleman*, apparently dealt with a situation in which the defendant was lawfully at liberty on bond or recognizance prior to trial, not one where the defendant was not arrested for over ten months following the issuance of the arrest warrants as in *Coleman*.

In *Coleman*, arrest warrants were issued on April 4, 1984 but remained unserved until February 26, 1985, over ten months later, because appellant’s whereabouts were unknown. Instead of ruling that under 28.2(a) the time for trial ran from the date the charge was filed as extended by a Rule 28.3(e) excluded period resulting from appellant’s absence or unavailability, the Court held that time began to run on the date of defendant’s arrest. The Court may have interpreted the Rule 28.2(a) language “lawfully at liberty” to encompass a situation where defendant’s whereabouts are unknown at the time an arrest warrant is issued, though that language in the context of 28.2(a) appears to refer to circumstances under which a defendant is, for example, released on his own recognizance after arrest “to answer for ... an offense.” This was the situation in *Glover v. State* relied upon by the Court in *Coleman*.

#### **Application to De Novo Trials in Misdemeanor Cases.**

The Arkansas Court of Appeals has decided that the time within which the defendant must be brought to trial after appeal of a

misdemeanor conviction begins running under Rule 28.1(c) and 28.2 on the day a case is appealed to circuit court. *Shaw v. State*, 18 Ark. App. 243, 712 S.W.2d 338 (1986). In *Shaw*, appellant was convicted in municipal court of driving while intoxicated on August 4, 1983. He appealed his conviction to circuit court on August 17, 1983, but the case was not set for trial until July 10, 1985. A trial followed on November 14, 1985. The Court held that time for trial began running on August 17 and that the trial court should have dismissed the charge because appellant’s 1985 trial occurred more than 18 months after August 17, 1983.

The Court also observed that Rules 28.3(b), (c), and (i) require that the trial judge make certain docket entries. Where, because of the court’s failure to make entries, the record does not disclose whether periods of time should be deemed excluded, a later ruling by the trial judge not supported by the court docket that excluded periods exist will not be upheld.

#### **Effect of Material.**

Trials following mistrials are explicitly governed by Rule 28.2(c), which has been found constitutional. *Glenn v. State*, 281 Ark. 454, 664 S.W.2d 868 (1984).

#### **Defendant Charged While in Prison.**

Where a defendant commits a crime, is returned to prison for a parole violation, is charged with the crime while in prison, but is not arrested on the charge until the day he is to be released from prison months later, time for trial begins running on the date the charge is filed. *Hall v. State*, 281 Ark. 282, 663 S.W.2d 926 (1984), interpreting Rules 28.1 and 28.2.

**Publisher’s Notes.** The introductory paragraph of the per curiam order of the Supreme Court of Arkansas issued on June 30, 1980 read: “Article VIII is amended by this restatement of the article which shall become effective on July 1, 1980. The time for trial of all defendants that has commenced to run pursuant to Rule 28.2 prior to July 1, 1980, shall continue to be governed by Article VIII as it existed prior to this amendment, but the time for trial of all defendants that commences to run pursuant to Rule 28.2 on July 1, 1980, or thereafter, shall be governed by this amendment of Article VIII:.”

This rule was set out in the per curiam order of the Supreme Court issued June 30, 1980, but no change was made in the rule.

### **RESEARCH REFERENCES**

**Ark. L. Rev. Note**, Speedy Trial and Excludable Delays Under the Arkansas Rules of Criminal Procedure: Norton v. State, 35 Ark. L. Rev. 591.

**U. Ark. Little Rock L.J.** Stockburger, Sur-

vey of Arkansas Law: Criminal Procedure, 2 U. Ark. Little Rock L.J. 217.

Arkansas Law Survey, Irving and Schoen, Criminal Procedure, 9 U. Ark. Little Rock L.J. 129.

Seventeenth Annual Survey of Arkansas Law — Criminal Procedure, 17 U. Ark. Little Rock L.J. 449.

## CASE NOTES

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### In General.

It is plain from the provisions of this rule, ARCrP 28.1 and ARCrP 28.3 that the drafters recognized that an accused who is incarcerated on pending charges, or on different charges, is at a disadvantage simply by virtue of his confinement. Hence, for such defendants, shorter periods for trial are provided by the speedy trial rule. *Miller v. Langston*, 296 Ark. 486, 757 S.W.2d 562 (1988).

Defendant did not waive his right to move for dismissal based on a speedy trial violation where his motion to dismiss was made before trial, and, under the circumstances, he was not required to challenge the court-ordered exclusion of time immediately upon issuance of the court's order; it is the burden of the prosecution and the courts to see that a defendant is brought to trial on time. *Tanner v. State*, 324 Ark. 37, 918 S.W.2d 166 (1996).

### Construction.

The twelve-month period in this rule is interrelated with ARCrP 28.3, which sets out the periods of delay that "shall" be excluded in computing time for a speedy trial. *Patterson v. State*, 318 Ark. 358, 885 S.W.2d 667 (1994).

### Applicability.

Before subsection (c) of this rule applies, the provision plainly presumes, at the least, the state had commenced trying its case against the defendant and the trial concluded

in a mistrial or the defendant had been tried but his conviction had been set aside, appealed, or collaterally attacked. *Thornton v. State*, 317 Ark. 257, 878 S.W.2d 378 (1994).

### Appeals to Circuit Court.

Even though this rule does not specifically address appeals from municipal court, upon an appeal of a municipal court decision to circuit court, the speedy trial rule begins to run from the day the appeal is filed in circuit court. *McBride v. State*, 297 Ark. 410, 762 S.W.2d 785 (1989).

### Burden of Proof.

The burden is upon the state to show good cause for delay if the accused is not brought to trial within the time limitations established in the speedy trial rules. *Chandler v. State*, 284 Ark. 560, 683 S.W.2d 928 (1985); *Williams v. State*, 290 Ark. 286, 718 S.W.2d 935 (1986), cert. denied 481 U.S. 1068, 107 S. Ct. 2460, 95 L. Ed 2d 869 (1987); *Allen v. State*, 294 Ark. 209, 742 S.W.2d 886 (1988).

Once the accused has shown that the trial was held after the speedy trial period expired, the burden rests upon the state to show the delay was legally justified. *Keys v. State*, 23 Ark. App. 219, 745 S.W.2d 628 (1988).

### Calculation of Time.

The date the charges are filed is the beginning for the calculation of the time for a speedy trial. *Keys v. State*, 23 Ark. App. 219, 745 S.W.2d 628 (1988).

An order allowing the withdrawal of a plea of guilty is analogous to an order granting a new trial, and the time for a trial begins to run anew after an order is entered allowing the withdrawal of a guilty plea. *Kennedy v. State*, 297 Ark. 488, 763 S.W.2d 648 (1989); *Nettles v. State*, 303 Ark. 8, 791 S.W.2d 702 (1990); *Towe v. State*, 304 Ark. 239, 801 S.W.2d 42 (1990).

Right to a speedy trial held not infringed. *Scott v. State*, 298 Ark. 31, 764 S.W.2d 616 (1989).

Pursuant to Rule 28.3(a), the period of delay resulting from an examination and hearing on the competency of the defendant as provided under § 5-2-305 and the period during which he is incompetent to stand trial is excludable. *McConaughy v. State*, 301 Ark. 446, 784 S.W.2d 768 (1990).

Time limitations for trial begin running on the date the charge is filed; there is no requirement that a defendant be arrested be-



fore the 12-month time period for speedy trial begins to run. *Nettles v. State*, 303 Ark. 8, 791 S.W.2d 702 (1990).

The state failed to show that there were excludable periods under ARCP 28.3(e) resulting from the absence or unavailability of the defendant, where the defendant lived in the same city, was at the same job during the time in question, and was in the police department on 4 separate occasions for other violations before he was finally arrested. *Tlapek v. State*, 305 Ark. 272, 807 S.W.2d 467 (1991).

Where defendant was in prison in another state, for a different crime, and was extradited to Arkansas to stand trial, he would have had to affirmatively request a trial in order to activate the speedy trial rule and where defendant did not, his right to a speedy trial did not begin to run until his actual return to the state. *Gillie v. State*, 305 Ark. 296, 808 S.W.2d 320 (1991).

Once defendant presented proof that the defendant missed the scheduled psychiatric appointments, and the trial court found that the delay was not attributable to him personally, the burden shifted back to the state to come forward with an explanation to have the time waiting for the exam excluded. *Brawley v. State*, 306 Ark. 609, 819 S.W.2d 704 (1991).

The period of delay resulting from an examination and hearing on the competency of the defendant was excludable from the 12-month period. *Hubbard v. State*, 306 Ark. 153, 812 S.W.2d 107 (1991).

When the defendant is scheduled for trial within the time for speedy trial and the trial is postponed because of the defendant, that is "good cause" to exclude the time attributable to the delay. *Lewis v. State*, 307 Ark. 260, 819 S.W.2d 689 (1991).

Although mistrial allegedly resulted from the prosecutor's actions, this rule should have applied and the speedy trial time period commenced at the time of filing of charges, not at time of arrest. *Odum v. State*, 311 Ark. 576, 845 S.W.2d 524 (1993).

The twelve-month period runs from the date of arrest for a person who has been held in custody, and not from the date of the filing of the information. *Bradford v. State*, 328 Ark. 701, 947 S.W.2d 1 (1997).

The speedy trial period commenced when the defendant was arrested on June 25, 1997, rather than when the felony information was later filed on November 6, 1997. *Jackson v. State*, 334 Ark. 406, 976 S.W.2d 370 (1998).

The issuance of a detainer to an inmate who is serving time on an unrelated charge does not trigger the commencement of the speedy trial period. *Jackson v. State*, 334 Ark. 406, 976 S.W.2d 370 (1998).

The speedy trial rules do not commence running until all the elements of the charged

offense have been completed. *Cheatham v. State*, 63 Ark. App. 106, 974 S.W.2d 490 (1998).

The speedy trial rules with respect to a murder charge did not begin to run on the date the defendant was arrested for the battery which eventually caused the victim's death since all of the elements of murder were not completed on that date. *Cheatham v. State*, 63 Ark. App. 106, 974 S.W.2d 490 (1998).

Where defendant stole a car with a passenger inside in Pulaski County, and proceeded to Faulkner County and committed crimes, and was arrested in Faulkner County on November 13, 1999, but not arrested in Pulaski County until May 12, 2000, and was convicted of the Pulaski County crimes on January 24, 2001, the theft-by-receiving charge for which defendant was arrested in Faulkner County did not link the distinct crimes committed in Faulkner County to the distinct crimes, including the theft-of-property charge, for which defendant was subsequently arrested in Pulaski County for purposes of the running of the speedy trial period in Pulaski County. *Nelson v. State*, 350 Ark. 311, 86 S.W.3d 909 (2002).

Appellant's right to a speedy trial was violated when his trial commenced on the 600th day following his arrest where only 168 days of delay were excludable as attributed to appellant and the state failed to show cause for the additional 70 days of delay. *Zangerl v. State*, 352 Ark. 278, 100 S.W.3d 695 (2003).

Defendant's argument that the charge of theft by receiving the second vehicle should have been dismissed as having arisen out of the same criminal episode when the charge of breaking and entering the first vehicle was dismissed for violation of the speedy-trial rule failed because the charges involve different vehicles, different locations and different victims, and the time for speedy trial commenced to run on the date of arrest for the theft by receiving the second vehicle, August 18, 2001, and the trial conducted on that charge in July 2002 was timely for speedy trial purposes. *Yancy v. State*, 85 Ark. App. 53, 146 S.W.3d 375 (2004).

Defendant successfully showed, and the state conceded, that defendant's prosecution was 113 days over the 12-month limit for speedy trial purposes; therefore, defendant's motion to dismiss should have been granted. *Berry v. Henry*, 364 Ark. 26, 216 S.W.3d 93 (2005).

Defendant's speedy-trial right was not violated and the trial court did not err when it denied his motion to dismiss because the trial was postponed due to the need for the appointment of new counsel, which was excludable for good cause pursuant to Ark. R. Crim. P. 28.3(h), and due to defendant's pretrial

motions, including his motions for a polygraph examination, to admit certain evidence under the Rape Shield law, to compel discovery, and for a mental evaluation, which was excludable under Ark. R. Crim. P. 28.3(a). *Parker v. State*, 93 Ark. App. 472, 220 S.W.3d 238 (2005).

#### **Continuance.**

Motions for continuance made after speedy trial deadline has passed did not constitute acquiescence in delay. *Duncan v. State*, 294 Ark. 105, 740 S.W.2d 923 (1987).

In a child pornography case, defendant's speedy trial rights were not violated where he was arrested on March 28, 2001, and his trial began on May 15, 2002, because defendant moved for a continuance on January 10, 2002, and the trial court granted the continuance until May 15, 2002; the additional 48 days beyond the 12 month period were during that continuance, and all of the time from January 10, 2002, until May 15, 2002, was properly excluded from the calculation of the speedy-trial period. *George v. State*, 358 Ark. 269, 189 S.W.3d 28 (2004), cert. denied 543 U.S. 1163, 125 S. Ct. 1329, 161 L. Ed. 2d 136 (2005).

Where defense counsel requested that defendant's capital murder trial be scheduled for a minimum of three days because of the nature of the offense and the number of witnesses, the trial court did not err in interpreting this request as a request for a continuance to the first date that the trial court's docket was free for three days, and the days for which the trial was continued were properly excluded in evaluating whether defendant's right to a speedy trial had been violated. *Davis v. State*, 375 Ark. 368, 291 S.W.3d 164 (2009).

Defendant was timely brought to trial because the case was passed from November 17, 2005, through January 5, 2006 at the request of the defendant, it was again passed at defendant's request from March 2, 2006, through May 4, 2006, and defendant failed to appear on May 4, 2006, and next appeared 28 days later on June 1, 2006. *Layton v. State*, 2009 Ark. App. 96, 302 S.W.3d 610 (2009).

Trial court did not err in denying defendant's motion to dismiss for lack of a speedy trial under Ark. R. Crim. P. 28.1(c) and subsection (a) of this rule because each of the three delays in defendant's trial dates were a result of defendant's own motions for continuances, which, pursuant to Ark. R. Crim. P. 28.3(c), were time that was properly excluded in calculating the time for trial. *Wade v. State*, 2009 Ark. App. 346, 308 S.W.3d 178 (2009).

#### **Conviction Reversed.**

Where the time for trial commenced running on the date defendant was incarcerated in jail to await trial on the charge, and defendant remained in jail awaiting trial for five

months until he was incarcerated in prison pursuant to conviction on another charge, but was not tried on the first charge until 14 months and 26 days from the date the time commenced to run, and where the state failed to show any authorized cause for delay, the conviction had to be reversed and dismissed. *Floyd v. State*, 280 Ark. 226, 656 S.W.2d 701 (1983).

#### **Date Charge is Filed.**

Subsection (a) of this rule is silent with respect to which particular charging instruments must be filed to satisfy the requirement that charges are filed; this silence is no doubt due to the fact that the requisite charging instruments in any case vary according to the classification of the crimes charged and the jurisdiction of the charging courts. *Archer v. Benton County Circuit Court*, 316 Ark. 477, 872 S.W.2d 397 (1994).

Defendant's right to receive notice of the felony charges against him is protected by Ark. Const., Art. 2, § 8, and Ark. Const., Amend. 21, which require those criminal charges to be filed by indictment or information; therefore, for purposes of his speedy trial rights and subsection (a) of this rule, the date charges were filed against defendant was the date the felony information was filed in circuit court, rather than the date the affidavit of probable cause to arrest him was filed. *Archer v. Benton County Circuit Court*, 316 Ark. 477, 872 S.W.2d 397 (1994).

#### **Date of Arrest.**

Where the defendant was tried 19 months after the charges were filed and nine months after his arrest, the defendant was not denied his right to a speedy trial because the time did not begin to run until the date of arrest. *Coleman v. Lofton*, 289 Ark. 573, 715 S.W.2d 435 (1986).

Where the deputy sheriff issued a citation to appear in court in lieu of arrest, as authorized under ARCrP 5.1(a) and 5.2(a), and the defendant was arrested when he appeared on his court date, the twelve-month speedy-trial time commenced from the date of arrest, not from the citation date. *Clifton v. State*, 326 Ark. 251, 930 S.W.2d 354 (1996).

Where the defendant was arrested prior to the filing of a felony information against her, the time for speedy trial began running on the date of her arrest. *Marks v. State*, 332 Ark. 374, 965 S.W.2d 764 (1998).

Where defendant was charged with a felony, as opposed to a misdemeanor, the time for speedy trial commenced on November 26, 2001, the date that defendant was arrested, and not March 1, 2001, the date that the affidavit for probable cause to obtain an arrest warrant was filed in district court; while an affidavit for an arrest warrant may have been a sufficient charging instrument for filing a



misdemeanor charge, it was not sufficient for filing a felony charge. *Watson v. State*, 358 Ark. 212, 188 S.W.3d 921 (2004).

Defendant was not deprived of his right to a speedy trial where he was arrested for the rape of his step-daughter on April 8, 2004, and tried on September 29, 2004, because the fact that defendant had been arrested in September 2003 for the charge of rape of his step-daughter in a different county had no bearing on the speedy trial calculations in this case as the time began to run with the arrest in this case. *Anderson v. State*, 93 Ark. App. 454, 220 S.W.3d 225 (2005).

Because defendant was released on bond before trial, his arrest date started the one-year, speedy-trial clock. *Miller v. State*, 100 Ark. App. 391, 269 S.W.3d 400 (2007).

#### **Defendant in Foreign Jurisdiction.**

An accused in prison in another state, for a different crime, must affirmatively request trial in order to activate the speedy trial rule. *White v. State*, 310 Ark. 200, 833 S.W.2d 771 (1992).

Appellant's speedy trial period did not begin to run until he waived extradition, therefore, his trial was well within the 12-month speedy trial period. *White v. State*, 310 Ark. 200, 833 S.W.2d 771 (1992).

#### **Defendant's Obligation.**

The defendant has an affirmative obligation to offer proof that any delay was not at his insistence. *Roberts v. City of Conway*, 266 Ark. 825, 586 S.W.2d 13 (1979).

Where defendant was arrested for burglary in July, 1978, convicted of unrelated offenses and sentenced in February, 1979, and trial on burglary charges was set for November, 1979, which was within three terms of court as required by ARCrP 28.1, and this rule, defendant could not, in the absence of proof of prejudice or testimony in support of his motion to dismiss, show that state failed to "promptly" seek his presence at trial as required by ARCrP 29.1. *Miller v. Lofton*, 272 Ark. 164, 612 S.W.2d 732 (1981) (decision based on rule prior to 1980 amendment of ARCrP 28.1).

#### **Docket Error.**

Where the term in which the defendant was charged with public servant bribery was excluded for that reason under this rule, the two succeeding terms were excluded under ARCrP 28.3, because of continuances granted at defendant's request, and the prosecutor was granted a continuance in the next following term which was incorrectly recorded on the docket as being granted to defendant, defendant was not entitled to have charges against him dismissed on speedy trial grounds since he failed to notify court of docket error prior to bringing motion to dismiss. *Anderson v. Hargraves*, 272 Ark. 259,

613 S.W.2d 587 (1981).

Where "pocket docket" entry, excluding period of time from calculation of speedy trial, was made several months after the delay occurred, 2 months after the 12-month period had elapsed, and 6 weeks after defendant filed his motion to dismiss, it was untimely and ineffectual. *Reed v. State*, 35 Ark. App. 161, 814 S.W.2d 560 (1991).

#### **Filing of Charge.**

The time for a timely trial commenced running on the day armed robbery charge was filed against defendant who was incarcerated in prison in this state pursuant to conviction on a prior offense. *Hall v. State*, 281 Ark. 282, 663 S.W.2d 926 (1984).

The calculation of the time for a speedy trial does not commence running at the date the crime was committed or the date of arrest; rather, subsection (a) of this rule provides that the time begins to run when the charge is filed in circuit court. *Howard v. State*, 291 Ark. 633, 727 S.W.2d 830 (1987).

Where a felony information was filed against the defendant on October 16, 1996, that was "the date charges were filed" under the rule. *Marks v. State*, 332 Ark. 374, 965 S.W.2d 764 (1998).

Defendant's right to a speedy trial was not violated under subsection (a) of this rule because excludable periods of time charged against defendant prior to the later filing of a possession-with-intent to deliver a controlled substance charge applied, as each of the offenses arose from the same criminal episode that occurred on the day of defendant's arrest. *Rueda v. State*, 2012 Ark. 144, — S.W.3d —, 2012 Ark. LEXIS 164 (Apr. 5, 2012).

#### **Late Filing of Information.**

Late filing of information did not start time running anew from day of the second arrest where defendant had been released on bail after first arrest and was later arrested again as a result of evidence obtained during the first search and arrest. *Williams v. State*, 271 Ark. 435, 609 S.W.2d 37 (1980).

#### **Nolle Prosequi.**

Where, just before defendant mother was to be tried for murder, it was learned for the first time that her daughter would testify it was she, not the defendant, who killed father, the state had good cause to nolle prosequi the charge; consequently, when it was determined there was insufficient evidence to find daughter a juvenile delinquent and, almost immediately, the state refiled the murder charge against the mother, the period of delay occasioned by the nolle prosequi was properly excluded under ARCrP 28.3(f) for purposes of meeting the speedy trial requirements of this rule. *Carter v. State*, 280 Ark. 34, 655 S.W.2d 379 (1983).

**Preservation for Review.**

Defendant's speedy-trial issue was not preserved for appellate review because he filed a general speedy-trial motion that asserted only that 781 total days had elapsed since he was arrested, he did not contemporaneously object to any of the excluded periods announced by the court, and, thus, he did not inform the court of the reason for his disagreement with its proposed action prior to or at the time it ruled on the matter. *Killian v. State*, 96 Ark. App. 92, 238 S.W.3d 629 (2006).

**Prosecution Barred.**

Where charges of possession of certain drugs with intent to deliver, which were added by an amended information, arose out of the same criminal episode for which the defendants were arrested, and where three full terms of court had expired since the date defendants were released on bond, the state was barred from prosecuting the defendants on any of the charges. *Callender v. State*, 263 Ark. 217, 563 S.W.2d 467 (1978).

In a prosecution for murder a three-year delay in bringing the defendant to trial caused by the failure of the municipal court to forward a copy of defendant's bond to the circuit court necessitated the defendant's absolute discharge. The failure of the State to check the available court records or otherwise demonstrate any diligence in locating the accused over a two and one half year period could not be excused. *Chandler v. State*, 284 Ark. 560, 683 S.W.2d 928 (1985).

**Retrial Following Mistrial.**

Where the defendant's trial began four months after his last mistrial was declared and his case was speedily processed from its inception, the defendant was not denied a speedy trial simply because just over nine months elapsed from the time the defendant was charged until he was ultimately convicted. *Glenn v. State*, 281 Ark. 454, 664 S.W.2d 868 (1984).

Defendant was not denied his right to speedy trial where defendant's trial at which he was convicted occurred within the required period following his mistrial. *Birmingham v. State*, 346 Ark. 78, 57 S.W.3d 118 (2001).

Although defendant's retrial commenced 491 days after a mistrial, subtracting a 168-day continuance from 491 days meant that defendant's trial commenced on day 323; because defendant was brought to trial within one year from the date of the mistrial, there was no violation of defendant's right to a speedy trial under subsection (c) of this rule. *Eubanks v. State*, 2012 Ark. 142, — S.W.3d —, 2012 Ark. LEXIS 162 (Apr. 5, 2012).

**Retrial on Remand.**

The time for trial commenced running anew on the date the mandate was issued by the Supreme Court Clerk, where the supreme

court issued an order granting a new trial on remand. *Clements v. State*, 312 Ark. 528, 851 S.W.2d 422 (1993).

**Right to Appeal Dismissal.**

When defendant was arrested on April 12, 2006 for 257 counts of felony theft of property, the state requested his release pending further investigation and a felony information was filed against him on December 6, 2006; the trial was delayed due to continuances and the recusal of the judge. When the circuit court dismissed the case for lack of speedy trial on December 10, 2008, the state was not permitted to bring an appeal under Ark. R. App. P. Crim. 3; because this rule, the speedy trial rule, was amended in 2007, the state's challenge to an interpretation of a prior version of Rule 28.2 was not important to the correct administration of the criminal law and would not have widespread ramifications. *State v. Weatherspoon*, 2009 Ark. 459, — S.W.3d —, 2009 Ark. LEXIS 618 (2009).

**Right to Speedy Trial.**

Defendant's right to a speedy trial was violated where defendant was first tried on a murder charge and then on a charge of possession with intent to distribute, which occurred 83 days after the 12-month period required. *Raglin v. State*, 35 Ark. App. 181, 816 S.W.2d 618 (1991).

Defendant was afforded a speedy trial, and the trial court properly denied his motion to dismiss because although he made a prima facie case of a speedy trial violation, the state identified an additional time period charged against him that put his trial within the required twelve-month period contained in Ark. R. Crim. P. 28.1; the delay was properly charged against defendant, he made no objection, and that excludable period put his trial within twelve months of his arrest as calculated under Ark. R. Crim. P. 28. *Barber v. State*, 2010 Ark. App. 210, — S.W.3d —, 2010 Ark. App. LEXIS 177 (Mar. 3, 2010).

**Waiver.**

Where an accused is offered a speedy trial but requests that the case be tried at a later date, and that delaying act is memorialized by a record taken at the time it occurred, he cannot complain that his right to speedy trial was denied. *Jenkins v. State*, 301 Ark. 586, 786 S.W.2d 566 (1990).

Defendant was not required to object to the delay of his second trial, caused by holding the murder trial first and, thereby, did not lose his right to contend that the delay violated his right to a speedy trial. *Raglin v. State*, 35 Ark. App. 181, 816 S.W.2d 618 (1991).

**When Time Begins to Run.**

Appellant's speedy trial rights were violated because he was not brought to trial



within 365 days of his arrest, even though several days were excluded under Ark. R. Crim. P. 28.3(d)(1) where a continuance was granted due to the fact that a witness was unable to appear after suffering complications from surgery. Moreover, although the time a competency exam was ordered stopped the speedy trial clock, it should have been restarted when the report was filed, and the state did not demonstrate that a pretrial motion filed by appellant caused any delay in the trial. *Eagle v. State*, 2012 Ark. App. 187, — S.W.3d —, 2012 Ark. App. LEXIS 284 (Feb. 29, 2012).

**Cited:** *Walker v. State*, 262 Ark. 331, 556 S.W.2d 655 (1977); *Alexander v. State*, 268 Ark. 384, 598 S.W.2d 395 (1980); *Garrison v. State*, 270 Ark. 426, 605 S.W.2d 467 (1980); *Archer v. State*, 271 Ark. 365, 609 S.W.2d 91 (1980); *Clark v. State*, 274 Ark. 81, 621 S.W.2d 857 (1981); *Hall v. State*, 279 Ark. 265, 650 S.W.2d 587 (1983); *Wilson v. State*, 10 Ark. App. 176, 662 S.W.2d 204 (1983); *Williams v. Lockhart*, 772 F.2d 475 (8th Cir. 1985); *Glover v. State*, 287 Ark. 19, 695 S.W.2d 829 (1985); *Lowe v. State*, 290 Ark. 403, 720 S.W.2d 293 (1986), overruled *Richards v. State*, 2 S.W.3d 766 (1999); *Horn v. State*, 294 Ark. 464, 743 S.W.2d 814 (1988); *Nelson v. State*, 297 Ark. 58, 759 S.W.2d 215 (1988); *Woods v. State*, 26 Ark. App. 109, 760 S.W.2d 392 (1988); *Campbell v. State*, 26 Ark. App. 133, 761 S.W.2d 613 (1988); *Spivey v. State*, 299 Ark. 412, 773 S.W.2d 446 (1989); *Asher v. State*, 300 Ark. 57, 776 S.W.2d 816 (1989), criticized *Key v. State*, 300 Ark. 66, 776 S.W.2d 820 (1989); *White v. State*, 301 Ark. 74, 781 S.W.2d 478 (1989);

*Johnson v. State*, 27 Ark. App. 217, 769 S.W.2d 37 (1989); *Roberts v. State*, 302 Ark. 4, 786 S.W.2d 568 (1990); *Towe v. State*, 303 Ark. 441, 798 S.W.2d 56 (1990); *Washington v. State*, 31 Ark. App. 62, 787 S.W.2d 254 (1990); *Lukehart v. State*, 32 Ark. App. 152, 798 S.W.2d 117 (1990); *Findley v. State*, 307 Ark. 53, 818 S.W.2d 242 (1991); *Cox v. Lineberger*, 304 Ark. 231, 801 S.W.2d 290 (1990); *Collins v. State*, 304 Ark. 587, 804 S.W.2d 680 (1991); *Meine v. State*, 309 Ark. 124, 827 S.W.2d 151 (1992); *Foster v. State*, 38 Ark. App. 245, 832 S.W.2d 293 (1992); *Cash v. State*, 40 Ark. App. 40, 842 S.W.2d 440 (1992); *Turbyfill v. State*, 312 Ark. 1, 846 S.W.2d 646 (1993); *Smith v. State*, 313 Ark. 93, 852 S.W.2d 109 (1993); *Hufford v. State*, 314 Ark. 181, 861 S.W.2d 108 (1993); *Lynch v. State*, 315 Ark. 47, 863 S.W.2d 834 (1993); *Basura v. City of Springdale*, 47 Ark. App. 66, 884 S.W.2d 629 (1994); *Samples v. State*, 50 Ark. App. 163, 902 S.W.2d 257 (1995); *McClung v. State*, 53 Ark. App. 196, 920 S.W.2d 867 (1996); *Goston v. State*, 326 Ark. 106, 930 S.W.2d 332 (1996); *Lively v. State*, 326 Ark. 398, 930 S.W.2d 339 (1996); *Bennett v. State*, 54 Ark. App. 154, 925 S.W.2d 432 (1996); *Goston v. State*, 55 Ark. App. 17, 930 S.W.2d 387 (1996); *Peete v. State*, 59 Ark. App. 186, 955 S.W.2d 708 (1997); *Strickland v. State*, 331 Ark. 402, 962 S.W.2d 769 (1998); *Kelch v. Erwin*, 333 Ark. 567, 970 S.W.2d 255 (1998); *Eubanks v. Humphrey*, 334 Ark. 21, 972 S.W.2d 234 (1998); *Gwin v. State*, 340 Ark. 302, 9 S.W.3d 501 (2000); *Ballard v. State*, 75 Ark. App. 15, 53 S.W.3d 53 (2001); *Cherry v. State*, 347 Ark. 606, 66 S.W.3d 605 (2002).

### Rule 28.3. Excluded periods.

The following periods shall be excluded in computing the time for trial. Such periods shall be set forth by the court in a written order or docket entry, but it shall not be necessary for the court to make the determination until the defendant has moved to enforce his right to a speedy trial pursuant to Rule 28 unless it is specifically provided to the contrary below. The number of days of the excluded period or periods shall be added to the time applicable to the defendant as set forth in Rules 28.1 and 28.2 to determine the limitations and consequences applicable to the defendant.

(a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on the competency of the defendant and the period during which he is incompetent to stand trial, hearings on pretrial motions, interlocutory appeals, and trials of other charges against the defendant. No pretrial motion shall be held under advisement for more than thirty (30) days, and the period of time in excess of thirty (30) days during which any such motion is held under advisement shall not be considered an excluded period.

(b) The period of delay resulting from a continuance attributable to congestion of the trial docket if in a written order or docket entry at the time the continuance is granted:

(1) the court explains with particularity the reasons the trial docket does not permit trial on the date originally scheduled;

(2) the court determines that the delay will not prejudice the defendant; and

(3) the court schedules the trial on the next available date permitted by the trial docket.

(c) The period of delay resulting from a continuance granted at the request of the defendant or his counsel. All continuances granted at the request of the defendant or his counsel shall be to a day certain, and the period of delay shall be from the date the continuance is granted until such subsequent date contained in the order or docket entry granting the continuance.

(d) The period of delay resulting from a continuance (calculated from the date the continuance is granted until the subsequent date contained in the order or docket entry granting the continuance) granted at the request of the prosecuting attorney, if:

(1) the continuance is granted because of the unavailability of evidence material to the state's case, when due diligence has been exercised to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at a later date; or

(2) the continuance is granted in a felony case to allow the prosecuting attorney additional time to prepare the state's case and additional time is justified because of the exceptional complexity of the particular case.

(e) The period of delay resulting from the absence or unavailability of the defendant. A defendant shall be considered absent whenever his whereabouts are unknown. A defendant shall also be considered unavailable whenever his whereabouts are known but his presence for the trial cannot be obtained or he resists being returned to the state for trial.

(f) The time between a dismissal or nolle prosequi upon motion of the prosecuting attorney for good cause shown, and the time the charge is later filed for the same offense or an offense required to be joined with that offense.

(g) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant acting with due diligence shall be granted a severance so that he may be tried within the time limits applicable to him.

(h) Other periods of delay for good cause. (Amended June 30, 1980, effective July 1, 1980; amended June 8, 1981; amended April 22, 1999.)

#### 1987 Unofficial Supplementary Commentary to Rule 28.3

Rules 28.1-28.3 are closely interrelated. Cases interpreting Rule 28.3 are also found in the commentary to Rules 28.1 and 28.2.

##### **Proof of Exceptional Circumstances Justifying Delay.**

Interpreting Rule 28.3(b), the Arkansas Supreme Court has observed that "a crowded docket is not an acceptable excuse for denying a speedy trial absent 'exceptional circumstances.'" *Garrison v. State*, 270 Ark. 426, 430, 605 S.W.2d 467, 468 (1980). The Court then quoted a passage from the commentary to the ABA Standards, *Speedy Trial* (1967):

Although it is fair to expect the state to provide the machinery needed to dispose of the usual business of the courts promptly, it does not appear feasible to impose the same requirements when certain unique, nonrecurring events have produced an inordinate number of cases for court disposition. Thus, when a large-scale riot or mass public disorder has occurred, some leeway for additional time is required to ensure that the many resulting cases may receive adequate attention ...

*Garrison* at 431, 605 S.W.2d at 469.



Apparently adopting the "exceptional circumstance" definition above, the Court found no such circumstances in *Garrison*.

In *Cash v. State*, 271 Ark. 881, 611 S.W.2d 510 (1981) the Arkansas Supreme Court held that a good cause for delay was not shown by proof that a witness was attending a law enforcement conference on the date of the trial. In *Roleson v. State*, 272 Ark. 346, 614 S.W.2d 656 (1981), the Court found that where state witnesses were unavailable because of "previous court commitments," *Id.* at 351, 614 S.W.2d at 658, good cause was shown.

#### **Delay Caused by Nolle Prosequi.**

Following *Klopfer v. North Carolina*, 386 U.S. 213, 18 L. Ed.2d 1 (1967), the Arkansas Supreme Court has ruled that entering a *nolle prosequi* does not toll the running of the speedy trial rule under Rule 28.3(f) absent a showing of good cause for the period of delay. *State v. Washington*, 273 Ark. 82, 617 S.W.2d 3 (1981). A *nolle prosequi* cannot be used to evade Sixth Amendment rights: "The State is not relieved of a speedy trial limitation placed on it merely because the defendant is permitted absolute release pending disposition of the charges." *Id.* at 88, 617 S.W.2d at 6. See, also, *Carter v. State*, 280 Ark. 34, 655 S.W.2d 379 (1983), where the Arkansas Supreme Court found good cause tolling the running of time in a case where murder charges against a mother were nolle prossed after her daughter confessed to the murder. The charges were later reinstated, leading to conviction of the mother for murder, when the evidence against the daughter turned out to be insufficient.

#### **Application to De Novo Trials in Misdemeanor Cases.**

The Arkansas Court of Appeals has decided that the time within which the defendant must be brought to trial after appeal of a misdemeanor conviction begins running under Rule 28.1(c) and 28.2 on the day a case is appealed to circuit court. *Shaw v. State*, 18 Ark. App. 243, 712 S.W.2d 338 (1986). In *Shaw*, appellant was convicted in municipal court of driving while intoxicated on August 4, 1983. He appealed his conviction to circuit court on August 17, 1983, but the case was not set for trial until July 10, 1985. A trial followed on November 14, 1985. The Court held that time for trial began running on August 17 and that the trial court should have dismissed the charge because appellant's 1985 trial occurred more than 18 months after August 17, 1983.

The Court also observed that Rules 28.3(b), (c), and (i) require that the trial judge make certain docket entries. Where, because of the Court's failure to make entries, the record does not disclose whether periods of time should be deemed excluded, a later ruling by

the trial judge not supported by the court docket that excluded periods exist will not be upheld.

#### **Rule 28.3 as Guide to Interpretation of Other Statutes.**

The Arkansas Supreme Court has stated that in the absence of controlling authority dictating how to calculate excluded periods of time in unrelated statutes, the Court will look to Rule 28.3(a) for guidance. *Lark v. State*, 276 Ark. 441, 637 S.W.2d 529 (1982) (interpreting Ark. Stat. Ann. § 41-1209(2) (Repl. 1977)). See, also, *Cheshire v. State*, 16 Ark. App. 34, 696 S.W.2d 322 (1985).

#### **Defendant Incarcerated in Prison in Another State.**

A defendant incarcerated in a prison in another jurisdiction as a result of a felony conviction must be tried within the time specified by Rule 29.1 read together with Ark. Stat. Ann. §§ 43-3201 to -3208 (Repl. 1977) (the Interstate Agreement on Detainers). The Detainers Act requires that a petitioner be brought to trial within 180 days after filing a request for final disposition with the prosecutor. The 180 day period within which trial must be held does not begin running until a demand for trial is made. *Dukes v. State*, 271 Ark. 674, 609 S.W.2d 924 (1981). Also, see *Blackmon v. Weber*, 277 Ark. 393, 642 S.W.2d 294 (1982).

Though Rule 28.1(g) provides that the speedy trial rule shall have no effect on cases governed by the Detainers Act, it should be noted that the 180 day period for trying a defendant under the Detainers Act may be triggered by a disposition request in response to a prosecutor's Rule 29.1(b) filing. *Dukes v. State*.

The Arkansas Court of Appeals has interpreted *Blackmon v. Weber* to require that a conviction be reversed and dismissed where appellant was brought to trial more than 120 days after he arrived in Arkansas pursuant to an Arkansas detainer in violation of Article IV(c), Ark. Stat. Ann. § 43-2301 (Repl. 1977). *Loane v. State*, 12 Ark. App. 374, 677 S.W.2d 864 (1984). Appellant was paroled by Oklahoma authorities shortly after arriving in Arkansas. He then was released on bond. The trial court found that Rule 28 governed his right to speedy trial after release. The Arkansas Court of Appeals, pointing to Rule 28.1(g) providing that the rule has no effect on cases governed by the Detainers Act, disagreed. It reversed and dismissed, relying on *Blackmon v. Weber*, where the Arkansas Supreme Court held that the Detainers Act, not Rule 28.1, governed a situation where appellant was returned to Arkansas pursuant to a detainer.

The dissent in *Loane* observed that the rationale underlying the Detainers Act is that a speedy trial promotes the rehabilitative

efforts of the incarcerating state and, since appellant in *Loane* had been paroled by Oklahoma after returning to Arkansas, the purposes of the Detainers Act were no longer germane, and the Arkansas speedy trial rule should have been deemed controlling.

**Reporter's Notes to 1999 Amendments:**

Subsection (b) has been amended and subsection (i) has been moved to the opening paragraph. These changes have been made to address recurrent problems arising in cases. *E.g., Hicks v. State*, 305 Ark. 393, 808 S.W.2d 348 (1991).

The opening paragraph was added which includes language formerly in subsection (i), but further provides that the trial court may determine the excluded periods when the defendant has moved for dismissal pursuant to Rule 28.1 rather than at an earlier date

although the judge is still free to do so earlier. This finding is a determination of the excluded periods.

Subsection (b) was amended to make more practical a continuance granted because of congestion of the trial docket. The three-pronged finding was substituted for the previous standard which required a finding of "exceptional circumstances." This requirement of the entry of a contemporaneous written order explaining the reasons for the continuance, finding that the defendant is not prejudiced, and scheduling a new trial date is in addition to the finding required as to the periods to be excluded. Typically, the period to be excluded under subsection (b) will be from the date on which the trial was scheduled as specified in (b)(1) to the rescheduled date as specified in (b)(3).

### RESEARCH REFERENCES

**Ark. L. Rev.** Note, Speedy Trial and Excludable Delays Under the Arkansas Rules of Criminal Procedure: Norton v. State, 35 Ark. L. Rev. 591.

**U. Ark. Little Rock L.J.** Holt, Survey of Criminal Procedure, 3 U. Ark. Little Rock L.J. 198.

Arkansas Law Survey, Irving and Schoen, Criminal Procedure, 9 U. Ark. Little Rock L.J. 129.

### CASE NOTES

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#### Constitutionality.

This rule, as applied to deny a motion to dismiss brought by a defendant who had resisted every attempt to bring him to trial, was not unconstitutional under Ark. Const., Art. 2, § 10, guaranteeing a right to speedy trial. *Faulk v. State*, 261 Ark. 543, 551 S.W.2d 194, appeal dismissed 434 U.S. 804, 98 S. Ct. 33, 54 L. Ed. 2d 62 (1977).

#### In General.

It is plain from the provisions of this rule, ARCrP 28.1 and ARCrP 28.2 that the drafters recognized that an accused who is incarcerated on pending charges, or on different charges, is at a disadvantage simply by virtue



of his confinement. Hence, for such defendants, shorter periods for trial are provided by the speedy trial rule. *Miller v. Langston*, 296 Ark. 486, 757 S.W.2d 562 (1988).

Any excludable periods under this rule must be figured into the speedy-trial calculation and applied to all charges stemming from the same criminal episode for which the original arrest was made; otherwise, the prosecutor would be forced to calculate a different speedy-trial period for each charge filed and to try the most recently filed charge first, thereby producing an illogical result. *Johnson v. State*, 337 Ark. 477, 989 S.W.2d 525 (1999).

Defendant's speedy-trial argument was not preserved for review because defendant and his counsel were present and failed to make a contemporaneous objection at the numerous hearings in which time was excluded for speedy trial purposes due to defendant's incomplete mental evaluation. *DeAsis v. State*, 360 Ark. 286, 200 S.W.3d 911 (2005).

#### **Construction.**

The language of this rule is mandatory. *Smith v. State*, 303 Ark. 524, 798 S.W.2d 94 (1990).

The exclusion of those periods identified under this rule is mandatory. *State v. McCann*, 313 Ark. 286, 853 S.W.2d 886 (1993).

The twelve-month period in ARCrP 28.2 is interrelated with this rule, which sets out the periods of delay that "shall" be excluded in computing time for a speedy trial. *Patterson v. State*, 318 Ark. 358, 885 S.W.2d 667 (1994).

Filing a pretrial motion does not toll the speedy-trial period; some delay attributable to the defendant must actually result from the motion. *Miller v. State*, 100 Ark. App. 391, 269 S.W.3d 400 (2007).

#### **Purpose.**

One purpose of the speedy trial rule is to protect the accused, but that rule is also to protect the victim of the crime and, perhaps above all, to serve the interests of the public. *Weaver v. State*, 313 Ark. 55, 852 S.W.2d 130 (1993).

The concept of the prompt and speedy trial is based upon sound public policy; the only meaningful way to ensure that the public policy is effectuated is to discharge an accused who is not promptly tried, which is the purpose of ARCrP 28.1(c). *Weaver v. State*, 313 Ark. 55, 852 S.W.2d 130 (1993).

#### **Applicability.**

Subsection (a) of this rule applies to criminal charges brought in circuit court and subsequently transferred to juvenile court. *State v. McCann*, 313 Ark. 286, 853 S.W.2d 886 (1993).

#### **Availability of Defendant.**

Where the authorities did not know the whereabouts of the defendant, the defendant

was absent or unavailable within the meaning of this rule. *Grooms v. State*, 260 Ark. 879, 545 S.W.2d 610 (1977); *Keys v. State*, 23 Ark. App. 219, 745 S.W.2d 628 (1988).

The period of delay resulting from the absence of a defendant is excludable under subsection (e) of this rule; accordingly, where defendant fled the state and disappeared for ten months, the trial which was held within 21 months of the date on which he was charged, was held within the required 18 months when the ten-month absence was excluded. *Wilson v. State*, 10 Ark. App. 176, 662 S.W.2d 204 (1983).

Defendant must be available for trial, excluding time delays which result from his resisting appearance for trial. *Allen v. State*, 294 Ark. 209, 742 S.W.2d 886 (1988); *Henson v. State*, 38 Ark. App. 155, 832 S.W.2d 269 (1992).

Accused could not be charged with time required for transport from state of arrest to prosecuting state. *Horn v. State*, 294 Ark. 464, 743 S.W.2d 814 (1988).

A defendant shall be considered absent when his whereabouts are unknown, or when his whereabouts are known but his presence for trial cannot be obtained. *Holmes v. State*, 33 Ark. App. 168, 803 S.W.2d 563 (1991).

Where trial was originally delayed due to the defendant's unavailability, the trial court's giving defendant the first available date, which was five days after the time for speedy trial expired, was one of the "exceptional circumstances" contemplated by this rule. *Henson v. State*, 38 Ark. App. 155, 832 S.W.2d 269 (1992).

The two-year delay between date of information and date of arrest was not excludable for good cause under subsection (h) of this rule where the state failed to show that the defendant's use of an alias impeded service of the arrest warrant. *Duncan v. Wright*, 318 Ark. 153, 883 S.W.2d 834 (1994).

Out-of-state defendant was "unavailable" for trial for the purpose of computing the 60 days, until he waived extradition. *Rodgers v. State*, 49 Ark. App. 136, 898 S.W.2d 475 (1995).

Whether or not a defendant's refusal to communicate with his attorney has any bearing on his unavailability for trial as described in this rule, testimony by the attorney or his staff regarding possibly excludable periods held inadmissible under Evid. Rule 502(b). *Byrd v. State*, 326 Ark. 10, 929 S.W.2d 151 (1996).

Whether or not a defendant's refusal to communicate with his attorney has any bearing on his unavailability for trial as described in this rule, testimony by the attorney or his staff regarding possibly excludable periods

held inadmissible under Evid. Rule 502(b). *Byrd v. State*, 326 Ark. 10, 929 S.W.2d 151 (1996).

Although the State claimed that defendant's whereabouts were unknown because there was no way the Faulkner County prosecutor could have known that defendant was serving time in a state prison on charges that originated in Pulaski County, the period between the time the information was filed and the denial of defendant's motion to dismiss was not excludable where there was no proof that there was an attempt to serve the warrant. *Lively v. State*, 326 Ark. 398, 930 S.W.2d 339 (1996).

Defendant's motion to dismiss for speedy-trial reasons was denied where the trial delay was attributable to defendant's unavailability, excludable under subsection (e) of this rule. *Brown v. State*, 330 Ark. 239, 952 S.W.2d 673 (1997).

The defendant was not entitled to a writ of prohibition dismissing the proceeding against him on speedy trial grounds as there were disputed questions of fact as to whether the state made a diligent, good-faith effort to locate him or whether his absence or unavailability was due to his own conduct. *Holbert v. Arkansas County*, 339 Ark. 462, 5 S.W.3d 474 (1999).

An 11-day delay was chargeable to the defendant on the basis of his absence or unavailability where the court mailed a notice of a hearing on December 22 to the defendant on December 11 before the defendant filed a notice of a second address to the court. *Smith v. Plegge*, 342 Ark. 232, 27 S.W.3d 402 (2000).

Pursuant to subsection (e) of this rule, because petitioner fled the jurisdiction to evade capture, that time was chargeable to petitioner; the state was diligent in procuring petitioner's attendance in Arkansas two days after learning of petitioner's whereabouts and the two days that were necessary to transport him back to Arkansas were charged to petitioner. *Doby v. Jefferson County Circuit Court*, 350 Ark. 505, 88 S.W.3d 824 (2002).

#### **Burden of State.**

It is the burden of the state to prove the delay in bringing the defendant to trial was legally justified. *State v. Lewis*, 268 Ark. 359, 596 S.W.2d 697 (1980); *Williams v. State*, 290 Ark. 286, 718 S.W.2d 935 (1986), cert. denied 481 U.S. 1068, 107 S. Ct. 2460, 95 L. Ed 2d 869 (1987); *Keys v. State*, 23 Ark. App. 219, 745 S.W.2d 628 (1988).

Where defendants were arrested prior to March, 1979, and should have been tried, but were not, by September, 1980, where the defendants were either on bail or lawfully at liberty prior to the date charges were filed in circuit court, and where the record showed that the defendants were unavailable because the sheriff failed to follow through in the

serving of the proper notice or warrants, dismissal of the charges under ARCrP 30.1, was proper where the state, in attempting to prove that the delay was legally justified under this rule and thus excludable in calculating the three terms of court, relied solely on inconclusive and sketchy court docket sheet notations. *State v. Washington*, 273 Ark. 82, 617 S.W.2d 3 (1981).

Where a defendant's trial was held after allowable period, the trial court erred in not granting a motion to dismiss pursuant to ARCrP 28.1, since the state did not carry its burden of proving the excludable periods of time under this rule by merely alleging that its witness, a deputy, had been admitted to the hospital on the date of the hearing for an emergency, but failing to show that the unavailability of that witness was for period alleged. *Van Sandt v. State*, 274 Ark. 7, 621 S.W.2d 681 (1981) (decision prior to 1980 amendment of ARCrP 28.1).

The burden is upon the state to prove good cause for any delay in the trial or that it was legally justified. *Williams v. State*, 275 Ark. 8, 627 S.W.2d 4 (1982).

Once defendant establishes that he was not tried within the twelve-month period, the burden shifts to the state to show that any delay was the result of defendant's conduct, or was otherwise justified. *Collins v. State*, 304 Ark. 587, 804 S.W.2d 680 (1991).

Where the trial court found that the delay was not attributable to the defendant personally, the burden shifted back to the state to come forward with an explanation to have the time waiting for the exam excluded. *Brawley v. State*, 306 Ark. 609, 819 S.W.2d 704 (1991).

There is a presumption that a trial occurring within the time limit set out in this rule meets constitutional requirements, and as the prosecutor's delay in bringing criminal charges did not constitute prejudice, the presumption was not overcome. *Cox v. State*, 36 Ark. App. 173, 820 S.W.2d 471 (1991).

It is the state's burden to show that a delay was a result of the defendant's conduct or otherwise justifiable by the excluded period recognized by the criminal rules. *Bowen v. State*, 73 Ark. App. 240, 42 S.W.3d 579 (2001).

Defendant's right to speedy trial was not violated as the state met its burden to show that there were 414 days that were permissibly excluded pursuant to this rule; further, it was of no consequence that the order granting a continuance to defendant with specificity was filed after the speedy-trial period had run because this rule provides that the excludable period of time shall be set forth by the court in a written order or docket entry, but it shall not be necessary for the court to make the determination until the defendant has moved



to enforce his right to a speedy trial. *May v. State*, 94 Ark. App. 202, 228 S.W.3d 517 (2006).

Defendant's right to a speedy trial was violated where defendant was not brought to trial within 12 months. The State failed to present sufficient evidence to make an 84-day continuance attributable to defendant; the associated docket sheet was neither part of the transcript submitted to the circuit court nor independently verified and certified by the clerk of the district court. *Rhoden v. State*, 98 Ark. App. 425, 256 S.W.3d 506 (2007).

#### **Calculation of Time.**

The date the charges are filed is the beginning for the calculation of the time for a speedy trial. *Keys v. State*, 23 Ark. App. 219, 745 S.W.2d 628 (1988).

The state failed to show that there were excludable periods under subsection (e) of this rule resulting from the absence or unavailability of the defendant where the defendant lived in the same city, at the same job during the time in question and was in the police department on 4 separate occasions for other violations before he was finally arrested. *Tlapek v. State*, 305 Ark. 272, 807 S.W.2d 467 (1991).

Where defendant was in prison in another state, for a different crime, and was extradited to Arkansas to stand trial, he would have to affirmatively request a trial in order to activate the speedy trial rule and where defendant did not, his right to a speedy trial did not begin to run until his actual return to the state. *Gillie v. State*, 305 Ark. 296, 808 S.W.2d 320 (1991).

The period of delay resulting from an examination and hearing on the competency of the defendant was excludable from the 12-month period. *Hubbard v. State*, 306 Ark. 153, 812 S.W.2d 107 (1991).

The period of delay, due to the appointment of new defense counsel, was not excludable as a delay for good cause because the defendant did nothing to cause his trial to be delayed beyond the time for a speedy trial. *Glover v. State*, 307 Ark. 1, 817 S.W.2d 409 (1991).

A period of delay resulting from subsection (a) of this rule's "trial of other charges against the defendant" in a foreign jurisdiction commences when the accused is taken to the foreign jurisdiction and ends when the trial in that jurisdiction is completed and the accused becomes available for extradition. *Patterson v. State*, 318 Ark. 358, 885 S.W.2d 667 (1994).

While subsection (a) of this rule does provide that the period of delay resulting from hearings on pretrial motions are excluded in computing the time for trial, Arkansas speedy-trial rules do not contemplate that the filing of a suppression motion by one defendant should toll the time as to another defen-

dant who is facing different charges filed in a distinct case. *Webb v. Ford*, 340 Ark. 281, 9 S.W.3d 504 (2000).

The excluded time period contemplated by the phrase "hearings on pretrial motions" begins at the time the pretrial motion is made and includes those periods of delay attributable to the defendant until the motion is heard by the court and not more than thirty days thereafter. *Gwin v. State*, 340 Ark. 302, 9 S.W.3d 501 (2000).

Although the docket sheet did not set out which of the 91 days between the filing of defendant's pretrial motions and the hearing were to be excluded, no argument was made that any of the delay was attributed to the state; thus, the 91 days was excluded against the speedy trial calculations. *Turner v. State*, 349 Ark. 715, 80 S.W.3d 382 (2002).

By establishing a period of delay beyond 12 months from the date of the charge, petitioner made a prime facie case for a speedy-trial violation; however, there was no violation of the speedy-trial rule because, after attributing excludable time periods to petitioner and the state pursuant to this rule, the time charged to the state was less than 12 months. *Doby v. Jefferson County Circuit Court*, 350 Ark. 505, 88 S.W.3d 824 (2002).

Defendant's right to a speedy trial was not violated because he was brought to trial within 12 months after several excludable time periods were subtracted from a 464-day period; therefore, defendant's motion to dismiss several drug and weapons charges was properly denied. *Gondolfi v. Clinger*, 352 Ark. 156, 98 S.W.3d 812 (2003).

Trial court did not err in denying defendant's motion to dismiss because of a speedy-trial violation as 505 days were properly excluded and the state was only required to account for 493 days. *Dodson v. State*, 358 Ark. 372, 191 S.W.3d 511 (2004).

In a stalking and terroristic threats case, denial of defendant's motion to dismiss on speedy-trial grounds was proper because subtracting the nol pros and continuance periods from the overall 426-day period between his arrest and the day his speedy-trial motion was filed left 347 days, well within the one-year period of Ark. R. Crim. P. 28.1. *Branning v. State*, 371 Ark. 433, 267 S.W.3d 599 (2007).

#### **Congested Trial Docket.**

Subsection (b) of this rule contemplates that a trial judge will regularly call the docket, and if a case is to be continued beyond the time permitted by law, then the reasons must be stated. *Novak v. State*, 294 Ark. 120, 741 S.W.2d 243 (1987).

Docket congestion was not reason for excluding period where court did not state those circumstances in its docket or order continuing the case. *Novak v. State*, 294 Ark. 120, 741 S.W.2d 243 (1987).

There is no requirement under this rule that an order setting forth a guilty plea and the authorization to withdraw the plea be entered prior to a petition for prohibition as there is for a continuance due to docket congestion. *Kennedy v. State*, 297 Ark. 488, 763 S.W.2d 648 (1989).

Where trial court entered an order explaining that it appeared that another trial would carry over into the following week, this situation constituted the type of an order contemplated by subsection (b) of this rule and was sufficient to exclude the period until the date of the next criminal docket. *Stanley v. State*, 297 Ark. 586, 764 S.W.2d 426 (1989).

Court's ruling about docket congestion was insufficient, where the order did not address any prejudice that might have resulted to defendant from the delay, nor did it explain why defendant was not brought to trial on any of the open days on the trial calendar. *Miller v. State*, 100 Ark. App. 391, 269 S.W.3d 400 (2007).

#### —Exceptional Circumstances.

Where the action of the trial judge in rescheduling defendant's case due to an exceptional circumstance was reasonable at the time taken, the fair administration of justice was best served by postponing defendant's trial to the next criminal docket, rather than having the defendant, his attorney, and a whole jury panel come in to see if a courtroom might be available. *Stanley v. State*, 297 Ark. 586, 764 S.W.2d 426 (1989).

Trial court erred in continuing defendant's case due to a crowded court docket without a showing of exceptional circumstances stated in an order continuing the case or on the docket prior to the expiration of the speedy trial period as required by this section. *Hicks v. State*, 305 Ark. 393, 808 S.W.2d 348 (1991), questioned *Bowen v. State*, 42 S.W.3d 579 (2001).

#### Continuance to Obtain Counsel.

Where the defendant assaulted his counsel a few days before the scheduled trial, leading them to request permission to withdraw, the court's action in ordering a continuance to allow the defendant to obtain other counsel was a delay for good cause. *Foxworth v. State*, 263 Ark. 549, 566 S.W.2d 151 (1978).

Where petitioner appeared at his scheduled arraignments and requested continuances in order to retain private counsel, that time was clearly chargeable to petitioner under subsection (c) of this rule. *Doby v. Jefferson County Circuit Court*, 350 Ark. 505, 88 S.W.3d 824 (2002).

#### Defendant in Foreign Jurisdiction.

An accused in prison in another state, for a different crime, must affirmatively request trial in order to activate the speedy trial rule.

*White v. State*, 310 Ark. 200, 833 S.W.2d 771 (1992).

Appellant's speedy trial period did not begin to run until he waived extradition, therefore, his trial was well within the 12-month speedy trial period. *White v. State*, 310 Ark. 200, 833 S.W.2d 771 (1992).

Because the authorities took the proper steps to procure defendant's presence in court for trial by putting a "hold" on him while he was in custody in another county, the disputed period of time was properly excluded under subsection (a) of this rule; therefore, the speedy-trial rule in Ark. R. Crim. P. 28.1 was not violated. *Arnold v. State*, 2011 Ark. App. 452, — S.W.3d —, 2011 Ark. App. LEXIS 475 (June 22, 2011).

#### Defendant Serving Sentence.

A situation in which the defendant is serving a sentence and not being held in jail on a pending charge is the equivalent of the defendant being held to bail or at liberty, since his confinement was not under the pending charge. *Jones v. State*, 266 Ark. 855, 586 S.W.2d 258 (1979).

#### Defendant's Obligation.

The defendant has an affirmative obligation to offer proof that any delay was not at his insistence. *Roberts v. City of Conway*, 266 Ark. 825, 586 S.W.2d 13 (1979).

Prosecutor's failure to pursue a sentencing hearing for nearly six years was prejudicial to defendant, who had pleaded guilty to rape; in addition, defendant was not required under subsection (a) of this rule to request a sentencing hearing in order for the speedy trial period, which extended to sentencing, to run. *Jolly v. State*, 358 Ark. 180, 189 S.W.3d 40 (2004), cert. denied 544 U.S. 948, 125 S. Ct. 1695, 161 L. Ed 2d 524 (2005).

Defendant's speedy trial rights were not violated because the arraignment had to be rescheduled due to defendant's failure to appear and subsequent late arrival. It was clear that the delay was defendant's fault, and therefore the State met its burden of showing that the delay was the result of defendant's conduct or was otherwise justified and that the circuit court was correct in excluding that twelve-day period from its speedy-trial calculations. *Yarbrough v. State*, 370 Ark. 31, 257 S.W.3d 50 (2007).

#### Delay at Defendant's Request.

Where defendant was arrested in January, 1977, during the October, 1976 term of court, charged by information a month later during the next term of court, had trial set for about 9 weeks after the charge and an attorney appointed for him, had a hearing on the date set for trial at which his appointed attorney was relieved and he was given 10 days to find an attorney, and finally the trial was held some 53 weeks after the initial arrest, the



case was tried within the time provided in these rules, after the continuance, and was not a violation of his right to speedy trial since the delay was at his request and not prejudicial. *Campbell v. State*, 264 Ark. 372, 571 S.W.2d 597 (1978).

The defendants were not denied their right to a speedy trial because the time during which the interlocutory appeal was pending was excluded in computing the time for trial. *Williams v. State*, 290 Ark. 286, 718 S.W.2d 935 (1986), cert. denied 481 U.S. 1068, 107 S.Ct. 2460, 95 L. Ed 2d 869 (1987).

Relevant, excludable periods involved delays that resulted from the defendant's pretrial motion to dismiss, his request for a competency evaluation, and his unauthorized absence from both the state and various trial dates. *Nelson v. State*, 297 Ark. 58, 759 S.W.2d 215 (1988).

The period of time a trial judge takes a motion to dismiss under advisement is excludable under subsection (a) of this rule. *McBride v. State*, 297 Ark. 410, 762 S.W.2d 785 (1989).

Trial court did not clearly err by excluding the 30 days during which defendant's motion to suppress was under advisement. *Smith v. State*, 303 Ark. 524, 798 S.W.2d 94 (1990).

Where a letter from defendant's attorney did not consent to a trial date past the speedy trial period, but merely asked to be notified as soon as the new date was determined, there was no indication that defense counsel knew the trial would be continued past the required time period, and the letter cannot be viewed as a delaying act. *Hicks v. State*, 305 Ark. 393, 808 S.W.2d 348 (1991), questioned *Bowen v. State*, 42 S.W.3d 579 (2001).

Postponement in bringing defendant to trial, that was prompted by appellant's motion to sever was excluded under the speedy trial rules. *Cash v. State*, 40 Ark. App. 40, 842 S.W.2d 440 (1992).

Where an accused is offered a speedy trial but requests that the trial take place at a later date because he will be filing a writ of prohibition, and the delaying act is memorialized by a record taken at the time it occurred, he cannot complain that his right to speedy trial was denied. *Rhodes v. Capeheart*, 313 Ark. 16, 852 S.W.2d 118 (1993).

No violation of ARCrP 28.1 shown where there were any number of excludable periods including defendant's delay in hiring counsel, his filing of a motion to suppress evidence, and his waiver and then withdrawal of his right to a jury trial. *Cupples v. State*, 326 Ark. 31, 929 S.W.2d 150 (1996).

Delays caused by defendant's request for psychiatric evaluations were excludable periods under either subsections (a), (c), or (h) of this rule. *Goston v. State*, 326 Ark. 106, 930 S.W.2d 332 (1996).

In determining the defendant's motion to dismiss on speedy trial grounds, the court properly excluded an 89-day-period from the day the court entered an order for a mental evaluation and the day the results of the examination were filed with the court. *Morgan v. State*, 333 Ark. 294, 971 S.W.2d 219 (1998).

A 25-day continuance was properly charged to the defendant where two court documents stated that the trial had been "reset by attorney" and "reset at the request of the defendant." *Chenoweth v. State*, 341 Ark. 722, 19 S.W.3d 612 (2000).

Two periods of delay were excluded from the speedy trial calculation where they were caused by a motion to suppress filed by the defendant and an agreement by the parties for a continuance to obtain additional information from the lead police investigator that was pertinent to the defendant's pretrial motions. *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000).

Because petitioner had appointed counsel all along in the form of the public defender's office, which could have pursued the ARCrP 17.3(b) remedies much earlier than it did, the trial court properly charged petitioner with the 173 days involved in the continuance to produce the discoverable evidence from the state. *Doby v. Jefferson County Circuit Court*, 350 Ark. 505, 88 S.W.3d 824 (2002).

Defendant was timely brought to trial because the case was passed from November 17, 2005, through January 5, 2006 at the request of the defendant, it was again passed at defendant's request from March 2, 2006, through May 4, 2006, and defendant failed to appear on May 4, 2006, and next appeared 28 days later on June 1, 2006. *Layton v. State*, 2009 Ark. App. 96, 302 S.W.3d 610 (2009).

Time period caused by a continuance granted at defendant's request because she had been in a car wreck was properly excluded from defendant's speedy trial calculation, as was the time period caused by her failure to appear, arrest, and extradition. *Sullivan v. State*, 2011 Ark. App. 576, — S.W.3d —, 2011 Ark. App. LEXIS 620 (Sept. 28, 2011).

#### **Delay by Hospital.**

The fact that the state hospital was undergoing renovations and was not able to examine defendant for five months was regrettable, but did not make the period of delay nonexcludable. Where defendant had requested the competency examination, and the trial court had issued an emergency commitment order, there was no indication that the state had deliberately sought to delay the trial. *Collins v. State*, 304 Ark. 587, 804 S.W.2d 680 (1991).

The state hospital is not an integral part of the criminal justice system. It is wholly independent of the judiciary or prosecuting attorney's office. Accordingly, delays caused by its

operations would not be subject to the same level of scrutiny pursuant to this rule as delays caused by the criminal justice system itself. *Collins v. State*, 304 Ark. 587, 804 S.W.2d 680 (1991).

The time required to prepare a competency report is not excluded because of the alleged bias of the examining physician. *Mack v. State*, 321 Ark. 547, 905 S.W.2d 842 (1995).

In determining the defendant's motion to dismiss on speedy trial grounds, the court properly excluded a 199-day-period from the day the defendant requested a transfer to a state hospital because of his deteriorating mental condition and the day the state hospital noted in a report that the defendant was fit to proceed to trial. *Morgan v. State*, 333 Ark. 294, 971 S.W.2d 219 (1998).

### **Delay Fighting Extradition.**

Where a defendant, while incarcerated in another state, resisted extradition to Arkansas for trial there, the delay caused by such resistance would be excluded in computing the time in which he must be brought to trial. *Faulk v. State*, 261 Ark. 543, 551 S.W.2d 194, appeal dismissed 434 U.S. 804, 98 S. Ct. 33, 54 L. Ed. 2d 62 (1977); *Allen v. State*, 294 Ark. 209, 742 S.W.2d 886 (1988).

There was no denial of a speedy trial where defendant resisted extradition in another state and was tried with sufficient promptness after he was returned to Arkansas. *O'Riordan v. State*, 281 Ark. 424, 665 S.W.2d 255 (1984).

Refusal to sign a waiver of extradition amounted to resisting return to this state for trial within framework of this rule. *Allen v. State*, 294 Ark. 209, 742 S.W.2d 886 (1988).

### **Discretion of Court.**

Where the state failed to show that there was good cause for the delay in bringing the accused to trial on manslaughter charges, the trial court did not abuse its discretion when it granted the defendant's motion to dismiss the charges because the state had not brought him to trial within three terms of court. *State v. Lewis*, 268 Ark. 359, 596 S.W.2d 697 (1980).

Indefinite continuance ordered by judge for good cause, and not by request of either party, held excludable. *Strickland v. State*, 331 Ark. 402, 962 S.W.2d 769 (1998).

### **Docket Error.**

Where the term in which the defendant was charged with public servant bribery was excluded for that reason under ARCrP 28.2, the two succeeding terms were excluded under this rule because of continuances granted at defendant's request, and the prosecutor was granted a continuance in the next following term which was incorrectly recorded on the docket as being granted to defendant, defendant was not entitled to have charges against him dismissed on speedy trial grounds since

he failed to notify court of docket error prior to bringing motion to dismiss. *Anderson v. Hargraves*, 272 Ark. 259, 613 S.W.2d 587 (1981).

If a defendant discovers a docket error which affects his speedy trial rights or takes exception to the wording of an order, it is incumbent on him to bring the matter to the attention of the trial court within a reasonable time. *Clements v. State*, 312 Ark. 528, 851 S.W.2d 422 (1993).

Where the record showed that the defendant delayed the case by not showing up for trial and that the trial court reset the case for the next available trial date, the failure of the court to make a docket entry or written order did not constitute reversible error. *Osborn v. State*, 340 Ark. 444, 11 S.W.3d 528 (2000).

### **Evidentiary Hearings.**

Failure of the record to specifically set out the state's reasons for the delay of defendant's trial made it necessary to grant defendant permission to apply to the trial court for an evidentiary hearing limited to the issue of whether counsel could have made a successful motion to dismiss the charges for failure to hold trial within the time limits set by this rule. *Spivey v. State*, 299 Ark. 412, 773 S.W.2d 446 (1989).

### **Examination Report.**

Because defendant's trial did not occur until 639 days after defendant was arrested, defendant made a prima facie case that his right to a speedy trial was violated, but because only 146 days were chargeable to the state, the trial court did not err in denying defendant's motion to dismiss for lack of speedy trial; 14 days were chargeable to defendant and 56 days were attributable to the state from defendant's time of arrest until the order for a mental health evaluation under § 5-2-305. *Block v. State*, 2010 Ark. App. 603, — S.W.3d —, 2010 Ark. App. LEXIS 634 (Sept. 15, 2010).

### **Failure to Ask Dismissal.**

Where the record revealed no delays resulting from other proceedings concerning the defendant under subsection (a) of this rule, no continuance was granted at the defendant's request under subsection (c) of this rule, no delay resulted from any absence of the defendant under subsection (e) of this rule, the only request for a continuance by the state under subsection (d) of this rule was made after allowable period expired, and, although the docket was congested due to exceptional circumstances, the court did not comply with subsection (b) of this rule by stating the circumstances, there was no reasonable legal basis for the failure of counsel to object to the violation of the defendant's right to a timely trial and, therefore, the defendant's rape conviction was reversed and dismissed. *Clark v. State*, 274 Ark. 81, 621 S.W.2d 857 (1981)



(decision prior to 1980 amendment of ARCrP 28.1).

#### **Good Cause.**

Where defendant was not tried until after allowable period had expired, there was good cause for two delays under subsection (h) of this rule, since, after defendant's trial was set for April 8, defendant's counsel was relieved of his appointment because he was named deputy prosecuting attorney and a replacement counsel was named on May 14, and then further delay occurred where, on defendant's motion, the prosecuting attorney was disqualified on the ground that his professional association with defendant's first attorney created a conflict of interest, and the delay continued until a special prosecutor was appointed on August 18 and defendant was not entitled to discharge under ARCrP 28.1. *Divanovich v. State*, 273 Ark. 117, 617 S.W.2d 345 (1981) (decision based on rule prior to 1980 amendment of ARCrP 28.1).

Delays held not for good cause. *Campbell v. State*, 26 Ark. App. 133, 761 S.W.2d 613 (1988) (judge's surgery and holidays).

When the defendant is scheduled for trial within the time for speedy trial and the trial is postponed because of the defendant, that is "good cause" to exclude the time attributable to the delay. *Lewis v. State*, 307 Ark. 260, 819 S.W.2d 689 (1991).

A 126-day delay was properly charged to the defendant where the appointment of new counsel was required as a result of the defendant's inability to work with his (second) counsel and because the state's case involved a "massive" amount of documents. *Blackwell v. State*, 338 Ark. 671, 1 S.W.3d 399 (1999).

Trial court did not err in excluding any of the four periods from the speedy-trial time calculation because defendant was tried within the 12 months as required by Ark. R. Crim. P. 28.1(b); defendant requested the continuances and did not object to the orders or their exclusion from the speedy trial calculation, and excluded periods without a written order or docket entry have been upheld where the record demonstrated that the delays were attributable to defendant or legally justified for "good cause" under subsection (h) of this rule. *Autrey v. State*, 90 Ark. App. 131, 204 S.W.3d 84 (2005).

#### **—Not Shown.**

The commencement of someone else's capital murder trial on defendant's scheduled trial date, does not, standing alone, constitute an exceptional circumstance justifying exclusion of time for docket congestion; likewise, in the absence of any explanation other than that the court preferred to try another case, the time period in question cannot be excluded for "good cause" pursuant to this rule.

*Tanner v. State*, 324 Ark. 37, 918 S.W.2d 166 (1996).

#### **Grant of Continuance.**

The period of delay resulting from a continuance granted at the request of the defendant or his counsel is an excluded period in applying the speedy trial rules. *Matthews v. State*, 268 Ark. 484, 598 S.W.2d 58 (1980); *Woods v. State*, 26 Ark. App. 109, 760 S.W.2d 392 (1988).

A continuance was excludable where the motion for continuance was a joint motion; the motion was considered to be joint as defense counsel approved the order as to form and did not raise any objections to the excluded period of time. *Bowen v. State*, 73 Ark. App. 240, 42 S.W.3d 579 (2001).

Where defendant was granted a continuance of over four months, this time period was not counted for speedy trial purposes and there was no violation of the speedy trial requirement. *George v. State*, 84 Ark. App. 275, 140 S.W.3d 492 (2003), rev'd 189 S.W.3d 28 (2004).

In a child pornography case, defendant's speedy trial rights were not violated where he was arrested on March 28, 2001, and his trial began on May 15, 2002, because defendant moved for a continuance on January 10, 2002, and the trial court granted the continuance until May 15, 2002; the additional 48 days beyond the 12 month period were during that continuance, and all of the time from January 10, 2002, until May 15, 2002, was properly excluded from the calculation of the speedy-trial period. *George v. State*, 358 Ark. 269, 189 S.W.3d 28 (2004), cert. denied 543 U.S. 1163, 125 S. Ct. 1329, 161 L. Ed. 2d 136 (2005).

Trial court did not err in denying defendant's motion to dismiss for lack of a speedy trial under Ark. R. Crim. P. 28.1(c) and 28.2(a) because each of the three delays in defendant's trial dates were a result of defendant's own motions for continuances, which, pursuant to subsection (c) of this rule, were time that was properly excluded in calculating the time for trial. *Wade v. State*, 2009 Ark. App. 346, 308 S.W.3d 178 (2009).

While defendant made a prima facie case of a speedy-trial violation under Ark. R. Crim. P. 28.1, as continuances filed by defendant and a codefendant were excluded by this rule, and as defendant's severance motion did not comply with Ark. R. Crim. P. 22.3(b)(i), less than 365 days expired between his arrest and trial; therefore, his motion to dismiss was properly denied. *Raymond v. State*, 2011 Ark. App. 179, — S.W.3d —, 2011 Ark. App. LEXIS 194 (Mar. 2, 2011).

#### **Grounds Insufficient.**

Where there was no finding that giving precedence to criminal cases was a practice followed by the civil divisions of county circuit

court — a legal responsibility of these divisions, as well as the criminal division — and where there was no finding the congestion was greater than before, or that relief was sought by asking for additional judges, the trial court's findings, entered only after a motion to dismiss was filed, did not constitute sufficient grounds to exclude any term of court, in considering whether speedy trial rule had been violated. *Harkness v. Harrison*, 266 Ark. 59, 585 S.W.2d 10 (1979).

#### **Incapacity of Judge.**

Illness or incapacity of a judge does not justify a delay in bringing an accused to trial. *Novak v. State*, 294 Ark. 120, 741 S.W.2d 243 (1987).

The court would reject the contention that a death in the family of the trial judge constituted good cause for a 113-day delay. *Eubanks v. Humphrey*, 334 Ark. 21, 972 S.W.2d 234 (1998).

#### **Ineffective Assistance of Counsel.**

Where the defendant made a motion for an omnibus hearing pursuant to ARCrP 20 and then waived that motion 55 days later, no trial date was set until almost a year after the defendant waived the hearing, and the defendant was tried more than 18 months after being charged, the delay beyond the speedy trial period was not the result of defendant's conduct. Therefore, the failure of defendant's counsel to make a dismissal motion pursuant to ARCrP 28.1 on the ground that the trial was held after the speedy trial period had expired was ineffective assistance of counsel, and defendant's conviction was reversed. *Walker v. State*, 288 Ark. 52, 701 S.W.2d 372 (1986).

#### **Intent.**

This rule contemplates that a trial judge will regularly call the docket, and if a case is to be continued beyond the time permitted by law, then the reasons will be stated. *Harkness v. Harrison*, 266 Ark. 59, 585 S.W.2d 10 (1979).

Subsection (b) of this rule was not intended to and should not permit the state to deny a speedy trial on the basis of crowded docket conditions absent an "exceptional circumstance." *Garrison v. State*, 270 Ark. 426, 605 S.W.2d 467 (1980).

#### **Mental Evaluation.**

The excluded period related to a mental evaluation of the defendant began on the day the trial judge ruled from the bench that she was to undergo mental evaluation, rather than the later date on which the order for her mental evaluation was entered. *Dillehay v. State*, 74 Ark. App. 100, 46 S.W.3d 545 (2001).

Defendant was not denied his right to a speedy trial where the total days excluded between hearings on pretrial motions and

continuances was 217 days, or four days short of the amount needed to bring the days to trial down to 12 months and the time consumed in obtaining a mental evaluation, which was also an excludable period, consumed more days than were required to bring defendant's trial within 12 months. *Turner v. State*, 349 Ark. 715, 80 S.W.3d 382 (2002).

Defendant's speedy-trial right was not violated and the trial court did not err when it denied his motion to dismiss because the trial was postponed due to the need for the appointment of new counsel, which was excludable for good cause pursuant to subsection (h) of this rule, and due to defendant's pretrial motions, including his motions for a polygraph examination, to admit certain evidence under the Rape Shield law, to compel discovery, and for a mental evaluation, which was excludable under subsection (a) of this rule. *Parker v. State*, 93 Ark. App. 472, 220 S.W.3d 238 (2005).

Because defendant's trial did not occur until 639 days after defendant was arrested, defendant made a prima facie case that his right to a speedy trial was violated, but because only 146 days were chargeable to the state, the trial court did not err in denying defendant's motion to dismiss for lack of speedy trial; 14 days were chargeable to defendant and 56 days were attributable to the state from defendant's time of arrest until the order for a mental health evaluation under § 5-2-305. *Block v. State*, 2010 Ark. App. 603, — S.W.3d —, 2010 Ark. App. LEXIS 634 (Sept. 15, 2010).

#### **Motion to Transfer.**

Speedy trial rule was violated where the time from the defendant's arrest until his trial was 527 days; the period of time from when defendant first moved to transfer to a different municipal court until the date his trial was set in that court was not excludable. *Bennett v. State*, 54 Ark. App. 154, 925 S.W.2d 432 (1996).

#### **Nolle Prosequi.**

Where, just before defendant mother was to be tried for murder, it was learned for the first time that her daughter would testify it was she, not the defendant, who killed father, the state had good cause to nolle prosequi the charge; consequently, when it was determined there was insufficient evidence to find daughter a juvenile delinquent and, almost immediately, the state refiled the murder charge against the mother, the period of delay occasioned by the nolle prosequi was properly excluded under subsection (f) of this rule for purposes of meeting the speedy trial requirements of ARCrP 28.2. *Carter v. State*, 280 Ark. 34, 655 S.W.2d 379 (1983).

The court rejected the contention that a nolle prosequi was not granted for good cause



and that the delay caused by the nolle prosequi should not be excluded because the defendant did not make a contemporaneous objection to the trial court's finding that the nolle prosequi was granted for good cause. *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000).

As the state had good cause to seek the nolle prosequi of a felony controlled substance charge pursuant to a plea negotiation, as there was no indication that the state was merely trying to evade the speedy-trial requirement, and as the time period during which the felony charge was nol-prossed was permissibly excluded under this rule, denial of defendant's motion to dismiss the refiled felony controlled substance charge on speedy-trial grounds was proper. *State v. Crawford*, 373 Ark. 95, 281 S.W.3d 736 (2008).

#### Orders and Docket Entries.

When a case is delayed by the accused and that delaying act is memorialized by a record taken at the time it occurred, that record may be sufficient to satisfy the requirements of subsection (i) of this rule. *Key v. State*, 300 Ark. 66, 776 S.W.2d 820 (1989); *Clements v. State*, 312 Ark. 528, 851 S.W.2d 422 (1993); *Wallace v. State*, 314 Ark. 247, 862 S.W.2d 235 (1993).

The record of the trial judge's finding that a continuance should be granted, which was agreed to by defendant, is sufficient to satisfy the requirements of subsection (i) of this rule. *Key v. State*, 300 Ark. 66, 776 S.W.2d 820 (1989).

Failure to raise the issue that no written order was entered setting out the excluded period as required by subsection (i) of this rule precluded its consideration on appeal. *Johnson v. State*, 27 Ark. App. 217, 769 S.W.2d 37 (1989).

A trial court should enter written orders, or make docket notations at the time continuances are granted to detail reasons for the continuances and to specify to a day certain the time covered by such excluded periods, but, a trial court's failure to comply with subsection (i) of this rule does not result in automatic reversal. *McConaughy v. State*, 301 Ark. 446, 784 S.W.2d 768 (1990); *Henson v. State*, 38 Ark. App. 155, 832 S.W.2d 269 (1992).

A written order or docket entry is obligatory under the plain wording of this rule. *Hudson v. State*, 303 Ark. 637, 799 S.W.2d 529 (1990).

Where records show the accused made 1 petition for commitment and 2 motions for psychiatric evaluation, all three of which resulted in commitment orders and consequent psychiatric evaluations, the record was sufficient to satisfy the requirements of subsection (i) of this rule. *Hubbard v. State*, 306 Ark. 153, 812 S.W.2d 107 (1991).

Where "pocket docket" entry, excluding pe-

riod of time from calculation of speedy trial, was made several months after the delay occurred, 2 months after the 12-month period had elapsed, and 6 weeks after defendant filed his motion to dismiss, it was untimely and ineffectual. *Reed v. State*, 35 Ark. App. 161, 814 S.W.2d 560 (1991).

When a case is delayed by the accused, and that delaying act is memorialized by a record taken at the time it occurred, that record may be sufficient to satisfy the requirements of subsection (i) of this rule. *Henson v. State*, 38 Ark. App. 155, 832 S.W.2d 269 (1992).

Failure to make written entries, required by subsection (i) of this rule, is not, in itself, reversible error. *Foster v. State*, 38 Ark. App. 245, 832 S.W.2d 293 (1992); *Wallace v. State*, 314 Ark. 247, 862 S.W.2d 235 (1993).

Where docket entry spoke to defendant's motion to sever, the notation of new trial date was made contemporaneously to the granting of the motion, and it specified the date upon which the trial was rescheduled, there was compliance with subsection (i) of this rule. *Cash v. State*, 40 Ark. App. 40, 842 S.W.2d 440 (1992).

For the trial court to wait some twenty days after defendant appeared for trial court before making any docket entry whatsoever does not satisfy the requirements of this rule. *Turbyfill v. State*, 312 Ark. 1, 846 S.W.2d 646 (1993).

Excludable periods without a written order or docket entry are upheld when the record itself demonstrates the delays were attributable to the accused and where the reasons were memorialized in the proceedings at the time of occurrence. *Lynch v. State*, 315 Ark. 47, 863 S.W.2d 834 (1993).

A trial court's failure to comply with subsection (i) of this rule does not result in automatic reversal; the record may be sufficient to satisfy the subsection's requirements. *Goston v. State*, 326 Ark. 106, 930 S.W.2d 332 (1996).

A 20-day time period was not excludable where the order memorializing the continuance was never filed, there was no docket notation at the time the continuance was granted, and there was no record memorializing the continuance. *Bowen v. State*, 73 Ark. App. 240, 42 S.W.3d 579 (2001).

Requirement of a written order or docket entry was satisfied when there was such an order or docket entry as well as when the record itself demonstrated the delays were attributable to the accused and where the reasons were memorialized in the proceedings at the time of the occurrence. *Jones v. State*, 347 Ark. 455, 65 S.W.3d 402 (2002), cert. denied 536 U.S. 909, 122 S. Ct. 2366, 153 L. Ed. 2d 187 (2002).

#### Preservation for Review.

Defendant's speedy-trial issue was not preserved for appellate review because he filed a

general speedy-trial motion that asserted only that 781 total days had elapsed since he was arrested, he did not contemporaneously object to any of the excluded periods announced by the court, and thus he did not inform the court of the reason for his disagreement with its proposed action prior to or at the time it ruled on the matter. *Killian v. State*, 96 Ark. App. 92, 238 S.W.3d 629 (2006).

#### **Proceedings Concerning Defendant.**

Delay resulting from an examination on the competence of the defendant is excluded in computing the twelve-month period; therefore, the defendant was not denied a speedy trial where he was tried within 12 months of his arrest, where the time for conducting a mental examination requested by him was excluded. *Scott v. State*, 286 Ark. 339, 691 S.W.2d 859 (1985).

Delay period due to trial on another charge was excludable. *Allen v. State*, 294 Ark. 209, 742 S.W.2d 886 (1988).

Where it was defendant's failure to keep appointments that caused the examination to be delayed, the court properly excluded pursuant to subsection (a) of this rule the period from the date of the letter from defendant's counsel requesting mental examination, to the date the court received the examination report. *Johnson v. State*, 27 Ark. App. 217, 769 S.W.2d 37 (1989).

The period of delay resulting from an examination and hearing on the competency of the defendant as provided under § 5-2-305 and the period during which he is incompetent to stand trial is excludable. *McConaughy v. State*, 301 Ark. 446, 784 S.W.2d 768 (1990).

The time necessary to complete a mental examination requested by a defendant, including the time between the order and the evaluation, is excluded from the twelve-month period in the speedy trial rule. *Hufford v. State*, 314 Ark. 181, 861 S.W.2d 108 (1993).

Defendant's trial for four state crimes allegedly committed while he was on furlough from a forty-year sentence in the Arkansas Department of Corrections did not violate the speedy trial rule, because the delay caused by defendant's arrest and trial on federal charges was excludable. *Patterson v. State*, 318 Ark. 358, 885 S.W.2d 667 (1994).

No violation of ARCrP 28.1 shown where there were any number of excludable periods including defendant's delay in hiring counsel, his filing of a motion to suppress evidence, and his waiver and then withdrawal of his right to a jury trial. *Cupples v. State*, 326 Ark. 31, 929 S.W.2d 150 (1996).

#### **Recusal of Judge.**

Where circuit judge recused from the case and requested the Judicial Department to appoint a new trial judge, the delay during the time that the first judge recused and

another judge was appointed was necessary and reasonable under the circumstances. *Clements v. State*, 312 Ark. 528, 851 S.W.2d 422 (1993).

#### **Refiling Charges.**

Where state filed nolle prosequi order and later refiled charges of first-degree battery, the period between the order and the refiled could not be excluded under subsection (f) of this rule since the action by the state of entering a nolle prosequi or dismissing with leave to refile does not toll the running of the speedy trial provisions under subsection (f) of this rule absent a showing of good cause for the period of delay; the state is not relieved of a speedy trial limitation placed upon it merely because the defendant is permitted absolute release pending disposition of the charges. *State v. Washington*, 273 Ark. 82, 617 S.W.2d 3 (1981) (decision prior to 1980 amendment of ARCrP 28.1).

Where the state first charged defendant with DWI, fourth offense, in circuit court, and later refiled the charge in municipal court as DWI, third offense, time in between first filing and refile was not a delay for good cause. *Lukehart v. State*, 32 Ark. App. 152, 798 S.W.2d 117 (1990).

#### **Requests for Continuances.**

Petitions by court appointed counsel to be relieved on the sole ground of conflict of interest in that the attorney had counseled with another individual whose interest conflicted with that of defendant could not be considered as requests for continuances within the meaning of this rule. *Archer v. State*, 271 Ark. 365, 609 S.W.2d 91 (1980).

On the defendant's motion to dismiss for violation of his right to a speedy trial, a 71-day-period was excludable as a period of delay resulting from a continuance granted at the request of the defendant or his counsel where the delay occurred after defense counsel announced his intent to file a writ of prohibition seeking to prohibit trial. *Cheat-ham v. State*, 63 Ark. App. 106, 974 S.W.2d 490 (1998).

Continuances granted at a defendant's attorney's request are excludable from the speedy-trial time, even if the defendant does not approve or is not consulted. *Huddleston v. State*, 339 Ark. 266, 5 S.W.3d 46 (1999).

#### **Right to Speedy Trial.**

Defendant's right to a speedy trial was violated where defendant was first tried on a murder charge and then on a charge of possession with intent to distribute which occurred 83 days after the 12-month period required. *Raglin v. State*, 35 Ark. App. 181, 816 S.W.2d 618 (1991).

Defendant was not required to object to the delay of his second trial, caused by holding the murder trial first and, thereby, did not



lose his right to contend that the delay violated his right to a speedy trial. *Raglin v. State*, 35 Ark. App. 181, 816 S.W.2d 618 (1991).

When delays under this rule were excluded from the time for speedy trial, the speedy trial period was met. *Smith v. State*, 313 Ark. 93, 852 S.W.2d 109 (1993).

There was no violation of the right to a speedy trial where defendant established a prima facie case because 483 days had elapsed since his arrest, but the state was able to show excludable periods of delay attributable to hearings on pretrial motions under subsection (a) of this section. *Gwin v. State*, 340 Ark. 302, 9 S.W.3d 501 (2000).

#### **Trial Held Timely.**

Although defendant was tried on a date eighty-two days beyond the twelve-month constraint of ARCrp 28.1, his constitutional right to a speedy trial was not violated where there were 127 days of “excludable time” under this rule. *Jones v. State*, 329 Ark. 603, 951 S.W.2d 308 (1997).

Defendant’s trial commenced within the required 12 months since the periods during which defendant obtained continuances and a mental exam did not count towards calculation of the 12-month period. *Birmingham v. State*, 346 Ark. 78, 57 S.W.3d 118 (2001).

In a sexual abuse case, the court did not err by denying defendant’s motion to dismiss on speedy trial grounds where the trial court stated on the record that it was continuing the rape-shield hearing until March 25, and all attorneys agreed to that date; further, the court entered its February 14, 2002, order stating that a hearing on the rape shield motions and all other motions filed herein would be heard on March 25, 2002, at 11:00 a.m., and the matter was set for trial on May 22, 2002, and that memorialization of the delay and the reasons therefore satisfied the requirements of this rule. *Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004).

Defendant was not deprived of his right to a speedy trial where he was arrested for the rape of his step-daughter on April 8, 2004, and tried on September 29, 2004, because the fact that defendant had been arrested in September 2003 for the charge of rape of his step-daughter in a different county had no bearing on the speedy trial calculations in this case as the time began to run with the arrest in this case; thus, the court did not need to even look to excludable time periods. *Anderson v. State*, 93 Ark. App. 454, 220 S.W.3d 225 (2005).

Defendant was afforded a speedy trial, and the trial court properly denied his motion to dismiss because although he made a prima facie case of a speedy-trial violation, the state identified an additional time period charged against him that put his trial within the

required twelve-month period contained in Ark. R. Crim. P. 28.1; the delay was properly charged against defendant, he made no objection, and that excludable period put his trial within twelve months of his arrest as calculated under Ark. R. Crim. P. 28. *Barber v. State*, 2010 Ark. App. 210, — S.W.3d —, 2010 Ark. App. LEXIS 177 (Mar. 3, 2010).

Defense counsel was not ineffective for failing to file a motion to dismiss based on speedy trial violations; four periods of time, when excluded from the 442-day period between arrest and trial, left 287 days, which was well within the one-year period for a speedy trial. *Rueda v. State*, 2012 Ark. 144, — S.W.3d —, 2012 Ark. LEXIS 164 (Apr. 5, 2012).

Defendant’s right to a speedy trial was not violated because periods of time were excludable due to defendant’s injuries from a car accident, defendant’s conduct in failing to appear for trial, and defendant’s extradition to Texas to serve a sentence there on other charges. *Sullivan v. State*, 2012 Ark. 74, — S.W.3d —, 2012 Ark. LEXIS 93 (Feb. 23, 2012).

#### **Trial Not Held Timely.**

The state did not carry its burden of showing that certain time periods should be excluded under this rule since the period between the recusal of the prosecuting attorney, who had been counsel to the defendant’s co-defendant, and the filing of the appeal under consideration could not be excluded because the trial court did not immediately appoint a substitute state’s attorney and because it was not the defendant’s fault that the prosecutor hired the codefendant’s counsel or that the defendant had not been granted a severance; accordingly, good cause for exclusion did not exist under subsection (h) of this rule and the defendant was entitled to dismissal of the charges pursuant to ARCrP 30.1. *Norton v. State*, 273 Ark. 289, 618 S.W.2d 164 (1981), overruled *Richards v. State*, 2 S.W.3d 766 (1999) (decision prior to 1980 amendment).

Where the record did not contain any written order or docket entry setting forth the excluded periods or the number of days in each period, and there was neither an order continuing the case nor an order setting forth the “exceptional circumstances” necessitating the delay, the trial judge failed to comply with subdivisions (b), (c), and (i) of this rule, and the defendant’s conviction was reversed and dismissed. *Shaw v. State*, 18 Ark. App. 243, 712 S.W.2d 338 (1986).

Appellant’s right to a speedy trial was violated when his trial commenced on the 600th day following his arrest where only 168 days of delay were excludable as attributed to appellant and the state failed to show cause for the additional 70 days of delay. *Zangerl v. State*, 352 Ark. 278, 100 S.W.3d 695 (2003).

Although defendant’s retrial commenced

491 days after a mistrial, subtracting a 168-day continuance under subsection (c) of this rule from 491 days meant that defendant's trial commenced on day 323; because defendant was brought to trial within one year from the date of the mistrial, there was no violation of defendant's right to a speedy trial. *Eubanks v. State*, 2012 Ark. 142, — S.W.3d —, 2012 Ark. LEXIS 162 (Apr. 5, 2012).

#### **Unavailability of Material Evidence.**

A 116-day continuance was properly excluded under subdivision (d)(1) of this rule where the state sought a continuance in order to obtain DNA testing as (1) the evidence sought was material to the state's case, (2) the state exercised due diligence to obtain the evidence, and (3) there were reasonable grounds to believe that the evidence would be available at a later date. *Chenoweth v. State*, 341 Ark. 722, 19 S.W.3d 612 (2000).

Where defendant's trial began 109 days after the 12 month period for speedy trial had run, but the delay was due in part to a continuance on defendant's motion and in larger part because the state was granted a continuance under subdivision (d)(1) of this rule while awaiting scientific lab results that were material to the case, defendant was not denied his right to a speedy trial. *Miles v. State*, 348 Ark. 544, 75 S.W.3d 677 (2002).

#### **Witness Unavailable.**

Where the trial court found that certain state witnesses were unavailable for the third term of court because of previous court commitments, the third term was properly excluded under this rule, in calculating the three terms within which the case must be tried; thus, the court did not err in denying the defendant's motion to dismiss for failure to try the case within three terms under ARCrP 28.1. *Roleson v. State*, 272 Ark. 346, 614 S.W.2d 656 (1981), questioned *Wingfield v. State*, 303 Ark. 291, 796 S.W.2d 574 (1990) (decision prior to 1980 amendment of ARCrP 28.1).

A witness is not unavailable unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial. *Meine v. State*, 309 Ark. 124, 827 S.W.2d 151 (1992).

Continuance granted due to the unavailability of a state's witness was excludable pursuant to subdivision (d)(1) of this rule. *Henson v. State*, 38 Ark. App. 155, 832 S.W.2d 269 (1992).

The State exercised due diligence in obtaining a material witness for trial; the fact that when the continuance to obtain the witness was granted, the case was not reset for trial, did not render the time unexcludable under subdivision (d)(1) of this rule. *Strickland v. State*, 331 Ark. 402, 962 S.W.2d 769 (1998).

In determining the defendant's motion to

dismiss on speedy trial grounds, the court properly excluded a 42-day-delay caused by the defendant's request for a continuance based on the unavailability of a witness. *Morgan v. State*, 333 Ark. 294, 971 S.W.2d 219 (1998).

On the defendant's motion to dismiss for violation of his right to a speedy trial, a 7-day-period was excludable where the state requested a continuance due to the unavailability of an expert witness and the defendant did not oppose the continuance. *Cheatham v. State*, 63 Ark. App. 106, 974 S.W.2d 490 (1998).

Appellant's speedy trial rights were violated because he was not brought to trial within 365 days of his arrest, even though several days were excluded under subdivision (d)(1) of this rule where a continuance was granted due to the fact that a witness was unable to appear after suffering complications from surgery. Moreover, although the time a competency exam was ordered stopped the speedy trial clock, it should have been restarted when the report was filed, and the state did not demonstrate that a pretrial motion filed by appellant caused any delay in the trial. *Eagle v. State*, 2012 Ark. App. 187, — S.W.3d —, 2012 Ark. App. LEXIS 284 (Feb. 29, 2012).

#### **Writ of Prohibition.**

A statement by defense counsel that he would seek a writ of prohibition after the trial court denied a motion to dismiss for lack of speedy trial resulted in the exclusion of the period of time from the making of that statement until further actions in the case made it obvious that he did not file such a writ. *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000).

**Cited:** *Thompson v. City of Little Rock*, 264 Ark. 213, 570 S.W.2d 262 (1978); *Wade v. State*, 264 Ark. 320, 571 S.W.2d 231 (1978); *Cash v. State*, 271 Ark. 881, 611 S.W.2d 510 (1981); *Lark v. State*, 276 Ark. 441, 637 S.W.2d 529 (1982); *Hall v. State*, 279 Ark. 265, 650 S.W.2d 587 (1983); *Loane v. State*, 12 Ark. App. 374, 677 S.W.2d 864 (1984), overruled in part *Cunningham v. State*, 14 S.W.3d 869 (2000); *Williams v. Lockhart*, 772 F.2d 475 (8th Cir. 1985); *Chandler v. State*, 284 Ark. 560, 683 S.W.2d 928 (1985); *Glover v. State*, 287 Ark. 19, 695 S.W.2d 829 (1985); *Cheshire v. State*, 16 Ark. App. 34, 696 S.W.2d 322 (1985); *Ellison v. Langston*, 290 Ark. 238, 718 S.W.2d 446 (1986); *Howard v. State*, 291 Ark. 633, 727 S.W.2d 830 (1987); *Duncan v. State*, 294 Ark. 105, 740 S.W.2d 923 (1987); *Gooden v. State*, 295 Ark. 385, 749 S.W.2d 657 (1988); *Kain v. State*, 296 Ark. 123, 752 S.W.2d 265 (1988); *Cox v. State*, 299 Ark. 312, 772 S.W.2d 336 (1989); *White v. State*, 301 Ark. 74, 781 S.W.2d 478 (1989); *Towe v. State*, 303 Ark. 441, 798 S.W.2d 56 (1990); *Washington v.*



State, 31 Ark. App. 62, 787 S.W.2d 254 (1990); Brawley v. State, 306 Ark. 609, 819 S.W.2d 704 (1991); J.B. v. State, 309 Ark. 70, 827 S.W.2d 144 (1992); State v. Edwards, 310 Ark. 516, 838 S.W.2d 356 (1992); Scroggins v. State, 312 Ark. 106, 848 S.W.2d 400 (1993); Matthews v. State, 313 Ark. 327, 854 S.W.2d 339 (1993); Thornton v. State, 317 Ark. 257, 878 S.W.2d 378 (1994); Jones v. State, 323 Ark. 655, 916 S.W.2d 736 (1996); Davis v. State, 325 Ark. 36, 924 S.W.2d 452 (1996); McClung v. State, 53 Ark. App. 196, 920 S.W.2d 867 (1996); Bennett v. State, 54 Ark. App. 154, 925 S.W.2d 432 (1996); Goston v.

State, 55 Ark. App. 17, 930 S.W.2d 387 (1996); Bradford v. State, 329 Ark. 620, 953 S.W.2d 549 (1997); White v. State, 330 Ark. 813, 958 S.W.2d 519 (1997); Tipton v. State, 331 Ark. 28, 959 S.W.2d 39 (1998); Kelch v. Erwin, 333 Ark. 567, 970 S.W.2d 255 (1998); Cherry v. State, 347 Ark. 606, 66 S.W.3d 605 (2002); Watson v. State, 358 Ark. 212, 188 S.W.3d 921 (2004); Wilson v. State, 88 Ark. App. 158, 196 S.W.3d 511 (2004); Berry v. Henry, 364 Ark. 26, 216 S.W.3d 93 (2005); Davis v. State, 375 Ark. 368, 291 S.W.3d 164 (2009); Smith v. State, 2010 Ark. 137, 361 S.W.3d 840 (2010).

## RULE 29. SPECIAL PROCEDURES: PERSON SERVING TERM OF IMPRISONMENT

### Rule 29.1. Prosecutor's obligations.

(a) If the prosecuting attorney has information that a person charged with a crime is imprisoned in a penal institution in the State of Arkansas, he shall promptly seek to obtain the presence of the prisoner for trial.

(b) If the prosecuting attorney has information that a person charged with a crime is imprisoned in a penal institution of a jurisdiction other than the State of Arkansas, he shall promptly cause a detainer to be filed with the official having custody of the prisoner and request such officer to advise the prisoner of the filing of the detainer and of the prisoner's right to demand trial.

(c) Upon receipt from a prisoner of a demand for trial upon a pending charge, the prosecuting attorney shall promptly seek to obtain the presence of the prisoner for trial.

**Publisher's Notes.** This rule was set out in the per curiam order of the Supreme Court

of Arkansas issued on June 30, 1980, but no change was made in the rule.

## CASE NOTES

### ANALYSIS

Demand for trial.  
Duty of prisoner.  
Equal protection.  
Promptly seek presence.  
Service of process.

### Demand for Trial.

Subsection (b) of this rule places the duty upon the prosecutor to promptly file a detainer upon learning that an accused is imprisoned elsewhere; the prisoner then has the right to demand trial and such trial must be had within 180 days unless there is good cause for a delay. *Dukes v. State*, 271 Ark. 674, 609 S.W.2d 924 (1981).

### Duty of Prisoner.

There is a positive duty upon a prisoner to seek a trial after he is notified that charges are pending; an accused in prison in another state, for a different crime, must affirmatively

request trial in order to activate the speedy trial rule or statute. *Dukes v. State*, 271 Ark. 674, 609 S.W.2d 924 (1981).

### Equal Protection.

Defendant in capital felony murder case was not denied equal protection of the law on ground that the speedy trial provisions of ARCrP 28.1 — 30.2, distinguish between persons serving a term of imprisonment on another conviction while awaiting trial on the principal charge (must be brought to trial within 18 months), and persons incarcerated as a result of the principal charge to be tried (must be brought to trial within 18 months, but entitled to release from incarceration after nine months), since neither is entitled to absolute discharge until after 18 months under ARCrP 30; furthermore, defendant failed to show any prejudice resulting from his incarceration prior to trial. *Hayes v. State*, 278

Ark. 211, 645 S.W.2d 662, cert. denied 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983).

#### **Promptly Seek Presence.**

Where defendant was tried within period required by ARCrP 28.1 and 28.2, defendant could not, in the absence of proof of prejudice or testimony in support of his motion to dismiss, show that state failed to "promptly" seek his presence at trial as required by this rule. *Miller v. Lofton*, 272 Ark. 164, 612 S.W.2d 732 (1981) (decision prior to 1980 amendment of ARCrP 28.1).

#### **Service of Process.**

The defendant's time limit in Interstate Agreement on Detainers (see § 16-95-101) was never triggered where the State never filed a detainer and the defendant was never served with a detainer while incarcerated in another state. *Durdin v. State*, 59 Ark. App. 207, 955 S.W.2d 912 (1997).

**Cited:** *Wade v. State*, 264 Ark. 320, 571 S.W.2d 231 (1978); *Williams v. State*, 271 Ark. 435, 609 S.W.2d 37 (1980); *Dukes v. Lockhart*, 769 F.2d 504 (8th Cir. 1985); *Keys v. State*, 23 Ark. App. 219, 745 S.W.2d 628 (1988).

## **RULE 30. CONSEQUENCES OF DENIAL OF SPEEDY TRIAL**

### **Rule 30.1. Absolute discharge.**

(a) Subject to the provisions of subsection (b) hereof, a defendant not brought to trial before the running of the time for trial, as extended by excluded periods, shall be absolutely discharged. This discharge shall constitute an absolute bar to prosecution for the offense charged and for any other offense required to be joined with that offense.

(b) An incarcerated defendant not brought to trial before the running of the time for trial as provided by Rules 28.1 — 28.3 shall not be entitled to absolute discharge pursuant to subsection (a) hereof but shall be recognized or released on order to appear.

(c) The time for trial of a defendant released pursuant to subsection (b) hereof shall be computed pursuant to Rules 28.1(b) and 28.2.

#### **RESEARCH REFERENCES**

**U. Ark. Little Rock L.J.** Stockburger, Survey of Arkansas Law: Criminal Procedure, 2

U. Ark. Little Rock L.J. 217.

#### **CASE NOTES**

##### **ANALYSIS**

Construction.  
Amended information.  
Burden of proof.  
Continuance.  
Discharge proper.  
Dismissal of charges.  
Equal protection.  
Incarcerated defendant.  
Jurisdiction.  
Presumption of timeliness.  
Release on recognizance.  
Timely trial.  
Waiver of speedy trial.

#### **Construction.**

A municipal court speedy trial violation motion to dismiss pursuant to subsection (a) of this rule may be raised in the de novo circuit court proceeding even though ARCrP 28.1 only refers to trial in a circuit court. *Whittle v. Washington County Circuit Court*, 325 Ark. 136, 925 S.W.2d 383 (1996).

#### **Amended Information.**

Where charges of possession of certain drugs with intent to deliver, which were added by an amended information, arose out of the same criminal episode for which the defendants were arrested, and where allowable period had expired since the date defendants were released on bond, the state was barred from prosecuting the defendants on any of the charges. *Callender v. State*, 263 Ark. 217, 563 S.W.2d 467 (1978).

#### **Burden of Proof.**

The burden is upon the State to show good cause for an untimely delay in the trial. *Chandler v. State*, 284 Ark. 560, 683 S.W.2d 928 (1985).

#### **Continuance.**

Defendant was timely brought to trial because the case was passed from November 17, 2005, through January 5, 2006 at the request of the defendant, it was again passed at



defendant's request from March 2, 2006, through May 4, 2006, and defendant failed to appear on May 4, 2006, and next appeared 28 days later on June 1, 2006. *Layton v. State*, 2009 Ark. App. 96, 302 S.W.3d 610 (2009).

#### **Discharge Proper.**

Where the record revealed no reason for delay in defendant's trial, he was discharged for violation of his speedy trial right. *Alexander v. State*, 268 Ark. 384, 598 S.W.2d 395 (1980).

Where defendant was jailed more than allowable period because trial was cancelled so that lead investigative officer could attend law enforcement conference, defendant was entitled to absolute discharge from the charges under ARCrP 28.1, and this rule. *Cash v. State*, 271 Ark. 881, 611 S.W.2d 510 (1981).

Where defendants were unavailable because the sheriff failed to follow through in the serving of the proper notice or warrants, dismissal of the charges under this rule was proper. *State v. Washington*, 273 Ark. 82, 617 S.W.2d 3 (1981).

In a prosecution for murder, a three-year delay in bringing the defendant to trial caused by the failure of the municipal court to forward a copy of defendant's bond to the circuit court necessitated the defendant's absolute discharge. The failure of the State to check the available court records or otherwise demonstrate any diligence in locating the accused over a two and one half year period could not be excused. *Chandler v. State*, 284 Ark. 560, 683 S.W.2d 928 (1985).

Speedy trial motion should have been granted. *Horn v. State*, 294 Ark. 464, 743 S.W.2d 814 (1988).

Appellant's right to a speedy trial was violated when his trial commenced on the 600th day following his arrest where only 168 days of delay were excludable as attributed to appellant and the state failed to show cause for the additional 70 days of delay. *Zangerl v. State*, 352 Ark. 278, 100 S.W.3d 695 (2003).

#### **Dismissal of Charges.**

Where the state failed to show that there was good cause for the delay in bringing the accused to trial on manslaughter charges, the trial court did not abuse its discretion when it granted the defendant's motion to dismiss the charges. *State v. Lewis*, 268 Ark. 359, 596 S.W.2d 697 (1980).

The state did not carry its burden of showing that certain time periods should be excluded under ARCrP 28.3, since the period between the recusal of the prosecuting attorney, who had been counsel to the defendant's codefendant, and the filing of the appeal under consideration could not be excluded because the trial court did not immediately appoint a substitute state's attorney and be-

cause it was not the defendant's fault that the prosecutor hired the codefendant's counsel or that the defendant had not been granted a severance; accordingly, good cause for exclusion did not exist under subsection (h) of ARCrP 28.3, and the defendant was entitled to dismissal of the charges pursuant to this rule. *Norton v. State*, 273 Ark. 289, 618 S.W.2d 164 (1981), overruled *Richards v. State*, 2 S.W.3d 766 (1999).

Defendant successfully showed, and the state conceded, that defendant's prosecution was 113 days over the 12-month limit for speedy trial purposes; therefore, defendant's motion to dismiss should have been granted. *Berry v. Henry*, 364 Ark. 26, 216 S.W.3d 93 (2005).

#### **Equal Protection.**

Defendant in capital felony murder case was not denied equal protection of the law on ground that the speedy trial provisions of ARCrP 28.1 — 30.2, distinguish between persons serving a term of imprisonment on another conviction while awaiting trial on the principal charge (must be brought to trial within 18 months), and persons incarcerated as a result of the principal charge to be tried (must be brought to trial within 18 months, but entitled to release from incarceration after nine months), since neither is entitled to absolute discharge until after 18 months under this rule; furthermore, defendant failed to show any prejudice resulting from his incarceration prior to trial. *Hayes v. State*, 278 Ark. 211, 645 S.W.2d 662, cert. denied 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983).

#### **Incarcerated Defendant.**

An incarcerated defendant not brought to trial before the running of time is not entitled to absolute discharge; instead he is entitled to be recognized and released on order to appear, and the time for his trial is then computed pursuant to Rules 28.1(b) and 28.2. *Matthews v. State*, 268 Ark. 484, 598 S.W.2d 58 (1980).

Where defendant was not tried within nine months after his arrest and incarceration, that delay did not entitle him to an absolute discharge; at most, he was entitled to be released and then to be tried within the time allowed by ARCrP 28.1(b). *Bell v. State*, 270 Ark. 1, 603 S.W.2d 397 (1980).

Where defendant was arrested in July, 1978, on burglary charges and separately charged with several other unrelated offenses, was tried and convicted on the unrelated charges in February, 1979, and sentenced to seven years and 30 days, and the date of trial for burglary was then set for November, 1979, he was not entitled to discharge for not being tried within nine months of the first trial, but was at most entitled to release from custody; however, even release was not possible since he was confined in the

department of corrections under an earlier conviction. *Miller v. Lofton*, 272 Ark. 164, 612 S.W.2d 732 (1981).

### **Jurisdiction.**

ARCrP 28.1 is jurisdictional inasmuch as it requires a defendant to be brought to trial within twelve months or it be absolutely discharged pursuant to subsection (a) of this rule. *Turbyfill v. State*, 312 Ark. 1, 846 S.W.2d 646 (1993); *Rhodes v. Capeheart*, 313 Ark. 16, 852 S.W.2d 118 (1993).

### **Presumption of Timeliness.**

There may be a denial of one's constitutional right to a speedy trial after a period of delay shorter than those permitted under ARCrP 28 and ARCrP 30, but a strong showing of prejudice would be necessary to overcome the presumption that a time within the prescribed limits of these rules meets constitutional requirements. *Matthews v. State*, 268 Ark. 484, 598 S.W.2d 58 (1980).

### **Release on Recognizance.**

Where defendant was held in jail for more than nine months on rape, attempted rape and burglary charges before being tried, he was not entitled to absolute discharge, but rather to release on his personal recognizance under ARCrP 28.1 and subsection (b) of this rule. *Cash v. State*, 271 Ark. 881, 611 S.W.2d 510 (1981).

Where the judge found that there had been a period of excusable delay, defendant was not entitled to dismissal; even if there was not excusable delay, defendant would only have been entitled to a release on his own recognizance, not absolute discharge. *Cassell v. State*, 273 Ark. 59, 616 S.W.2d 485 (1981).

### **Timely Trial.**

Defendant's right to speedy trial was not violated. *State v. Messer*, 269 Ark. 431, 601 S.W.2d 857 (1980).

Defendant was brought to trial within the allowable time limitation; although defendant may have been entitled to pre-trial release at the end of nine months, as opposed to absolute discharge, such entitlement did not affect his convictions. *Wallace v. State*, 270 Ark. 17, 603 S.W.2d 399 (1980).

Where state filed nolle prosequi order and later refiled charges of first-degree battery, the period between the order and the refile could not be excluded under subsection (f) of ARCrP 28.3, in calculating the allowable period under ARCrP 28.1, since the action by the state of entering a nolle prosequi or dismissing with leave to refile does not toll the running of the speedy trial provisions under subsection (f) of Rule 28.3 absent a showing of good cause for the period of delay; the state is not relieved of a speedy trial limitation placed upon it merely because the defendant is per-

mitted absolute release pending disposition of the charges. *State v. Washington*, 273 Ark. 82, 617 S.W.2d 3 (1981).

Defendant's right to a speedy trial was not violated because he was brought to trial within 12 months after several excludable time periods were subtracted from a 464-day period; therefore, defendant's motion to dismiss several drug and weapons charges was properly denied. *Gondolfi v. Clinger*, 352 Ark. 156, 98 S.W.3d 812 (2003).

Trial court properly excluded time to hear motions filed by defendant, to complete a mental examination requested by defendant, to honor continuances requested by defendant, and for the state to obtain a witness who was unavailable to testify from the 12-month period which the state had, pursuant to ARCrP 28.1, to try defendant, who was charged with capital murder, aggravated robbery, and theft of property. *Romes v. State*, 356 Ark. 26, 144 S.W.3d 750 (2004).

Trial court did not err in denying defendant's motion to dismiss because of a speedy-trial violation as 505 days were properly excluded and the state was only required to account for 493 days. *Dodson v. State*, 358 Ark. 372, 191 S.W.3d 511 (2004).

Defendant's argument that the charge of theft by receiving the second vehicle should have been dismissed as having arisen out of the same criminal episode when the charge of breaking and entering the first vehicle was dismissed for violation of the speedy-trial rule failed because the charges involved different vehicles, different locations and different victims, and the time for speedy trial commenced to run on the date of arrest for the theft by receiving the second vehicle, August 18, 2001, and the trial conducted on that charge in July 2002 was timely for speedy trial purposes. *Yancy v. State*, 85 Ark. App. 53, 146 S.W.3d 375 (2004).

Defendant was not deprived of his right to a speedy trial where he was arrested on April 8, 2004, and tried on September 29, 2004, for the rape of his step-daughter because the fact that defendant had been arrested in September 2003 for the charge of rape of his step-daughter in a different county had no bearing the speedy trial calculations in this case as the time began to run with the arrest in this case; thus, defendant had no right to be charged as there was no speedy trial violation. *Anderson v. State*, 93 Ark. App. 454, 220 S.W.3d 225 (2005).

In a stalking and terroristic threats case, denial of defendant's motion to dismiss on speedy-trial grounds was proper because subtracting the nol pros and continuance periods from the overall 426-day period between his arrest and the day his speedy-trial motion was filed left 347 days, well within the one-



year period of Ark. R. Crim. P. 28.1. *Branning v. State*, 371 Ark. 433, 267 S.W.3d 599 (2007).

Although defendant's retrial commenced 491 days after a mistrial, subtracting a 168-day continuance from 491 days meant that defendant's trial commenced on day 323; because defendant was brought to trial within one year from the date of the mistrial, there was no violation of defendant's right to a speedy trial and defendant was not entitled to dismissal. *Eubanks v. State*, 2012 Ark. 142, — S.W.3d —, 2012 Ark. LEXIS 162 (Apr. 5, 2012).

#### **Waiver of Speedy Trial.**

Where no period of authorized delay was proven and more than 12 months lapsed from the date of filing armed robbery charge, the charge would have been discharged, and prosecution absolutely barred, if counsel had moved for dismissal; defendant waived his right to a speedy trial when he later pleaded guilty. *Hall v. State*, 281 Ark. 282, 663 S.W.2d 926 (1984).

Defendant's speedy trial rights were not violated because the arraignment had to be rescheduled due to defendant's failure to appear and subsequent late arrival. It was clear that the delay was defendant's fault, and

therefore the State met its burden of showing that the delay was the result of defendant's conduct or was otherwise justified and that the circuit court was correct in excluding that twelve-day period from its speedy-trial calculations. *Yarbrough v. State*, 370 Ark. 31, 257 S.W.3d 50 (2007).

**Cited:** *Wade v. State*, 264 Ark. 320, 571 S.W.2d 231 (1978); *Archer v. State*, 271 Ark. 365, 609 S.W.2d 91 (1980); *Williams v. State*, 271 Ark. 435, 609 S.W.2d 37 (1980); *Wallace v. Lockhart*, 701 F.2d 719 (8th Cir. 1983), cert. denied 464 U.S. 934, 104 S. Ct. 340, 78 L. Ed. 2d 308 (1983); *Glover v. State*, 287 Ark. 19, 695 S.W.2d 829 (1985); *Jackson v. State*, 290 Ark. 375, 720 S.W.2d 282 (1986); *Lowe v. State*, 290 Ark. 403, 720 S.W.2d 293 (1986), overruled *Richards v. State*, 2 S.W.3d 766 (1999); *Allen v. State*, 294 Ark. 209, 742 S.W.2d 886 (1988); *Keys v. State*, 23 Ark. App. 219, 745 S.W.2d 628 (1988); *Roberts v. State*, 302 Ark. 4, 786 S.W.2d 568 (1990); *Henson v. State*, 38 Ark. App. 155, 832 S.W.2d 269 (1992); *Green v. State*, 313 Ark. 87, 852 S.W.2d 110 (1993); *Marks v. State*, 332 Ark. 374, 965 S.W.2d 764 (1998); *Eubanks v. Humphrey*, 334 Ark. 21, 972 S.W.2d 234 (1998); *Miller v. State*, 100 Ark. App. 391, 269 S.W.3d 400 (2007).

### **Rule 30.2. Waiver.**

Failure of a defendant to move for dismissal of the charges under these rules prior to a plea of guilty or trial shall constitute a waiver of his rights under these rules.

#### **RESEARCH REFERENCES**

**Ark. L. Rev. Note**, Speedy Trial and Excludable Delays Under the Arkansas Rules of Criminal Procedure: *Norton v. State*, 35 Ark. L. Rev. 591.

#### **CASE NOTES**

##### **ANALYSIS**

Effective assistance of counsel.  
Failure to move for dismissal.  
No waiver of rights.

##### **Effective Assistance of Counsel.**

A waiver of the right to a speedy trial does not operate, as a matter of law, as a waiver of the right to effective assistance of counsel; the constitutional right to effective assistance of counsel at the time of entering a plea of guilty is not vitiated by this rule. *Hall v. State*, 281 Ark. 282, 663 S.W.2d 926 (1984).

##### **Failure to Move for Dismissal.**

Where no period of authorized delay was proven and more than 12 months lapsed from the date of filing armed robbery charge, the

charge would have been discharged, and prosecution absolutely barred, if counsel had moved for dismissal; defendant waived his right to a speedy trial when he later pleaded guilty. *Hall v. State*, 281 Ark. 282, 663 S.W.2d 926 (1984).

##### **No Waiver of Rights.**

Where the accused made a motion to dismiss for lack of speedy trial on October 3, 1979, the fact that the accused had been granted a continuance in August of 1979 did not affect the timeliness of his dismissal motion, because the accused asserted, and the state did not contest the assertion, that the third term of court after the date the accused was arrested and charged expired May 9, 1979, and the accused did not waive his right

to a speedy trial under this rule because he did not plead guilty and his motion was made before he was tried. *Garrison v. State*, 270 Ark. 426, 605 S.W.2d 467 (1980).

Where defendant's counsel did not move to dismiss the charges on speedy trial grounds, thereby waiving defendant's right to a timely trial, the failure to so move did not waive his right to effective assistance of counsel and he could raise the claim that failure to move for dismissal constituted ineffective assistance of

counsel in a post-conviction relief petition under ARCrP 37.1, although he must prove prejudice from the claimed error. *Clark v. State*, 274 Ark. 81, 621 S.W.2d 857 (1981).

**Cited:** *Hall v. State*, 279 Ark. 265, 650 S.W.2d 587 (1983); *Glover v. State*, 287 Ark. 19, 695 S.W.2d 829 (1985); *Gooden v. State*, 295 Ark. 385, 749 S.W.2d 657 (1988); *Spivey v. State*, 25 Ark. App. 269, 757 S.W.2d 186 (1988).

## ARTICLE IX. TRIAL BY JURY

### RULE 31. RIGHT TO TRIAL BY JURY

#### Commentary to Article IX

The following rules are proposed chiefly to supplement existing statutory authority. Their provisions are not addressed to fundamental constitutional considerations such as when the right to trial by jury accrues. Rather the focus ranges from fundamental threshold questions concerning waiver to problems of less moment such as note-taking by jurors.

Of course the rules respecting trial by jury are to be considered against the background of the mandates of both the Arkansas and Federal Constitutions and interpretive decisions.

Article 2, § 10 of the Arkansas Constitution confers the right to trial by jury upon an accused. Under this provision an accused enjoys the right to a jury trial in *all* criminal prosecutions in a circuit court. It will be noted that, on its face, this constitutional provision confers a broader right to a jury trial speaking to the states via the Fourteenth Amendment. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 88 S. Ct. 1472, 20 L. Ed. 2d 538 (1968); *Baldwin v. New York*, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970); *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

It seems well established by *Duncan, supra*, and its progeny that the due process clause of the Fourteenth Amendment does not impose the requirements of Article 3, § 2 of the Federal Constitution and the Sixth Amendment thereto upon the states in criminal prosecutions for "petty" crimes.

Article 2, § 10 of the Arkansas Constitution, however, does not distinguish between "petty" and "serious" offenses for purposes of requiring a trial by jury in a circuit court. Neither, in fact, does statutory authority conferring the right to a trial by jury in lower courts. *See, e.g., Ark. Stat. Ann. §§ 44-114, 44-210 (Repl.1964).*

Five rules comprise Article IX dealing with trial by jury.

The first, Rule 31, treats waiver of trial by jury in some detail. Rules 31.1 and 31.2 require assent by the prosecuting attorney in conjunction, in most instances, with a request of record made personally by the defendant. In making waiver contingent on prosecutorial assent, the rule reenacts the present statutory requirement of Ark. Stat. Ann. § 43-2108 (Repl. 1964). Under narrowly circumscribed conditions, waiver by counsel alone is permitted by Rule 31.3.

Under Rule 31.4 a defendant charged with a capital felony may waive neither a trial by jury on the issue of guilt nor determination of sentence by a jury unless the prosecuting attorney waives the death penalty, the waiver is approved by the court, and the court determines that the defendant's proffered waiver is freely and voluntarily made. *See, Ark. Stat. Ann. §§ 43-2108 (Repl. 1964); 43-2108.1, 43-2108.2 (Supp. 1973).*

Withdrawal of a waiver made voluntarily and knowingly is left to the discretion of the trial court by Rule 31.5. There is no Arkansas statutory authority dealing with the withdrawal of a knowing and voluntary waiver of jury trial. However, the Arkansas Supreme Court did consider this subject in *Scates v. State*, 244 Ark. 333, 424 S.W.2d 876 (1968), where the following language appears:

While the Arkansas Constitution provides in Article 2, Section 7, for the right of trial by jury, it also provides for waiver of this right under the same provision in accordance with Ark. Stat. Ann. § 43-2108, *supra*. After the defendant's right to trial by a jury has been duly waived, as in the case at bar, it is within the discretion of the trial court to permit or deny a withdrawal of such waiver. *Id.* at 337, 338, 424 S.W.2d at 879.



As a consequence, Rule 31.5 merely codifies in rule form present decisional law.

Rule 32 refines present authority regarding selection of jurors. Rule 32.1 goes further than existing Arkansas law — Ark. Stat. Ann. § 39-207 (Supp. 1973) — which provides that “[t]he master list of jurors’ names and addresses ... may be examined in the presence of the Circuit Judge by litigants or their attorneys who desire to verify that names drawn from the wheel or box were placed there in the manner provided herein by the Commissioners.” Under the proposed rule, no requirement is imposed that such lists be examined in the presence of the judge or that they be requested only for a specific, statutorily set out purpose. Additionally, if other relevant information is in the court clerk’s possession, it can be secured pursuant to the rule’s provisions.

Rule 32.2 deals with the purposes of voir dire examination and the manner in which it should be conducted.

Present law found at Ark. Stat. Ann. § 39-226 (Repl. 1962) requires the court only to examine jurors “upon all matters set forth in the statutes as disqualifications.” Rule 32.2 refines this authority by setting out with more precision the matters to be explained and inquired into by the court.

Under present law litigants have a right to examine jurors separately. *Griffin v. State*, 239 Ark. 431, 389 S.W.2d 900 (1965). Although Rule 32.2 adopts existing law, it also takes a further step by making it clear that the primary responsibility for conducting voir dire examination rests with the court. The thrust of Rule 32.2 is toward avoidance of improper use of voir dire. See, ABA *Standards, Trial by Jury* (Approved Draft: 1968) at 64. (This volume is hereafter cited *Standards, Trial by Jury*.)

Rule 33 is one of broad purview and addresses problems involving such matters as restraint of defendants and jury requests for supplementary instructions.

Initially, in Rule 33.1 [now Rule 33.4], the problem of the recalcitrant witness or defendant is dealt with. There is Arkansas law to the effect that restraint is justifiable under certain circumstances as a reasonable precautionary measure to prevent the escape of an accused. See, *Rayburn v. State*, 200 Ark. 914, 141 S.W.2d 532 (1940); *Johnson v. State*, 253 Ark. 1, 484 S.W.2d 92 (1972).

The United States Supreme Court has recently approved both restraint of refractory defendants and their removal from the court room. *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), rehearing denied, 398 U.S. 915, 90 S. Ct. 1684, 26 L. Ed. 2d

80 (1970). Relying on *Allen*, *supra*, the Arkansas Supreme Court in *Morris v. State*, 249 Ark. 1005, 462 S.W.2d 842 (1971), has approved of removing a defendant from the court room during trial.

To minimize the possibility of prejudice to a defendant excluded from the court room or restrained in the presence of the jury, Rule 33.1 [now Rule 33.4] requires that the court (1) enter into the record the reasons for the action taken, and (2) give a cautionary instruction if one is requested by the defendant or his attorney. Lastly, as the comment to the rule indicates, the rule is not designed to restrict the trial judge’s discretion as to proper methods of dealing with an unruly defendant or witness.

Rule 33.2 [now Rule 33.5] explicitly authorizes notetaking during trial, a practice already common in many jurisdictions within the state.

Several arguments against note-taking have been raised in the past, but the Commission’s thinking harmonizes with that of the ABA *Standards* Reporters in concluding that the advantages of note-taking outweigh whatever disadvantages might be said to exist. See, *Standards, Trial by Jury* at 97-100.

Rule 33.3 [now Rule 33.6] is derived from Ark. Stat. Ann. § 27-1732.1 (Repl. 1962), but is broader in as much as the rule obliges the trial judge to deliver copies of the instructions to the jury at the request of any party or a juror.

Rule 33.4 [now Rule 33.7] governs giving additional instructions to a jury after it has retired to deliberate. The proposed rules treat the subject with much greater specificity than present authority. See, Ark. Stat. Ann. § 43-2139 (Repl. 1964).

Juror orientation, a subject treated neither by statute nor case law in Arkansas, is the subject of Rule 34. Essentially the rule provides that jurors shall be educated as to the nature of their duties and, to some extent, as to trial procedures and legal terminology, in order that they might perform their obligations better and more efficiently.

The last rule of the Article, Rule 35, has no statutory counterpart. This provision precludes a trial judge from praising or criticizing a verdict in the presence of the jury rendering it. Comments expressing appreciation to jurors for the performance of a public service are permitted.

The Commission feels the restraint imposed by the rule is essential since the same jurors criticized or praised might immediately be assigned to duty respecting other pending cases of the same nature. The rule is, consequently, calculated to prevent judicial comment regarding one case from influencing the disposition of any other case.

**Rule 31.1. Waiver of trial by jury: assent by prosecutor.**

No defendant in any criminal cause may waive a trial by jury unless the waiver is assented to by the prosecuting attorney and approved by the court.

**Comment to Rule 31.1**

It is not the purpose of this rule to impose any limitation on a court's discretion to refuse to allow the waiver of trial by jury.

**1987 Unofficial Supplementary Commentary to Rule 31.1**

This Rule is mandatory. Even in a capital case the defendant cannot avoid a jury trial by entering a plea of guilty under Rule 24.

*Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986). See, also, Rule 31.4 governing guilty pleas to capital felonies.

**RESEARCH REFERENCES**

**Ark. L. Rev.** Disorderly Conduct and Loitering — A Modern Approach to Traditional Legislation, 30 Ark. L. Rev. 186.

Pleading Guilty in Arkansas: A Journey Down the Rabbit's Hole, 55 Ark. L. Rev. 401.

**CASE NOTES****ANALYSIS**

Constitutionality.

Construction.

Assent by prosecutor.

Mandatory nature of rule.

Notice.

Waiver found appropriate.

**Constitutionality.**

There is no federal rule binding the state courts to use a 12-member jury in state criminal prosecutions and an agreement to proceed with an 11-member jury in accordance with state law and court rules was not a violation of the constitutional right to trial by jury. *Vinston v. Lockhart*, 850 F.2d 420 (8th Cir. 1988).

Requirement under § 16-89-108(a) and this rule, that a prosecutor approve defendant's request to plead guilty and waive a jury trial, did not violate defendant's due process rights because the sentencing scheme codified at § 16-90-801 — 16-90-804 did not create a liberty interest in protecting from exposure to higher ranges of sentences. *Whitlow v. State*, 357 Ark. 290, 166 S.W.3d 45 (2004).

**Construction.**

Under this rule and Ark. Const., Art. 2, § 7, a defendant charged under § 5-65-205 has the right to a jury trial, and to the extent that § 5-65-205(c) prevents a defendant from having a jury determination, it is unconstitutional. *Medlock v. State*, 328 Ark. 229, 942 S.W.2d 861 (1997).

Where the record contained no evidence that defendant was informed by the court of

his right to be tried by a jury, or that he executed a knowing, voluntary, and intelligent waiver of that right, he was deprived of his constitutional right to trial by jury; a criminal defendant bears no burden of demanding a trial by jury. *Davis v. State*, 81 Ark. App. 17, 97 S.W.3d 921 (2003).

**Assent by Prosecutor.**

The trial court erred in accepting, without the State's assent, the defendant's guilty pleas to four counts of delivering a controlled substance. *State v. Vasquez-Aerreola*, 327 Ark. 617, 940 S.W.2d 451 (1997).

A trial court may not accept a guilty plea when the prosecuting attorney does not consent to the plea and instead requests a jury trial. *State v. Smittie*, 341 Ark. 909, 20 S.W.3d 352 (2000).

**Mandatory Nature of Rule.**

Criminal cases which require trial by jury must be so tried unless waived by the defendant, assented to by the prosecutor, and approved by the court; the first two requirements are mandatory before the court has any discretion in the matter. *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986); *State v. Vasquez-Aerreola*, 327 Ark. 617, 940 S.W.2d 451 (1997).

**Notice.**

Trial court's standard practice of requiring a defendant to request a jury at least 48 hours before trial was not in accordance with the Arkansas Constitution or the Arkansas Rules of Criminal Procedure; the notice requirement put a defendant in the position of for-



feiting his or her right to a jury trial due to inaction. *Swindle v. State*, 373 Ark. 519, 285 S.W.3d 200 (2008), rehearing denied — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 456 (Sept. 18, 2008), cert. denied — U.S. —, 129 S. Ct. 1616, 173 L. Ed. 2d 994 (2009).

#### **Waiver Found Appropriate.**

Defendant's unequivocal, signed writing that waived his right to a jury trial was

sufficient under Ark. R. Crim. P. 31.2; a verbatim record was not required. *Barrow v. State*, 2010 Ark. App. 589, — S.W.3d —, 2010 Ark. App. LEXIS 637 (Sept. 15, 2010).

**Cited:** *Griggs v. State*, 280 Ark. 339, 658 S.W.2d 371 (1983); *Elmore v. State*, 305 Ark. 426, 809 S.W.2d 370 (1991), modified 809 S.W.2d 370 (1991); *Winkle v. State*, 310 Ark. 713, 841 S.W.2d 589 (1992); *Calnan v. State*, 310 Ark. 744, 841 S.W.2d 593 (1992).

### **Rule 31.2. Waiver of trial by jury: personal request.**

Should a defendant desire to waive his right to trial by jury, he may do so either (1) personally in writing or in open court, or (2) through counsel if the waiver is made in open court and in the presence of the defendant. A verbatim record of any proceedings at which a defendant waives his right to a trial by jury in person or through counsel shall be made and preserved. (Amended June 6, 1994.)

**Publisher's Notes.** The Per Curiam Order dated June 6, 1994, provided, in part: "The

purpose of this rule is to memorialize *Bolt v. State*, 314 Ark. 387, 862 S.W.2d 841 (1993)."

#### **1987 Unofficial Supplementary Commentary to Rule 31.2**

The "in writing or in open court" requirement of Rule 31.2 must be complied with. In a federal habeas corpus proceeding, the court will not presume a knowing, intelligent, and

understanding waiver of a defendant's right to a jury trial from a silent record. *Williamson v. Lockhart*, 636 F. Supp. 1298 (E.D. Ark. 1986).

#### **CASE NOTES**

##### **ANALYSIS**

Constitutionality.

Construction.

Appeal.

Express declaration required.

Insufficient basis for waiver.

Notice.

Open court.

Record of waiver.

Representation by counsel.

Waiver by counsel.

Waiver found appropriate.

Withdrawal of waiver.

##### **Constitutionality.**

There is no federal rule binding the state courts to use a 12-member jury in state criminal prosecutions and an agreement to proceed with an 11-member jury in accordance with state law and court rules was not a violation of the constitutional right to trial by jury. *Vinston v. Lockhart*, 850 F.2d 420 (8th Cir. 1988).

##### **Construction.**

When construing Ark. Const., Art. 2, § 7 together with this rule, the law is clear that the only way a defendant may waive the jury trial right is by personally making an express declaration in writing or in open court and

that the record of the open court proceedings where the defendant waives his or her right must be preserved. *Hill v. State*, 47 Ark. App. 44, 883 S.W.2d 857 (1994).

Under this rule and Ark. Const., Art. 2, § 7, a defendant charged under § 5-65-205 has the right to a jury trial, and to the extent that § 5-65-205(c) prevents a defendant from having a jury determination, it is unconstitutional. *Medlock v. State*, 328 Ark. 229, 942 S.W.2d 861 (1997).

##### **Appeal.**

Because the law providing the manner of waiver is obviously designed to assure that the jury trial right is not forfeited by inaction on the part of a defendant, the contemporaneous objection rule did not apply and defendant's conviction was reversed. *Calnan v. State*, 310 Ark. 744, 841 S.W.2d 593 (1992).

The Arkansas Constitution and Rules of Criminal Procedure assume a defendant will be tried by a jury unless that right is expressly waived. The law providing the manner of waiver is obviously designed to assure that the jury trial right is not forfeited by inaction on the part of a defendant. *Calnan v. State*, 310 Ark. 744, 841 S.W.2d 593 (1992).

Denial of defendant's motion for a mistrial

was appropriate because he invited the alleged error. If he had not agreed to start his trial without alternate jurors, then the circuit court could have seated some when the trial began; defendant had to have known that his second cousin had been seated as a juror and yet, he let the matter go until she was dismissed. *Marshall v. State*, 102 Ark. App. 175, 283 S.W.3d 597 (2008).

#### **Express Declaration Required.**

Where two separate questions (the possibility of incarceration and waiver of a jury trial) were being discussed by the prosecutor and defendant at the same time, the apparent withdrawal of defendant's request for a jury trial in exchange for the prosecutor's not seeking incarceration did not constitute an express declaration by defendant of an intentional relinquishment of his right to a jury trial. *Duty v. State*, 45 Ark. App. 1, 871 S.W.2d 400 (1994).

#### **Insufficient Basis for Waiver.**

Where the defendant was never made aware either by the trial court or his attorney, that the choice confronting him was, on the one hand, to be tried by jury of his peers, or on the other hand, to have his guilt or innocence determined by the judge, the defendant was deprived of sufficient information to make a knowing and intelligent waiver of the right to a jury trial. *Williamson v. Lockhart*, 636 F. Supp. 1298 (E.D. Ark. 1986).

Where the record contained no evidence that defendant was informed by the court of his right to be tried by a jury, or that he executed a knowing, voluntary, and intelligent waiver of that right, the defendant was deprived of his constitutional right to trial by jury. *Davis v. State*, 81 Ark. App. 17, 97 S.W.3d 921 (2003).

Wife who was found to be in civil contempt and sentenced to one year in a detention center did not waive her right to a jury trial where she was never advised that she was entitled to one. *Linder v. Weaver*, 364 Ark. 319, 219 S.W.3d 151 (2005).

In a felony non-support case, where counsel requested a jury trial at the pretrial hearing but the case proceeded as a bench trial, the appellate court held that defendant was denied his right to a jury trial as the record was silent as to whether defendant had knowingly, intelligently, and understandingly waived his right to a jury trial. *Burrell v. State*, 90 Ark. App. 114, 204 S.W.3d 80 (2005).

Dismissal of defendant's appeal of his conviction in the city court was improper as the dismissal would waive defendant's right to a jury trial, which he did not waive; defendant neither personally made an express declaration in writing or in open court, nor did counsel make the waiver in open court in the

presence of the defendant. *Ayala v. State*, 365 Ark. 192, 226 S.W.3d 766 (2006).

#### **Notice.**

Trial court's standard practice of requiring a defendant to request a jury at least 48 hours before trial was not in accordance with the Arkansas Constitution or the Arkansas Rules of Criminal Procedure; the notice requirement put a defendant in the position of forfeiting his or her right to a jury trial due to inaction. *Swindle v. State*, 373 Ark. 519, 285 S.W.3d 200 (2008), rehearing denied — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 456 (Sept. 18, 2008), cert. denied — U.S. —, 129 S. Ct. 1616, 173 L. Ed. 2d 994 (2009).

#### **Open Court.**

Waiver of jury trial in judge's chambers satisfied the "open court" requirement of this rule where defendant requested a hearing in the judge's chambers because defendant did not want the jury panel to overhear, and thus be prejudiced by, defendant's statements regarding his reluctance to have his case tried to a jury; once in chambers, defendant made it absolutely clear that he wished to have his case tried to the circuit judge and not the jury because he feared a jury would "automatically" conclude he was guilty and "railroad" him, and, after the trial court admonished defendant that he was "giving up one of the most precious rights that anybody has in this country," defendant concluded that he wanted to take his chances with the trial judge. *Burton v. State*, 327 Ark. 65, 937 S.W.2d 634 (1997).

#### **Record of Waiver.**

Presuming waiver of right to a jury trial from a silent record is impermissible; the record must demonstrate or evidence disclose that a defendant knowingly, intelligently and understandingly waived his or her right to a jury trial and anything less is not a waiver. *Williamson v. Lockhart*, 636 F. Supp. 1298 (E.D. Ark. 1986).

#### **Representation by Counsel.**

It is not required that a waiver be accompanied by the advice of an attorney before a decision to waive a jury trial in order for that waiver to be "intelligent"; however, such a waiver must rest on an adequate preliminary statement of the trial court delineating the rights of the accused and the consequences of the proposed waiver with the implication, at least tacit, that the accused should reasonably comprehend her position and appreciate the possible effects of her choice. *Maxwell v. State*, 73 Ark. App. 45, 41 S.W.3d 402 (2001).

#### **Waiver by Counsel.**

Where defendant's counsel stated in open court, on the record, and in defendant's presence that defendant waived a jury trial and



specifically asked the trial court to hear the case, the defendant “personally” waived a jury trial in compliance with this rule and Ark. Const., Art. 2, § 7. *Bolt v. State*, 314 Ark. 387, 862 S.W.2d 841 (1993).

While a defendant who desires to waive his right to a jury trial under this rule must do so either in writing or in open court, his or her attorney may also make such a waiver so long as the defendant has acknowledged he or she had been informed of the right and the attorney waives the right in open court, on the record and in the defendant’s presence. *Bolt v. State*, 314 Ark. 387, 862 S.W.2d 841 (1993).

An attorney’s waiver of his client’s right to a jury trial, made in open court and in the presence of the defendant, satisfied the requirement of this rule that such a waiver be made “personally; where defense counsel explicitly submitted the case to the court for a bench trial, the defendant was bound by his attorney’s action. *Johnson v. State*, 314 Ark. 471, 863 S.W.2d 305 (1993).

A waiver communicated by defense counsel in chambers, without defendant being present and without a record being made of the colloquy, was insufficient. *Hill v. State*, 47 Ark. App. 44, 883 S.W.2d 857 (1994).

Defendant effectively waived his right to have a jury sentence him where it was shown that defendant was in court when his attorney stated that the jury would not be needed for sentencing and did not object. *Tumilson v. State*, 93 Ark. App. 91, 216 S.W.3d 620 (2005).

Summary denial of an inmate’s Ark. R. Crim. P. 37.1 postconviction relief petition was reversed because the order did not provide the requisite findings and conclusions, and the record did not clearly support affirmation; because no hearing was held, the trial court had an obligation to provide written

findings that showed that the inmate was entitled to no relief. It was not conclusive from the petition or the record that relief was not warranted on the inmate’s claims concerning illegal sentencing as there was no evidence that counsel agreed to allow the court to sentence on a gun enhancement charge. *Davenport v. State*, 2011 Ark. 105, — S.W.3d —, 2011 Ark. LEXIS 91 (Mar. 10, 2011).

#### **Waiver Found Appropriate.**

Defendant’s unequivocal, signed writing that waived his right to a jury trial was sufficient under this rule; a verbatim record was not required. *Barrow v. State*, 2010 Ark. App. 589, — S.W.3d —, 2010 Ark. App. LEXIS 637 (Sept. 15, 2010).

#### **Withdrawal of Waiver.**

Trial court abused its discretion by not allowing defendant to withdraw his waiver of a jury trial, because defendant waived his right to a jury trial and then immediately changed his mind. Defendant conceded that his initial waiver of his right to be tried by a jury was valid, however, there was no indication of any bad faith and the prosecutor made no objection to defendant’s request to withdraw the waiver, and given the timeliness of the withdrawal request, there was no indication that this would have caused any delay, inconvenience to witnesses, or prejudice to the State. *Hester v. State*, 100 Ark. App. 234, 267 S.W.3d 623 (2007).

**Cited:** *Griggs v. State*, 280 Ark. 339, 658 S.W.2d 371 (1983); *Elmore v. State*, 305 Ark. 426, 809 S.W.2d 370 (1991), modified 809 S.W.2d 370 (1991); *Winkle v. State*, 310 Ark. 713, 841 S.W.2d 589 (1992); *Sievers v. City of Fort Smith*, 320 Ark. 136, 894 S.W.2d 940 (1995).

### **Rule 31.3. Waiver of trial by jury: waiver by counsel or agent.**

In misdemeanor cases, where only a fine is imposed by the court, a jury trial may be waived by the defendant’s attorney, except that a corporation charged with any crime may waive a jury trial through counsel or authorized corporate officer.

#### **CASE NOTES**

##### **ANALYSIS**

Constitutionality.  
Presence of defendant.

##### **Constitutionality.**

There is no federal rule binding the state courts to use a 12-member jury in state criminal prosecutions and an agreement to proceed with an 11-member jury in accordance with state law and court rules was not a violation of the constitutional right to trial by jury. *Vinston v. Lockhart*, 850 F.2d 420 (8th Cir. 1988).

Wife who was found to be in civil contempt and sentenced to one year in a detention center did not waive her right to a jury trial where she was never advised that she was entitled to one. *Linder v. Weaver*, 364 Ark. 319, 219 S.W.3d 151 (2005).

##### **Presence of Defendant.**

This rule is consistent with § 16-89-103, which states that a defendant’s presence is not required in misdemeanor cases. *Bolt v. State*, 314 Ark. 387, 862 S.W.2d 841 (1993).

**Cited:** *Elmore v. State*, 305 Ark. 426, 809 S.W.2d 370 (1991), modified 809 S.W.2d 370 (1991).

### Rule 31.4. Waiver of trial by jury: capital felonies.

No defendant charged with a capital felony may waive either trial by jury on the issue of guilt or the right to have sentence determined by a jury unless:

(a) the court in which the cause is to be tried determines that the waiver is voluntarily and freely proffered without compulsion or coercion; and

(b) the prosecuting attorney, with the permission of the court, has waived the death penalty; and

(c) the prosecuting attorney has assented to the waiver of trial by jury, and such waiver has been approved by the court.

#### 1987 Unofficial Supplementary Commentary to Rule 31.4

Since only a jury can impose a death sentence, it has been argued that the death penalty statute unconstitutionally infringes upon an accused's right to plead not guilty and avoid a jury trial and, thus, a death

sentence. The Arkansas Supreme Court has consistently rejected this argument. See, *Hill v. State*, 289 Ark. 387, 713 S.W.2d 233 (1986); *Ruiz v. State*, 275 Ark. 410, 630 S.W.2d 44 (1982).

### RESEARCH REFERENCES

**Ark. L. Rev.** Pleading Guilty in Arkansas: A Journey Down the Rabbit's Hole, 55 Ark. L. Rev. 401.

### CASE NOTES

#### ANALYSIS

Constitutionality.

Mandatory requirements.

Notice of trial.

Protection for accused.

#### Constitutionality.

There is no federal rule binding the state courts to use a 12-member jury in state criminal prosecutions and an agreement to proceed with an 11-member jury in accordance with state law and court rules was not a violation of the constitutional right to trial by jury. *Vinston v. Lockhart*, 850 F.2d 420 (8th Cir. 1988).

#### Mandatory Requirements.

Criminal cases which require trial by jury must be so tried unless waived by the defendant, assented to by the prosecutor, and approved by the court; the first two requirements are mandatory before the court has any discretion in the matter. *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986).

Because the prosecutor had not waived the death penalty nor assented to defendant's waiver of the right to a jury trial, defendant

was not permitted to enter a plea of guilty to capital murder under the terms of this rule. *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003).

#### Notice of Trial.

Defendant's failure to respond to a notice of trial setting, which advised that the court was to be notified 48 hours in advance if a jury trial was requested, did not constitute a waiver of a jury trial. *Reaser v. State*, 47 Ark. App. 7, 883 S.W.2d 851 (1994).

#### Protection for Accused.

The fact that, under this rule, a defendant may agree to waive trial by jury on the issue of guilt or the right to have guilt determined by a jury because the court and state will waive the death penalty does not chill an accused's right to a jury trial; rather, the rule offers a protection for the accused who wishes to avoid a jury trial. *Ruiz v. State*, 275 Ark. 410, 630 S.W.2d 44, cert. denied 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148 (1982).

**Cited:** *Numan v. State*, 291 Ark. 22, 722 S.W.2d 276 (1987); *State v. Robbins*, 342 Ark. 262, 27 S.W.3d 419 (2000).



### Rule 31.5. Discretionary withdrawal of waiver.

A defendant may not withdraw his voluntary and knowing waiver of trial by jury as a matter of right, but the court, in its discretion, may permit withdrawal of the waiver prior to the commencement of trial.

#### CASE NOTES

##### Withdrawal Improperly Denied.

The trial court abused its discretion in denying the defendant's motion to withdraw her waiver of a jury trial where the trial court (1) erred in concluding that appellant waived her right to a jury trial knowingly and intelligently, (2) abused its discretion in denying her motion for the additional reason that this motion was filed after the defendant engaged private counsel who advised her that a jury trial was preferable, and (3) her motion was filed more than one month prior to trial, and no inconvenience to witnesses or to the administration of justice was demonstrated. *Maxwell v. State*, 73 Ark. App. 45, 41 S.W.3d 402 (2001).

Trial court abused its discretion by not allowing defendant to withdraw his waiver of jury trial, because defendant waived his right to a jury trial and then immediately changed his mind. Defendant conceded that his initial waiver of his right to be tried by a jury was valid, however, there was no indication of any bad faith and the prosecutor made no objection to defendant's request to withdraw the waiver, and given the timeliness of the withdrawal request, there was no indication that this would have caused any delay, inconvenience to witnesses, or prejudice to the State. *Hester v. State*, 100 Ark. App. 234, 267 S.W.3d 623 (2007).

## RULE 32. SELECTION OF JURORS

### Rule 32.1. List of prospective jurors.

The circuit court may require members of petit jury panels to complete written questionnaires setting forth the following information:

- (i) age;
- (ii) marital status;
- (iii) extent of education;
- (iv) occupation of juror and spouse; and
- (v) prior jury service.

Upon request, such questionnaires shall be made available by the clerk of the court to the defendant or his counsel and the prosecuting attorney. Upon a showing of good cause, additional information may be furnished regarding jurors by order of the court.

#### RESEARCH REFERENCES

**ALR.** Validity and application of computerized jury selection practice or procedure. 110 ALR 5th 329.

Validity, Construction, and Application of Right of Defendant in State Criminal Proceeding to Jury Composed Solely of United States Citizens. 36 ALR 6th 189.

**U. Ark. Little Rock L.J.** Sullivan, An Overview of the Law of Jury Selection for Arkansas Criminal Trial Lawyers, 15 U. Ark. Little Rock L.J. 37.

#### CASE NOTES

##### Questionnaires.

The decision to allow the use of expanded juror questionnaires lies within the sound discretion of the trial court. *Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996).

The concept of expanded juror question-

naires is merely a written form of voir dire examination. *Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996).

Defendant contended that he was entitled to an expanded juror questionnaire because there was no timeliness requirement in either

this rule or ARCrP 32.2; however, the trial court did not err in denying the motion because it had wide latitude involving voir dire, defendant failed to show how the trial court's ruling was prejudicial, and defendant was not prevented from asking any relevant question that was contained in the proposed questionnaire when defendant conducted examinations of the prospective jurors. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003).

Neither § 16-10-301 to 16-10-305 nor § 21-6-402 to 21-6-406 refer to a fee that may be charged by bailiffs, clerks, or the courts for

potential juror information. Therefore, a circuit court erred when it refused to refund a \$3.00 fee charged by a bailiff for potential juror information in a criminal case. *Aikens v. State*, 368 Ark. 641, 249 S.W.3d 788 (2007).

Trial court did not err in excusing some prospective jurors in a capital murder case based on the written answers they gave to a questionnaire without ever being required to appear and answer questions from counsel. Such a questionnaire was clearly permitted under this rule. *Miller v. State*, 2010 Ark. 1, 362 S.W.3d 264 (2010).

## Rule 32.2. Voir dire examination.

(a) Voir dire examination shall be conducted for the purpose of discovering bases for challenge for cause and for the purpose of gaining knowledge to enable the parties to intelligently exercise peremptory challenges. The judge shall initiate the voir dire examination by:

- (i) identifying the parties; and
- (ii) identifying the respective counsel; and
- (iii) revealing the names of those witnesses whose names have been made known to the court by the parties; and
- (iv) briefly outlining the nature of the case.

(b) The judge shall then put to the prospective jurors any question which he thinks necessary touching their qualifications to serve as jurors in the cause on trial. The judge shall also permit such additional questions by the defendant or his attorney and the prosecuting attorney as the judge deems reasonable and proper.

### 1987 Unofficial Supplementary Commentary to Rule 32.2

The trial court has broad discretion in determining the proper scope of voir dire examination by counsel, and restrictions imposed by the trial court will not require reversal on appeal unless a clear abuse of discretion is shown. Where appointed counsel for a defendant was not permitted to inquire of jurors about his being appointed, presumably as opposed to being retained, *Finch v. State*, 262 Ark. 313, 556 S.W.2d 434 (1977), and where it was alleged that the prosecutor "testified" about the credibility of police informants who were to testify at trial, *Parker v. State*, 265 Ark. 315, 578 S.W.2d 206 (1979), no error was found by the Arkansas Supreme Court.

On the other hand, it is clear that the trial court should, on occasion, permit more

sharply focused inquiry about specific subjects such as prospective jurors' views about insanity defenses. In these cases it is not enough for the trial court merely to get assurances from prospective jurors that they will follow the law. *Fauna v. State*, 265 Ark. 934, 582 S.W.2d 18 (1979). The Arkansas Supreme Court has held, however, that "prospective jurors may not be questioned with respect to a hypothetical set of facts expected to be proved at trial and thus commit the jury to a decision in advance, but that they may be questioned, as here, about their mental attitude toward certain types of evidence, such as circumstantial evidence." *Hobbs v. State*, 277 Ark. 271, 275-76, 641 S.W.2d 9, 12 (1982).

## RESEARCH REFERENCES

**ALR.** Validity and application of computerized jury selection practice or procedure. 110 ALR 5th 329.

Validity, Construction, and Application of Right of Defendant in State Criminal Proceeding to Jury Composed Solely of United States Citizens. 36 ALR 6th 189.

**Ark. L. Rev. Comment.** Peremptory Challenge: Striking Down Discrimination in Arkansas's Jury Selection Process, 59 Ark. L. Rev. 93.

**U. Ark. Little Rock L.J.** Note, Criminal Procedure — Voir Dire — Prosecutors Must Now Show That a Juror Is Irrevocably Com-



mitted to Voting Against the Maximum Penalty Before Striking for Cause. Haynes v. State, 270 Ark. 685, 606 S.W.2d 563 (1980), 4 U. Ark. Little Rock L.J. 371.

Sullivan, An Overview of the Law of Jury Selection for Arkansas Criminal Trial Lawyers, 15 U. Ark. Little Rock L.J. 37.

## CASE NOTES

### ANALYSIS

Purpose.  
Discretion of trial judge.  
Exclusion.  
Interruptions by court.  
Limitations on questioning.  
No prejudicial error.  
Preserving issue.  
Public proceeding.  
Questionnaires.  
Rehabilitation of jurors.  
Sentencing.  
Sequestration.

### Purpose.

The purpose of voir dire examinations is to gain knowledge for the intelligent exercise of peremptory challenges. Ward v. State, 308 Ark. 415, 827 S.W.2d 110, cert. denied 506 U.S. 841, 113 S. Ct. 124, 121 L. Ed. 2d 79 (1992).

The purposes of voir dire examination are to discover if there is any basis for challenges for cause and to gain knowledge for the intelligent exercise of peremptory challenges; those purposes do not include an attempt to commit the jurors to a decision in advance. Nutt v. State, 312 Ark. 247, 848 S.W.2d 427 (1993).

### Discretion of Trial Judge.

This rule has not materially affected the principle that the extent and scope of voir dire examination lies within the discretion of the trial judge, who is not subject to reversal except for clear abuse of such discretion. Finch v. State, 262 Ark. 313, 556 S.W.2d 434 (1977).

The extent and scope of voir dire examination of prospective jurors are matters lying within the sound judicial discretion of the trial court, the latitude of which is rather wide. Parker v. State, 265 Ark. 315, 578 S.W.2d 206 (1979).

The scope of voir dire examination by counsel is largely within the sound judicial discretion of the trial court, and his limitation of that examination is not reversible on appeal unless it is a clear abuse of discretion. Fauna v. State, 265 Ark. 934, 582 S.W.2d 18 (1979).

In capital felony murder prosecution, where one venireman stated that he had not formed an opinion about capital punishment before the voir dire began, because he had not thought about it or had to make that decision, that he was not sure what his opinion would have been if he had been the first juror

questioned but he had decided that he believed in it under certain circumstances, the defendant was not prejudiced by this recited occurrence, since he did not receive the death penalty and incident did not demonstrate abuse of court's discretion in refusal to conduct sequestered voir dire. Heffernan v. State, 278 Ark. 325, 645 S.W.2d 666 (1983).

The extent and scope of voir dire examination is largely within the sound discretion of the trial judge and the latitude of that discretion is rather wide; his restriction of that examination will not be reversed on appeal unless that discretion is clearly abused. Izzard v. State, 10 Ark. App. 265, 663 S.W.2d 192 (1984); Henry v. State, 309 Ark. 1, 828 S.W.2d 346 (1992).

The trial judge did not abuse his discretion by refusing to allow defendant to strike members of the jury panel in chambers. Felty v. State, 306 Ark. 634, 816 S.W.2d 872 (1991).

There is no abuse of discretion when the trial court curtails protracted voir dire examination, or restricts questions that do not touch upon the qualifications of the venirepersons to serve as impartial jurors, or that are potentially confusing to the prospective jurors. Henry v. State, 309 Ark. 1, 828 S.W.2d 346 (1992).

This rule provides trial judges with wide latitude in conducting and monitoring voir dire; sequestration of the jury for purposes of voir dire is also within the discretion of the trial court. Danzie v. State, 326 Ark. 34, 930 S.W.2d 310 (1996).

The trial court did not abuse its discretion in the manner in which it questioned prospective jurors where, after defense counsel asked an unclear question, the court asked a question in an attempt to ascertain whether the prospective juror had prejudged the case and whether she could render a verdict based on the evidence adduced at trial rather than based on media accounts. Britt v. State, 334 Ark. 142, 974 S.W.2d 436 (1998).

The trial court did not abuse its discretion in restricting the defendant's voir dire of prospective jurors with regard to lesser offenses since the line of questioning was irrelevant because it was unknown at that point whether instructions on lesser charges would even be submitted to the jury. Christopher v. State, 340 Ark. 404, 10 S.W.3d 852 (2000).

It was not an abuse of discretion for the trial court to refuse to allow the defendant in a murder prosecution to ask the jury if they

understood that the state would be allowed to put on evidence of the nature and circumstances of the crime but that she could not put on any evidence of innocence, and to ask the jury if they understood that the failure to put on any evidence of innocence did not mean she agreed with the state's theory of the case where the court had not yet determined whether evidence of innocence would be excluded. *Goff v. State*, 341 Ark. 567, 19 S.W.3d 579 (2000).

Permitting a general voir dire and then a specific, individual voir dire falls readily within the circuit court's discretion with respect to the extent and scope of voir dire. *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004).

Trial judge is responsible for regulating and conducting voir dire, and the fact that the rule permits such additional questioning as he or she deems proper underscores the discretion vested in the trial judge. *Hughes v. State*, 98 Ark. App. 375, 255 S.W.3d 891 (2007).

#### **Exclusion.**

A member of the news media, though not a party to the litigation, has standing to question an exclusion from voir dire. *Memphis Publishing Co. v. Burnett*, 316 Ark. 176, 871 S.W.2d 359 (1994).

#### **Interruptions by Court.**

Where in almost every instance while a juror was being examined, the court interrupted the defense counsel by stating that the court would declare the law and then proceed to ask the prospective jurors if they would follow the court's reasoning, although this temporarily interrupted defense counsel, it did not prevent them from coming through the side door or back door and eventually gaining all the information they sought, and while it appears that both the court and defense counsel were too aggressive, the purposes of voir dire on behalf of the defense were effectively carried out by able counsel. *Van Cleave v. State*, 268 Ark. 514, 598 S.W.2d 65 (1980), questioned *Wingfield v. State*, 303 Ark. 291, 796 S.W.2d 574 (1990).

#### **Limitations on Questioning.**

In a criminal prosecution for capital murder, the circuit court did not abuse its discretion in limiting counsel's ability to question individual jurors regarding: (a) favoring one child over another; (b) personal knowledge of one who was mentally retarded; (c) the type of domestic violence incurred; and (d) a spouse's employment in the circuit clerk's office; counsel's questions would have been more appropriate during the general voir dire. *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004).

Court did not err when it denied defense counsel the right to question prospective jurors after the prosecutor challenged those jurors for cause on whether they could impose

the death penalty under certain circumstances; the court was only required to ask questions of jurors that it believed were necessary and to permit attorneys to ask additional questions it deemed reasonable and necessary. *Thessing v. State*, 365 Ark. 384, 230 S.W.3d 526 (2006).

Trial court did not abuse its discretion in denying defendant's request to ask a venire person whether the venire person had a prior DWI conviction because any information that defendant might have gleaned from questioning the venire person about the conviction would not have impugned the prosecution's use of a peremptory challenge to excuse the venire person from the jury. *Hughes v. State*, 98 Ark. App. 375, 255 S.W.3d 891 (2007).

#### **No Prejudicial Error.**

Where trial court permitted prosecuting attorney to go beyond the purpose of the voir dire, but there was no motion for mistrial or admonishment, there was no prejudicial error. *Sanders v. State*, 278 Ark. 420, 646 S.W.2d 14 (1983).

There was no error in a felony case whereby prospective jurors were questioned on voir dire and subjected to challenges for cause and peremptory challenges two jurors at a time, as long as the state and the defendant were allowed to examine jurors individually and the state was required to exercise its peremptory challenges first. *Chenoweth v. State*, 291 Ark. 372, 724 S.W.2d 488 (1987).

Although defendant argued that the circuit court erred in preventing his counsel from responding to the prosecutor's statement during voir dire regarding convictions and circumstantial evidence and, thus, prejudiced him, questioning on voir dire was a matter of discretion vested in the circuit court; further, defendant never argued his credibility or prejudice point to the circuit court and, had he done so, the court might well have understood the basis for defendant's statement and admonished the venire not to view its ruling as a credibility matter. *Henderson v. State*, 360 Ark. 356, 201 S.W.3d 401 (2005).

In a rape prosecution where the victim was a police officer, the fact that the prosecutor asked the jurors during voir dire to agree that a combat trained person could be raped with minimal force did not violate § 16-31-102(b)(3), as the jurors were not asked to agree that rape could occur without force, but the questions were directed to the amount of force necessary. *McElroy v. State*, 2011 Ark. App. 533, — S.W.3d —, 2011 Ark. App. LEXIS 582 (Sept. 14, 2011).

#### **Preserving Issue.**

Defendant objected to seating a juror during voir dire and requested that the trial court dismiss her for cause, such that the point was preserved for review; case law does not sup-



port the argument that a party must make an additional objection at the conclusion of voir dire. *Adams v. State*, 2009 Ark. 375, 326 S.W.3d 764 (2009).

Trial court did not err in reading the enhancement offenses of commission of a felony with a firearm and commission of a felony in the presence of a child to a jury prior to trial because the enhancement charges did not give the jury any potentially prejudicial information about defendants. The reading of the enhancements gave the prospective jurors knowledge as to the nature of the offenses alleged, which was necessary for them to have in order for voir dire to be properly conducted. *Watkins v. State*, 2009 Ark. App. 124, 302 S.W.3d 635 (2009).

#### **Public Proceeding.**

Jury selection is a stage of the proceedings where openness is particularly appropriate under the guarantee of a public trial provided for in U.S. Const., Amend. 6, Ark. Const., Art. 2, § 10, and § 16-10-105. *Memphis Publishing Co. v. Burnett*, 316 Ark. 176, 871 S.W.2d 359 (1994).

#### **Questionnaires.**

The concept of expanded juror questionnaires is merely a written form of voir dire examination. *Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996).

Defendant contended that he was entitled to an expanded juror questionnaire because there was no timeliness requirement in either ARCrP 32.1 or this rule; however, the trial court did not err in denying the motion because it had wide latitude involving voir dire, defendant failed to show how the trial court's ruling was prejudicial, and defendant was not

prevented from asking any relevant question that was contained in the proposed questionnaire when defendant conducted examinations of the prospective jurors. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003).

#### **Rehabilitation of Jurors.**

In defendant's capital murder case, a court did not err in refusing to allow defense counsel to attempt to rehabilitate prospective jurors by additional voir dire questions where the court had already posited the general question of whether the prospective jurors could consider the death penalty under any circumstances; the court clearly did not believe that additional questions would be productive or beneficial. *Isom v. State*, 356 Ark. 156, 148 S.W.3d 257 (2004), cert. denied 543 U.S. 865, 125 S. Ct. 204, 160 L. Ed. 2d 110 (2004).

#### **Sentencing.**

No reversible error occurred even though defendant's attorney was unable to question potential jurors regarding sentencing, where defendant was not sentenced by the jury. *Armer v. State*, 51 Ark. App. 173, 912 S.W.2d 436 (1995), aff'd 929 S.W.2d 705 (1996).

#### **Sequestration.**

Sequestration of the jury for voir dire purposes is within the trial court's discretion. *Heffernan v. State*, 278 Ark. 325, 645 S.W.2d 666 (1983).

**Cited:** *Jones v. City of Newport*, 29 Ark. App. 42, 780 S.W.2d 338 (1989); *Bryant v. State*, 304 Ark. 514, 803 S.W.2d 546 (1991); *Johnson v. State*, 308 Ark. 7, 823 S.W.2d 800 (1992), cert. denied 505 U.S. 1225, 112 S. Ct. 3043, 120 L. Ed. 2d 911 (1992).

### **Rule 32.3. Alternate jurors.**

(a) The court may direct that additional jurors be called and impanelled in addition to the regular jury to sit as alternate jurors. The number of alternate jurors shall be at the discretion of the court, taking into consideration the estimated length and cost of the trial, the number of witnesses, and the ages and health of the regular jurors. Alternate jurors in the order in which they are called shall replace jurors who are discharged by the court for good cause upon being found unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the regular jurors. Each side shall be entitled to one peremptory challenge for each alternate juror to be impanelled. The additional peremptory challenge may be used against an alternate juror only, and all other peremptory challenges allowed by law shall not be used against an alternate juror.

(b) Any alternate juror, who has not replaced a regular juror prior to the time the jury retires to consider its verdict, shall be further instructed by the court in addition to the usual instruction regarding discussion of the case and not permitting any one to discuss the case with him or her, to remain at

the courthouse during deliberation. During deliberation, should any regular juror die, or upon good cause shown to the court be found unable or disqualified to perform his or her duties, the court may order the juror to be discharged. The court may in its discretion, as an alternative to mistrial, replace such juror with the next alternate. In such event, the court shall instruct the jury to disregard all previous deliberation, and to commence deliberation anew. The trial court in its discretion may seat additional alternates as jurors in this manner as needed.

(c) In the case of a capital murder trial or any other bifurcated trial in which the court cannot fix punishment pursuant to Ark. Code Ann. § 5-4-103(b), and in which there are alternate jurors remaining after the jury has returned a verdict of guilty, the next alternate jurors, not to exceed two, shall be placed in the jury box along with the regular jurors. Any alternate jurors in addition to these two shall be dismissed. The trial will proceed with the penalty phase. When the jury retires to deliberate the penalty, the remaining alternate juror or jurors will again remain at the courthouse during deliberation.

(1) If at any time after a verdict of guilty, but before a verdict fixing punishment, a juror who participated in the guilt phase of a capital murder trial or other trial described above dies, becomes ill, or is otherwise found to be unable or disqualified to perform his or her duties, such juror shall be discharged. The court may in its discretion, as an alternative to mistrial or any other option available by statute or these rules, replace such juror with the next alternate. However, in such event, the court may first give the defendant, with the agreement of the prosecution, the option to waive jury sentencing, in which case the court shall impose sentence, or to accept a verdict by the remaining jurors. If the defendant does not waive jury sentencing, or agree to accept a verdict by the remaining jurors, the trial will continue with the alternate participating in the penalty phase. In such event, the court shall instruct the jury to commence deliberation anew as to the sentencing phase only.

(2) Notwithstanding Ark. Code Ann. § 5-4-602(3), which requires that the same jury sit in the sentencing phase of a capital murder trial, the court may in its discretion proceed pursuant to this rule and seat an alternate juror. (Adopted May 21, 1998.)

**Reporter's Notes.** In *Johnson v. State*, 328 Ark. 526 (1997), the Supreme Court held that Ark. Code Ann. § 5-4-103(b)(3) authorized the trial court to fix punishment when the twelfth juror became disqualified in the sentencing phase. "[T]he court was authorized to

fix punishment when the jury was unable to agree upon the punishment because only eleven jurors remained after one was disqualified."

**Cross References.** Alternate jurors, § 16-30-102.

## CASE NOTES

### Notification of Parties.

Trial court did not commit reversible error when it replaced a juror, who was excused when her sister became gravely ill, with an

alternate juror for the penalty phase of defendant's trial without discussing it with the parties. *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002).



## RULE 33. MOTIONS FOR DIRECTED VERDICT AND OTHER TRIAL PROCEDURES

### Rule 33.1. Motions for directed verdict and motions for dismissal.

(a) In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence. A motion for directed verdict shall state the specific grounds therefor.

(b) In a nonjury trial, if a motion for dismissal is to be made, it shall be made at the close of all of the evidence. The motion for dismissal shall state the specific grounds therefor. If the defendant moved for dismissal at the conclusion of the prosecution's evidence, then the motion must be renewed at the close of all of the evidence.

(c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. A renewal at the close of all of the evidence of a previous motion for directed verdict or for dismissal preserves the issue of insufficient evidence for appeal. If for any reason a motion or a renewed motion at the close of all of the evidence for directed verdict or for dismissal is not ruled upon, it is deemed denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence. (Adopted July 10, 1995; amended January 22, 1998; amended April 8, 1999.)

**Publisher's Notes.** Former ARCrP 33.1. has been renumbered as ARCrP 33.4.

**Court's Comment to Rule 33.1 (1995):** This rule is former ARCrP 36.21(b). The word "again" has been added to the first sentence to emphasize the requirement that an appropriate motion be made after the State's case and at the close of the case. The next to the last sentence was added to codify the holding in *Walker v. State*, 318 Ark. 107, 883 S.W.2d 831 (1994), in which the Supreme Court expressed the standard as follows: "We draw a bright line and hold that a motion for a directed verdict in a criminal case must state the specific ground of the motion." *Walker* at 109. For example, in *Walker* a motion simply stating that the evidence was insufficient for a conviction of first or second degree murder or manslaughter did not preserve for appeal issues relating to whether the state proved that the defendant had the requisite culpable mental state for any of those offenses. The last sentence was added to reflect the holding in *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (June 5, 1995), which did not require a party to repeat the specific deficiencies in the evidence when the motion is renewed.

**Reporter's Notes, 1988 Amendment [of former ARCrP 36.21]:** It is the feeling of the committee that this change would bring the criminal rules and the civil rules into alignment by requiring a motion challenging the sufficiency of the evidence as an essential step to raising the issue on appeal.

**Addition to Reporter's Notes, 1998 Amendment:** A new sentence has been added to the rule to make clear that a party's failure to obtain a ruling on his or her motion for directed verdict at the close of all the evidence is not a waiver of the issue of the sufficiency of the evidence for purposes of appellate review. Compare *Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996) (sufficiency of evidence issue was not preserved for appeal where there was no ruling on the defendant's motion for directed verdict at the close of all the evidence). The new sentence provides that the motion is deemed denied if for any reason it is not ruled upon.

**Addition to Reporter's Notes, 1999 Amendment:** The rule was divided into subsections for ease of reference. Subsection (a) applies to jury trials, subsection (b) to bench trials, and subsection (c) to both. In both jury

and bench trials, the defendant is required to notify the trial court of the particular reasons why the state's evidence is insufficient in order to preserve that issue for appeal. This requirement in a bench trial is a change in previous procedure and overrules the decision

in *Strickland v. State*, 322 Ark. 312, 909 S.W.2d 318 (1995). See generally *Note, An Analysis of Arkansas's Exceptional Treatment of the Contemporaneous Objection Rule in Criminal Bench Trials*, 19 U. Ark. Little Rock L.J. 291 (1997).

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Annual Survey of Caselaw, Criminal Procedure, 24 U. Ark. Little Rock L. Rev. 941.

## CASE NOTES

### ANALYSIS

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### In General.

Directed verdict motions are treated as challenges to the sufficiency of the evidence. *Bennett v. State*, 308 Ark. 393, 825 S.W.2d 560 (1992).

In no case has the Supreme Court allowed a meritorious argument as to sufficiency of the evidence prevail over the defendant's failure to raise it in the trial court. *Collins v. State*, 308 Ark. 536, 826 S.W.2d 231 (1992).

A challenge to the sufficiency of the evidence must be made by a directed verdict motion. *Jackson v. State*, 316 Ark. 405, 871 S.W.2d 591 (1994), questioned *Dale v. State*, 935 S.W.2d 274 (1996).

Circuit court was never asked to determine whether a motion for a directed verdict should be granted on first-degree murder, thus, there was no ruling for the appellate court to review; it was defendant's obligation to obtain a ruling to preserve an issue for appeal, and the appellate court considered the issue of a directed verdict motion on capital murder, where the defendant was convicted of first-degree murder, and held that the denial of a directed verdict motion based on a failure to prove capital murder would not provide a basis on

which to appeal where the criminal defendant was convicted of first-degree murder. *Ashley v. State*, 358 Ark. 414, 191 S.W.3d 520 (2004).

Trial court did not err by denying defendant's motion for a directed verdict where the jury could have inferred that he in some way aided in the commission of the murder, and any error in instructing the jury on affirmative defenses was harmless. *Jackson v. State*, 359 Ark. 87, 194 S.W.3d 757 (2004).

Defendant's motions for directed verdict were properly denied where, for purposes of § 5-12-101, it was immaterial whether defendant ever intended to use physical force against the victim to further his escape from the store; physical force meant any bodily impact, and testimony from the victim was that defendant struck him in the nose, which was corroborated by the police officer's testimony and believed by the jury. *McElyea v. State*, 87 Ark. App. 103, 189 S.W.3d 67 (2004).

### Construction.

Where defendant made a motion for a directed verdict at the close of the state's evidence, but failed to do so at the close of the case, and 2 days after his conviction, he filed a motion for a directed verdict or a judgment non-obstante verdicto on the conviction; the motion made 2 days after the jury verdict was in fact a motion for a new trial, and thus, the court declined to address the defendant's sufficiency of the evidence issue. *Easter v. State*, 306 Ark. 452, 815 S.W.2d 924 (1991).

This rule is stated in the conjunctive, clearly requiring the motion to be made in both instances. *Hayes v. State*, 312 Ark. 349, 849 S.W.2d 501 (1993).

Counsel as well as trial courts have often, in their efforts to expedite proceedings, treated various matters, including motions for directed verdict, in a rather cursory fashion; however, the appellate court's strict construction of this rule requires that a motion for a directed verdict be specifically made. *Cummings v. State*, 315 Ark. 541, 869 S.W.2d 17 (1994), questioned *Dale v. State*, 935 S.W.2d 274 (1996).

While it is true that S. Ct. & Ct. App. Rule



4-3(h) requires the Arkansas Supreme Court to review the record for error in life and death cases, this review presupposes that sufficient an objection was made at trial; where defendant failed to make a specific motion for directed verdict indicating the particular deficiencies in the State's proof, it is as if he failed to object at all, and that failure below precluded review of the sufficiency of the evidence on appeal. *Webb v. State*, 327 Ark. 51, 938 S.W.2d 806 (1997).

In a criminal appeal, the appellate court was precluded from reviewing appellant's sufficiency claim because appellant failed to move at trial to dismiss the state's case at the close of evidence based on the insufficiency of evidence. *Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567 (2003).

### Purpose.

A motion for a directed verdict at the close of the state's case has as its purpose a procedure for determining whether the state has met the burden of establishing a prima facie case, with that question to be resolved by the court as a matter of law. *Rudd v. State*, 308 Ark. 401, 825 S.W.2d 565 (1992).

### Applicability.

The 1999 amendment to subsection (b) of this rule applied to a juvenile proceeding arising out of an incident which occurred prior to the effective date of the amendment where the adjudication hearing occurred after the effective date of the amendment as the amendment did not criminalize conduct that was previously noncriminal, did not increase the severity or harshness of the punishment for the offense, and did not deprive the juvenile of a defense that was available to him at the time he committed the offense with which he was charged. *Trammell v. State*, 70 Ark. App. 210, 16 S.W.3d 564 (2000).

### Appellate Review.

Where a motion for directed verdict, although lodged at the close of the state's case, was not made at the conclusion of defendant's evidence, review by the Supreme Court was precluded. *Hayes v. State*, 311 Ark. 645, 846 S.W.2d 182 (1993).

When the sufficiency of the evidence is challenged, the Supreme Court considers only that evidence which supports the guilty verdict. *Stipes v. State*, 315 Ark. 719, 870 S.W.2d 388 (1994).

Double jeopardy considerations require the appellate court to consider a challenge to the sufficiency of the evidence prior to other assignments of trial error. *Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997).

A specific directed-verdict motion is required to preserve a sufficiency of the evidence challenge in a proceeding for the revoca-

tion of probation. *Miner v. State*, 70 Ark. App. 142, 15 S.W.3d 356 (2000), *aff'd* 28 S.W.3d 280 (2000).

A trial court's decision considering and then denying a motion for a directed verdict made after the jury was instructed, but before closing arguments, did not comply with this rule, which requires that the motion be renewed at the close of the case. *Robinson v. State*, 348 Ark. 280, 72 S.W.3d 827 (2002).

Defendant's failure to challenge the sufficiency of the evidence at both the close of the state's case and the close of all of the evidence constituted a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict on appeal. *Grady v. State*, 350 Ark. 160, 85 S.W.3d 531 (2002), appeal dismissed — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 143 (Mar. 6, 2008).

Court did not reach the merits of defendant's argument that the evidence was not sufficient to support his conviction because defendant failed to preserve the issue for review; in defendant's directed-verdict motions, defendant failed to specify how the state's case was deficient, as required by this rule. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003).

Arkansas Supreme Court will strictly construe and apply Admin. Order No. 4, and require that all motions for directed verdicts be conducted on the record at the times such motions are mandated; under Admin. Order No. 4, unless the parties agree otherwise, it is the duty of the circuit court to require a verbatim record in any contested proceeding before it. *Robinson v. State*, 353 Ark. 372, 108 S.W.3d 622 (2003).

Defendant's argument on appeal that there was no evidence to satisfy the element of negligent care and that, in the absence of proof of this element, her conviction had to be reversed, was raised for the first time on appeal and, thus, the appellate court could not address it. *Houston v. State*, 82 Ark. App. 556, 120 S.W.3d 115 (2003).

To preserve an issue for appeal from a decision on a directed-verdict motion, the issue had to be stated clearly and specifically to the trial court and, because defendant failed to raise the appealed issue in his directed-verdict motion, the issue was not properly preserved for appellate review. *Phillips v. State*, 361 Ark. 1, 203 S.W.3d 630 (2005).

When defendant challenged the sufficiency of the evidence supporting his convictions for second degree domestic battery, under § 5-26-304(a)(1), and third degree domestic battery, under § 5-26-305(a)(1), alleging that the victim was not a "family or household member" who could be a victim of these offenses, his challenge was waived because this particular ground was not preserved for appellate re-

view as it was not raised in the trial court. *Brock v. State*, 90 Ark. App. 164, 204 S.W.3d 562 (2005).

Appeal from defendant's conviction was meritless where the only adverse ruling was the trial court's denial of his directed-verdict motion, which was not preserved for appeal because the motion was not specific, as required by subsection (b) of this rule; a general motion that merely asserted that the state failed to prove its case was inadequate to preserve the issue for appeal. *Wright v. State*, 92 Ark. App. 369, 214 S.W.3d 280 (2005).

Where it was unclear from the record as to whether defendant had renewed her motion for a directed verdict at the close of evidence, as required by subsection (b) of this rule, the issue was not preserved for review. \$ 735 in *United States Currency v. State*, 364 Ark. 526, 222 S.W.3d 209 (2006).

Defendant's drug convictions were upheld as the appellate court did not address the merits of the sufficiency argument because his directed-verdict motion was not preserved for review; defendant raised specific arguments on appeal that were not raised at the trial court level. *Nelson v. State*, 365 Ark. 314, 229 S.W.3d 35 (2006), appeal dismissed — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 494 (Sept. 27, 2007).

When defendant moved to dismiss because aggravating factors were allegedly improperly submitted to the jury during the death penalty phase of defendant's trial, none of defendant's objections specified the respect in which the evidence was deficient; as such, defendant failed to preserve the argument for review, and the submission of the aggravating circumstances to the jury was not a situation that fell within a Wicks exception. *Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006).

Where defendant failed to renew his directed-verdict motion following the state's rebuttal testimony, his sufficiency arguments were not preserved for appeal and the appellate court could not reach the merits of his argument. *Deshazo v. State*, 95 Ark. App. 398, 237 S.W.3d 493 (2006).

Defendant's conviction for rape was affirmed as his arguments concerning sufficiency of the evidence, under subsection (c) of this rule, were not preserved for appellate review. *Stone v. State*, 371 Ark. 78, 263 S.W.3d 553 (2007).

Defendant's sufficiency-of-the-evidence challenge to his theft-of-property charges was not properly preserved for review under subsections (a) and (c) of this rule because defendant moved only for a directed verdict on the capital-murder, aggravated-robbery, and residential-burglary charges; thus, review was limited only to those convictions. *Young v. State*, 371 Ark. 393, 266 S.W.3d 744 (2007).

In a case alleging rape, kidnapping, and

third-degree domestic battery, a sufficiency of the evidence argument was not preserved for review because defendant argued on the first time on appeal that the amount of restraint or force used did not warrant a kidnapping conviction and a third-degree battery conviction in addition to the rape. This was not the same argument raised during a directed verdict motion. *Rounsaville v. State*, 372 Ark. 252, 273 S.W.3d 486 (2008).

Defendant's conviction for unlawful discharge of a firearm from a vehicle was upheld where defendant's argument regarding the sufficiency of the evidence was not preserved for appellate review; defense counsel failed to make the specific motion regarding lack of evidence to prove serious physical injury at the close of the state's case. *Maxwell v. State*, 373 Ark. 553, 285 S.W.3d 195 (2008).

Appellate court was precluded from considering the merits of defendant's argument that insufficient evidence of accomplice liability was presented to support his conviction of capital murder because defense counsel failed to make a specific motion regarding the lack of evidence to prove that defendant was an accomplice. *Bienemy v. State*, 374 Ark. 232, 287 S.W.3d 551 (2008).

Defendant convicted of first degree murder under § 5-10-102(a) failed to preserve his complaint that the evidence of intent was insufficient by failing to make a motion for directed verdict at the close of the state's case and at the close of all the evidence, as required by this rule. *Brown v. State*, 374 Ark. 324, 287 S.W.3d 587 (2008).

Argument that defendant made on appeal regarding the denial of a directed verdict motion under subsection (a) of this rule was not the same argument that defendant made at trial; thus, the argument on appeal was not preserved for appellate review. *Williams v. State*, 375 Ark. 132, 289 S.W.3d 97 (2008).

An appellate court declined to reach the merits of defendant's argument that a trial court should have granted defendant's motion for a directed verdict on accomplice liability and that the state was pursuing inconsistent theories because the judgment against an alleged accomplice did not indicate the state's theory of the accomplice's criminal responsibility. *Bradley v. State*, 2009 Ark. App. 714, — S.W.3d —, 2009 Ark. App. LEXIS 885 (2009).

Defendant failed to preserve for review that the evidence was insufficient to show that he committed theft by receiving of the car keys, because his motion to the trial court for a directed verdict was made too late, when defendant the motion during discussion of jury instructions, after both sides had rested. *Lewis v. State*, 2009 Ark. App. 504, 323 S.W.3d 640 (2009).

Defendant failed to preserve for review that there was no evidence that he had a shotgun



upon entering the victim's home, because the issue was not argued before the trial court. *Lewis v. State*, 2009 Ark. App. 504, 323 S.W.3d 640 (2009).

Where defendant was convicted of four counts of battery, his motion for a directed verdict did not challenge whether the state had proved that he committed serious physical injury under circumstances manifesting extreme indifference to the value of human life; therefore, the issue was not preserved for appellate review under this rule. *Davis v. State*, 2009 Ark. App. 573, — S.W.3d —, 2009 Ark. App. LEXIS 743 (2009).

During defendant's criminal trial for first degree felon murder in violation of § 5-10-102(a)(1) with theft as the underlying felony under § 5-36-103, defendant challenged the sufficiency of the evidence supporting the theft charge but did not file a motion for a directed verdict challenging the sufficiency of the evidence supporting his conviction for first degree felony murder; therefore, the issue was not preserved for appellate review. *Lockhart v. State*, 2009 Ark. App. 587, — S.W.3d —, 2009 Ark. App. LEXIS 735 (2009).

Where a state trooper discovered two kilogramss of cocaine in duct-taped packages found in a car during a traffic stop, defendants gave incriminating statements; at trial, they made no pretrial motion to suppress the evidence or the statements under Ark. R. Crim. P. 16.2. Defendants' motion for a directed verdict, which was labeled as a motion to dismiss, was not an adequate attempt to suppress the evidence; therefore, any issue concerning the admission of the evidence or defendants' statements was not preserved for review. *Camacho-Mendoza v. State*, 2009 Ark. App. 597, 330 S.W.3d 46 (2009).

Defendant made a directed-verdict motion at the close of the state's case in chief, but failed to renew his directed-verdict motion after the presentation of the state's rebuttal testimony as required by subsection (a) of this rule; therefore, his challenge to the sufficiency of the evidence supporting his conviction for rape was not preserved for review. *Rouzer v. State*, 2009 Ark. App. 658, — S.W.3d —, 2009 Ark. App. LEXIS 819 (2009).

While defendant brought a motion for a directed verdict during a rape trial, the motion failed to identify in what respect the evidence was insufficient and, therefore, did not preserve the argument for appeal under subsection (a) of this rule. Accordingly, the appellate court would not address the merits of defendant's argument as to the sufficiency of the evidence. *Rye v. State*, 2009 Ark. App. 839, — S.W.3d —, 2009 Ark. App. LEXIS 1055 (2009).

Juvenile's challenge to the sufficiency of the evidence was unpreserved, as the juvenile failed to make a motion to dismiss at the close

of all of the evidence that was specific enough to advise the circuit court of the exact element of the crime that the state had failed to prove; counsel did not argue the failure to prove the specific element of the offense for second-degree murder. *T.C. v. State*, 2010 Ark. 208, 364 S.W.3d 53 (2010).

Defendant waived some of his arguments for purposes of appeal under subsection (c) of this rule because he failed to raise them in his motion to dismiss; even so, the assertions were matters that were within the province of the trier of fact to determine credibility, and the trier of fact's credibility determinations, and the trial court did not find the testimony on these subjects worthy of belief. *Lee v. State*, 2010 Ark. App. 15, — S.W.3d —, 2010 Ark. App. LEXIS 4 (2010).

In a case in which defendant was convicted on theft of property, in violation of § 5-36-103, and he argued on appeal that the evidence was insufficient to show that the value of the property exceeded \$2,500 or more, he had not preserved that issue for appeal. His motion under subsection (b) of this rule for dismissal and renewal of that motion made no mention whatsoever of the value of the stolen property. *Walker v. State*, 2010 Ark. App. 63, — S.W.3d —, 2010 Ark. App. LEXIS 70 (Jan. 20, 2010).

Defendant's second-degree sexual assault conviction, pursuant to § 5-14-125(a)(3), was proper because defendant's argument that the state failed to offer proof that defendant touched the victim for the purpose of obtaining sexual gratification was not raised below and therefore, pursuant to subsections (a) and (c) of this rule, could not be addressed on appeal. *Ross v. State*, 2010 Ark. App. 129, — S.W.3d —, 2010 Ark. App. LEXIS 138 (Feb. 11, 2010).

Juvenile's challenge to the sufficiency of the evidence was unpreserved, as the juvenile failed to make a motion to dismiss at the close of all of the evidence that was specific enough to advise the circuit court of the exact element of the crime that the state had failed to prove; counsel did not argue the failure to prove the specific element of the offense for second-degree murder. *T.C. v. State*, 2010 Ark. 208, 364 S.W.3d 53 (2010).

When defendant was convicted of simultaneously possessing drugs and firearms, in violation of § 5-74-106(a)(1), defendant did not waive, for appellate review, the issue of whether sufficient evidence showed defendant possessed a firearm by not renewing a directed verdict motion at the close of all evidence because defendant moved for a directed verdict at the close of the state's evidence, and defendant did not present any evidence. *Patton v. State*, 2010 Ark. App. 453, — S.W.3d —, 2010 Ark. App. LEXIS 476 (May 26, 2010).

When defendant was convicted of being a

felon in possession of a firearm, defendant did not preserve for appellate review the issue of whether sufficient evidence showed defendant possessed a firearm because defendant made no motion for a directed verdict. *Patton v. State*, 2010 Ark. App. 453, — S.W.3d —, 2010 Ark. App. LEXIS 476 (May 26, 2010).

Two of defendant's challenges to the sufficiency of the evidence were not preserved for appellate review because, at trial, defendant had moved to dismiss in the time and manner directed by subsections (b) and (c) of this rule, but defendant's argument was simply that the state failed to establish possession of the controlled substances. *Jacobs v. State*, 2010 Ark. App. 860, — S.W.3d —, 2010 Ark. App. LEXIS 898 (Dec. 15, 2010).

Since defendant failed to raise in his dismissal motion the particular grounds he argued on appeal, as required by this rule, the court declined to address his argument. *Brown v. State*, 2011 Ark. App. 150, — S.W.3d —, 2011 Ark. App. LEXIS 152 (Feb. 23, 2011).

Defendant never argued to the trial court that the state's evidence proved a Class B felony kidnapping pursuant to § 5-11-102, but not Class Y. Accordingly, defendant failed to comply with the requirements of subsections (a) and (c) of this rule, and the issue was not preserved for appellate review. *Sweet v. State*, 2011 Ark. 20, — S.W.3d —, 2011 Ark. LEXIS 27 (Jan. 27, 2011).

As defendant's counsel properly moved for a directed verdict pursuant to subsections (a) and (c) of this rule, the issue of whether the evidence was sufficient to support the convictions was properly preserved for review on appeal. *Jackson v. State*, 2011 Ark. App. 528, — S.W.3d —, 2011 Ark. App. LEXIS 583 (Sept. 14, 2011).

Credibility arguments relating to a conviction for second-degree sexual assault were not preserved for appellate review because appellant presented different arguments at the trial court level; appellant argued that the charge was a lesser-included offense of rape and that the element of sexual gratification was not proven. Arguments not raised at trial were not addressed for the first time on appeal, and appellant was not able to change the grounds for his directed verdict motion on appeal. *Clayton v. State*, 2012 Ark. App. 199, — S.W.3d —, 2012 Ark. App. LEXIS 299 (Mar. 7, 2012).

Defendant's failure to move for a directed verdict on the ground that the substance he possessed was amphetamine, not methamphetamine precluded the court from reviewing the issue. *Ashley v. State*, 2012 Ark. App. 131, — S.W.3d —, 2012 Ark. App. LEXIS 232 (Feb. 8, 2012).

Where defendant's directed-verdict motion did not specify any deficiency in the state's proof, the reviewing court could not consider

defendant's claim that the evidence at trial was insufficient to convict him of first-degree murder. *Plessy v. State*, 2012 Ark. App. 74, — S.W.3d —, 2012 Ark. App. LEXIS 168 (Jan. 18, 2012).

Defendant convicted of the lesser-included offense of second-degree battery waived a challenge to the sufficiency of the evidence supporting his conviction where he did not argue in his motions for directed verdict that an element of second-degree battery was not proven. *Chestang v. State*, 2012 Ark. App. 222, — S.W.3d —, 2012 Ark. App. LEXIS 329 (Mar. 28, 2012).

Defendant's challenge to the sufficiency of the evidence supporting a theft of property conviction was not preserved for appellate review under subsection (c) of this rule as defendant failed to make a directed verdict motion regarding the particular charge. *Nickelson v. State*, 2012 Ark. App. 363, — S.W.3d —, 2012 Ark. App. LEXIS 476 (May 23, 2012).

### **Bench Trial.**

In a trial by the court without a jury, it is unnecessary to raise the question of sufficiency of the evidence by motion at the close of the trial to preserve the issue for appeal. *Igwe v. State*, 312 Ark. 220, 849 S.W.2d 462 (1993).

Although defendant moved for a directed verdict, the motion was actually a motion for dismissal pursuant to subsection (b) of this rule because the motion was made in a bench trial, not a jury trial. *Turner v. State*, 2010 Ark. App. 214, — S.W.3d —, 2010 Ark. App. LEXIS 209 (Mar. 3, 2010).

Defendant did not preserve the question of the sufficiency of the evidence supporting defendant's conviction, in a bench trial, of misdemeanor theft, for appellate review, because (1) it was apparent that defendant's counsel's statement asking the court to find defendant not guilty was in the nature of a closing argument, and (2) defendant's counsel never moved for dismissal before making this closing argument, as required by this rule. *Higgins v. State*, 2010 Ark. App. 442, — S.W.3d —, 2010 Ark. App. LEXIS 462 (May 19, 2010).

### **Close of the Case.**

Where defense moved for a directed verdict at the close of the state's case and renewed the motion at the close of the defense's case-in-chief, but the state presented a rebuttal case, then the defense's failure to further renew the motion until after the state made its closing arguments, i.e., after the jury had been charged, meant that the motion was not renewed "at the close of the case," and the sufficiency of evidence argument was not preserved for review. *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997).

For purposes of determining whether a motion for directed verdict is made again at the



close of the case in a prosecution of multiple defendants, the relevant point in time is the close of each individual defendant's case. *Williams v. State*, 338 Ark. 178, 992 S.W.2d 89 (1999).

Defendant, who was convicted of murdering his girlfriend and of kidnapping her two grandchildren, waived his argument that there was insufficient evidence to sustain the kidnapping convictions by not renewing his motion for directed verdict at the close of the State's rebuttal testimony. *Smith v. State*, 347 Ark. 277, 61 S.W.3d 168 (2001).

The appellant failed to move for dismissal at the close of the evidence pursuant to subsection (b) of this rule where he made his motion as part of and during his closing argument, after the state gave its closing argument. *J.R. v. State*, 73 Ark. App. 194, 40 S.W.3d 342 (2001).

In a capital murder trial, appellant properly preserved a challenge to the sufficiency of the evidence on appeal by moving for a directed verdict at the close of the state's case and again at the close of all the evidence, as required by this rule. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003).

Defendant failed to make a specific motion regarding the sufficiency of the evidence to prove the charges of kidnapping and terrorist threatening at both the close of the state's case and the close of all of the evidence; accordingly, his sufficiency argument relating to the jury's verdict on those two charges was not preserved for the supreme court's review. *Rounsaville v. State*, 2009 Ark. 479, 346 S.W.3d 289 (2009).

#### **Lesser Included Offenses.**

A defendant is required to address the lesser-included offenses in his motion for a directed verdict to preserve on appeal a challenge to the sufficiency of the evidence necessary to support a conviction for a lesser-included offense; failure to question the sufficiency of the evidence for lesser-included offenses, either by name or by apprising the trial court of the elements of the lesser-included offenses, at the close of the state's case constituted a waiver of the argument. *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996).

To preserve for appeal the issue of sufficiency of the evidence to support a conviction of a lesser-included offense, a defendant's motion for directed verdict must address the elements of the lesser-included offense. *Moore v. State*, 330 Ark. 514, 954 S.W.2d 932 (1997).

Where defendant moved for a directed verdict as to first-degree battery on the theory that the State failed to prove he caused serious physical injury to another person, defendant's challenge to the battery conviction was waived where the jury convicted the defendant of second-degree battery and defendant did not argue any aspect of second-battery in

his motion for directed verdict. *Brown v. State*, 347 Ark. 308, 65 S.W.3d 394 (2001).

#### **Record.**

Where the record failed to reflect defendant's motion for a directed verdict at the end of the trial, appellant could have corrected and had the record modified but failing to do so, his claim was not preserved for review. *Shankle v. State*, 309 Ark. 40, 827 S.W.2d 642 (1992).

Subsection (a) of this rule requires a defendant to make a motion for directed verdict at the close of the evidence offered by the prosecution and at the close of all the evidence, and the motion must recite the specific grounds in support of the requested directed verdict; further, the failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict under subsection (c) of this rule. *Robinson v. State*, 353 Ark. 372, 108 S.W.3d 622 (2003).

#### **Renewal of Motion.**

Defendant was procedurally barred from raising the issue of sufficiency of the evidence as to kidnapping and rape, since he failed to renew his motion for directed verdict at the close of all of the evidence. *Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119 (1992); *Cummings v. State*, 315 Ark. 541, 869 S.W.2d 17 (1994), questioned *Dale v. State*, 935 S.W.2d 274 (1996).

A motion for a directed verdict at the close of the entire case is rendered necessary, of course, by virtue of the automatic waiver that occurs when the defendant proceeds to mount a case. *Cummings v. State*, 315 Ark. 541, 869 S.W.2d 17 (1994), questioned *Dale v. State*, 935 S.W.2d 274 (1996).

Motion for directed verdict must be renewed at the end of the "close of the case." An attempt to renew a motion for directed verdict after the jury has been charged is not timely and is not in compliance with this rule. *Claiborne v. State*, 319 Ark. 602, 892 S.W.2d 511 (1995).

Defendant complied with this rule when he made a directed verdict motion at the close of the state's case specifying the grounds, made a second motion for directed verdict at the conclusion of his case, incorporating the arguments made in connection with his initial motion, and, after rebuttal, at the close of all the evidence, simply stated "I would renew all previous motions I have made"; the defendant is not required to restate his grounds for directed verdict when the defendant has made a specific motion at the close of the state's case, and incorporates the same arguments by the later renewal. *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995).

In prosecution for aggravated robbery, defendant was procedurally barred from challenging the sufficiency of the evidence because he failed to renew his motion for a directed verdict at the close of all evidence. *Love v. State*, 324 Ark. 526, 922 S.W.2d 701 (1996).

Issue of sufficiency not preserved for appeal where defendant renewed the motion for directed verdict as required by subsection (b) of this rule, but failed to obtain a ruling on the renewed motion. *Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996).

Issue of sufficiency not preserved for appeal where defendant renewed he motion for directed verdict as required by this rule, but failed to obtain a ruling on the renewed motion. *Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996).

The motion for directed verdict must be renewed at the close of the case; an attempt to renew a motion after the jury has been charged is not timely. *Webb v. State*, 326 Ark. 878, 935 S.W.2d 250 (1996).

Despite the "in every instance" language in ARCP 50(a), as long as a specific basis was articulated for the original directed-verdict motion, a general renewal is sufficient. *Dale v. State*, 55 Ark. App. 184, 935 S.W.2d 274 (1996).

Defendant did not preserve for appellate review his challenge to the sufficiency of the evidence that he acted with a culpable mental state where he failed to renew his motion for a directed verdict after the prosecution presented rebuttal evidence. *Williams v. State*, 56 Ark. App. 156, 940 S.W.2d 500 (1997).

In a murder trial, because defendant failed to renew her motion for a directed verdict following the state's rebuttal, as required by this rule, the appellate court could not consider defendant's sufficiency of the evidence argument on appeal. *Doss v. State*, 351 Ark. 667, 97 S.W.3d 413 (2003).

Defendant failed to comply with the requirements of this rule where she failed to make a renewed motion for dismissal at the close of the evidence; because defendant failed to comply with this rule, her sufficiency argument was not preserved for appeal. *Maxwell v. State*, 359 Ark. 335, 197 S.W.3d 442 (2004).

Defendant's argument relating to the sufficiency of the evidence was not preserved for appellate review because defendant failed to make a directed verdict motion at the close of the state's evidence and again at the close of all the evidence, as required by this rule. *Fisher v. State*, 84 Ark. App. 318, 139 S.W.3d 815 (2004).

Defendant's failure to renew his motion for directed verdict at the close of all the evidence operated as a waiver of his challenge to the sufficiency of the evidence to support the jury's verdict, and the issue is not preserved

for review under subsections (a) and (c) of this rule. *Chunestudy v. State*, 2012 Ark. 222, — S.W.3d —, 2012 Ark. LEXIS 246 (May 24, 2012).

### Revocation Proceedings.

The rule applies to probation revocation proceedings and requires a defendant in such a proceeding to move for dismissal, stating the specific grounds therefor, in order to preserve the question of the sufficiency of the evidence to support the verdict or judgment. *Miner v. State*, 342 Ark. 283, 28 S.W.3d 280 (2000), overruled *Barbee v. State*, 56 S.W.3d 370 (2001), questioned *Rudd v. State*, 61 S.W.3d 885 (2001).

The rule applies to a hearing to revoke a suspended sentence. *Thompson v. State*, 342 Ark. 365, 28 S.W.3d 290 (2000).

A defendant is not required to move for dismissal or directed verdict under this rule in a probation revocation proceeding in order to preserve error on appeal. *Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001).

Defendant in a revocation proceeding was not required to comply with this rule regarding motions for directed verdict in order to preserve the issue of the sufficiency of the evidence; consequently, she was not precluded from raising a sufficiency issue on appeal of the revocation. *Brown v. State*, 85 Ark. App. 382, 155 S.W.3d 22 (2004).

### Specific Grounds.

#### —In General.

A motion for a directed verdict at the close of the case is something more than a matter of mere form: it goes to the substance of the evidence arrayed against the criminal defendant, and is not a technicality subject to "tidying up" in chambers. *Thomas v. State*, 315 Ark. 504, 868 S.W.2d 483 (1994).

A general motion is insufficient to preserve a defendant's argument that the statutory elements of his crime were not proved. *Stewart v. State*, 320 Ark. 75, 894 S.W.2d 930 (1995).

General motion insufficient to preserve challenge of sufficiency of evidence on appeal. *Smallwood v. State*, 326 Ark. 813, 935 S.W.2d 530 (1996).

Argument that there was insufficient evidence to support a kidnapping conviction based on a lack of evidence on the element of restraint without consent was not preserved for appellate review because a motion for the directed verdict before the trial court did not raise this issue. *Davis v. State*, 365 Ark. 634, 232 S.W.3d 476 (2006).

Defendant's challenge to the sufficiency of the evidence was procedurally barred because he made only a general directed-verdict motion to the trial court. *White v. State*, 2010 Ark. App. 588, — S.W.3d —, 2010 Ark. App. LEXIS 645 (Sept. 15, 2010).



Counsel's motion for acquittal on a charge of aggravated residential burglary based upon the insufficient evidence of the elements of the charge failed to satisfy the requirements of subsections (a) and (c) of this rule because counsel did not specify how the evidence was insufficient. *Bell v. State*, 2011 Ark. App. 5, — S.W.3d —, 2011 Ark. App. LEXIS 9 (Jan. 5, 2011).

Defendant's prior contempt proceedings did not present a double-jeopardy bar to the state's prosecution for criminal nonsupport, § 5-26-401, because each time defendant failed to pay his child support, he offended his ongoing duty to provide support; the state was not seeking to punish defendant for the acts of nonpayment for which he had already been punished, but rather, the state was attempting to penalize defendant for a violation of the statute for which he had not yet been punished. *Halpaine v. State*, 2011 Ark. 517, — S.W.3d —, 2011 Ark. LEXIS 600 (Dec. 8, 2011).

In a driving while intoxicated case, several issues were barred on appeal because they were not adequately raised in a directed verdict motion. Appellant was bound by the scope and nature of the motion and was unable to change the grounds on appeal. *Carruth v. State*, 2012 Ark. App. 305, — S.W.3d —, 2012 Ark. App. LEXIS 431 (May 2, 2012).

#### —Not Stated.

Where defendant failed to provide a specific basis for his directed verdict motion, the trial court did not err in denying it. *Helton v. State*, 320 Ark. 352, 896 S.W.2d 887 (1995).

Where neither defendant's original directed-verdict motion nor his renewal motion indicated that any specific deficiency in the evidence was called to the trial court's attention, there was a failure to raise the specific basis for a directed verdict at trial, and defendant could not challenge the sufficiency of the evidence on appeal. *Jones v. State*, 323 Ark. 655, 916 S.W.2d 736 (1996).

Argument that evidence of offense was insufficient not considered on appeal where the defendant's directed verdict motion did not specify the manner in which the evidence was insufficient or the elements of the offense alleged not to have been proven by the State. *McCoy v. State*, 326 Ark. 104, 929 S.W.2d 712 (1996).

Issue of denial of motion for directed verdict not preserved for appellate review where defendant did not specify the proof alleged to be insufficient. *Lovelady v. State*, 326 Ark. 196, 931 S.W.2d 430 (1996).

Motion for a directed verdict "on all counts on the grounds of insufficient evidence" was clearly insufficient to preserve defendant's argument that the statutory elements of his crimes were not proved. *Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997).

Motion for a directed verdict stating that the state failed to make a prima facie case was no more than a general motion for a directed verdict. *Gray v. State*, 327 Ark. 113, 937 S.W.2d 639 (1997).

Where the defendant's directed verdict motions failed to specifically identify the proof of the element of the crime alleged to be missing, the court refused to consider the defendant's challenge to the sufficiency of the evidence. *Travis v. State*, 328 Ark. 442, 944 S.W.2d 96 (1997).

Defendant's failure to make a specific motion for directed verdict precluded a review of the sufficiency of the evidence on appeal. *Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997).

A claim of insufficient evidence was barred by the defendant's failure to state specific grounds in his directed verdict motion where defense counsel stated only that his motion was based on a "lack of evidence." *Bowen v. State*, 342 Ark. 581, 30 S.W.3d 86 (2000).

The defendant's motions for directed verdict failed to specify the respect in which the evidence was deficient and, instead, they were simply general motions stating that the evidence was insufficient, which was not adequate to comply with the requirements of the rule. *Hutcherson v. State*, 74 Ark. App. 72, 47 S.W.3d 267 (2001).

Defendant's general motion for a directed verdict failed to comport with this rule because it did not inform the trial court of the specific issues in the state's case that were being challenged and, thus, precluded appellate review of his capital murder conviction. *Grady v. State*, 350 Ark. 160, 85 S.W.3d 531 (2002), appeal dismissed — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 143 (Mar. 6, 2008).

Because defendant's standby counsel merely stated that the testimony did not reflect all of the elements of capital murder, the objection was insufficient to preserve a sufficiency argument for appeal and the trial court's denial of defendant's motion for a directed verdict was not preserved for review. *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003).

Where defendant was on trial for simultaneous possession of drugs (marijuana) and a firearm, defendant's motion for directed verdict as to the simultaneous possession charge was insufficient because counsel merely moved to dismiss for lack of sufficient proof and did not specify the respect in which the evidence was insufficient; in any event, the .22 Derringer pistol in plain view constituted substantial evidence within the meaning of § 5-1-102(6). *Saulsberry v. State*, 81 Ark. App. 419, 102 S.W.3d 907 (2003).

Defendant was procedurally barred from mounting a challenge on appeal to his rape conviction because his trial counsel's initial

motion at the close of the state's case was manifestly a general challenge to the sufficiency of the evidence and failed to point to any specific flaw in the state's case, nor did it specify any elements of the criminal acts which had not been proven; therefore, because defendant's directed verdict motion was non-specific, it was not preserved for appellate review. *Pinell v. State*, 364 Ark. 353, 219 S.W.3d 168 (2005).

Defendant's sufficiency argument was not preserved for review because defense counsel made a generic directed-verdict motion which the circuit court denied and, in renewing the motion, it was clearly general and lacked any mention of the specific element or elements of the crime which the state might have failed to establish. *Carey v. State*, 365 Ark. 379, 230 S.W.3d 553 (2006).

Appellate court refused to consider defendant's claim that the trial court erred by denying his motion for a directed verdict on the ground that the evidence was insufficient; defendant failed to make a proper directed verdict motion where the motion merely stated that the evidence was insufficient and did not provide a specific deficiency. *Smith v. State*, 367 Ark. 274, 239 S.W.3d 494 (2006).

Where defendant's directed-verdict motion was general and did not inform the trial court of any specific deficiencies in the state's proof, the argument that defendant made on appeal regarding the sufficiency of the evidence to support his conviction for battery was waived. *Davis v. State*, 97 Ark. App. 6, 242 S.W.3d 630 (2006).

Defendant's motion for a directed verdict was general in nature. Therefore, in light of this rule, the only issue that he preserved for appellate review was whether the evidence was insufficient to convict him of rape where there was no physical evidence of abuse. *Price v. State*, 2010 Ark. App. 111, — S.W.3d —, 2010 Ark. App. LEXIS 105 (Feb. 3, 2010).

Rape and kidnapping defendant's general directed-verdict motion that the state failed to prove all the elements charged failed to comport with the requirement of this rule that the directed-verdict motion state the specific grounds therefor. *Tapia v. State*, 2010 Ark. App. 124, — S.W.3d —, 2010 Ark. App. LEXIS 136 (Feb. 11, 2010).

#### —Required.

A challenge to the sufficiency of the evidence, whenever it is made, requires a specific motion to apprise the trial court of the particular point raised, and a general "usual motion" will not suffice. *Middleton v. State*, 311 Ark. 307, 842 S.W.2d 434 (1992).

A motion by defendant's attorney for a directed verdict that as to each of the five counts the state has not proved sufficiency of the evidence was not sufficiently specific to

preserve the issue for appeal. *Houston v. State*, 319 Ark. 498, 892 S.W.2d 274 (1995).

Defendant's initial and renewal motions for a directed verdict on the grounds that the evidence established defendant's defense of justification and that the evidence was insufficient to establish his intent to purposely cause the victim's death was sufficiently specific to preserve this issue for appellate review. *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996).

Where motion for directed verdict stated that the state failed to link defendant to the crime, but did not mention that the state failed to prove the "premeditated and deliberate" element of capital murder, defendant did not preserve the intent issue for appeal. *Roseby v. State*, 329 Ark. 554, 953 S.W.2d 32 (1997), overruled *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998).

Motion for directed verdict was denied and the judge had no opportunity to rule on specific grounds with respect to any of the charges where defense counsel was given the opportunity, but did not "specify the respect in which he evidence was deficient." *Welch v. State*, 330 Ark. 158, 955 S.W.2d 181 (1997).

#### —Stated.

Motion for directed verdict sufficiently specified that the evidence was insufficient for a conviction because the element of identity was missing. *Wilson v. State*, 332 Ark. 7, 962 S.W.2d 805 (1998).

#### Sufficiency of Evidence.

The defendant's general objection was insufficient to satisfy the requirements of subsection (c) of this rule with regard to two counts of second degree murder, especially as it was clear that he intended to object only to a first degree murder charge and two felony-murder charges. *Crisp v. State*, 341 Ark. 893, 20 S.W.3d 394 (2000).

Defendant waived his insufficiency of the evidence challenge as his motion for directed verdict addressed only the capital murder charges and failed to address the lesser-included offenses. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003).

Trial court properly denied defendant's motion for directed verdict on his convictions for possession of drug paraphernalia with intent to manufacture and possession of a controlled substance because the evidence sufficiently linked defendant to the contraband in that it showed that: (1) there was an operational methamphetamine lab in the kitchen of the shared residence; (2) numerous items used for the manufacture of crystal methamphetamine was seized from the residence; (3) drug paraphernalia was also found in a burn barrel near the residence and in the trash can on the back porch, indicating an ongoing drug manufacturing process; (4) the trash bags found



on the side of the road alerted the drug task force to the existence of an illegal drug lab and included a receipt from a store that listed several items used to manufacture crystal methamphetamine that was traced to defendant; and (5) the jury was not required to believe defendant's statements, regarding items found in his office, in which he denied any knowledge of the contraband. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003).

Trial court correctly denied defendant's motion for a directed verdict on the charges of rape and first-degree violation of a minor where the evidence clearly demonstrated that defendant occupied a position of trust or authority over the victim during the time that he lived with her and her mother; defendant had repeatedly disciplined the victim and she considered him to be her father. *Martin v. State*, 354 Ark. 289, 119 S.W.3d 504 (2003).

Defendant's challenges to the sufficiency of the evidence were not preserved for appellate review because he failed to make a motion for dismissal at the close of all evidence before closing arguments; in addition, defendant's argument that this rule served no perceivable purpose was without merit because it allowed the trial court the option of either granting the motion or allowing the prosecution to reopen its case to supply the missing proof. *McClina v. State*, 354 Ark. 384, 123 S.W.3d 883 (2003).

Witness who testified that she was a manager-level employee, that she handled the store when the manager was absent, and that, as such, she was familiar with the store's merchandise pricing, had independent actual knowledge of the value of stolen articles; thus, the value evidence was more than sufficient to support the verdict for theft of property over \$500. *Polk v. State*, 82 Ark. App. 210, 105 S.W.3d 797 (2003).

Trial court did not err in failing to grant defendant's motions for directed verdict on the charges of possession of methamphetamine and possession of drug paraphernalia where the evidence, along with defendant's presence in the residence and the presence of drug paraphernalia and an odor associated with the manufacture of methamphetamine, corroborated the testimony of accomplices and tended to connect defendant with the commission of the offense of possession of drug paraphernalia. *Breshears v. State*, 83 Ark. App. 159, 119 S.W.3d 61 (2003).

Test for determining the sufficiency of the evidence for directed verdict purposes is whether a verdict is supported by substantial evidence, direct or circumstantial; substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Tate v. State*, 84 Ark. App. 184, 137 S.W.3d 404 (2003), rev'd 167 S.W.3d 655 (2004).

In a capital murder case, the state proved defendant's extreme indifference to value of human life under § 5-10-101(a)(1) where a witness testified that defendant demanded to hold the gun in robbery, the witness saw defendant point an arm at the victim, defendant admitted to the shooting during a custodial interrogation but claimed the gun discharged accidentally when the delivery man grabbed it, and expert testimony showed that the fatal shot was not made at a close range; hence, defendant's motions for a directed verdict were properly denied. *Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004).

In criminal prosecution for rape, defendant was not entitled to a direct verdict; the victim's testimony, along with the testimony of a doctor that the victim's hymen had an injury consistent with sexual abuse, and the fact that defendant fled the jurisdiction, was sufficient evidence to support the rape conviction. *Hanlin v. State*, 356 Ark. 516, 157 S.W.3d 181 (2004).

Evidence was sufficient to convict defendant of rape where the victim testified that defendant forcibly held her down and penetrated her with his penis, and the arresting officer noticed that the victim had blood on her lip and defendant's shirt had blood on it; the jury was certainly within its right to believe the officer's testimony that indicated that force was used. *Benson v. State*, 357 Ark. 43, 160 S.W.3d 341 (2004).

Where defendant was in the room where drug manufacturing materials were found while executing a search warrant, under § 16-89-111(e)(1), such evidence was sufficient to connect defendant to the crime of manufacturing methamphetamine; hence, where accomplice testimony against defendant also pointed to defendant, the trial court did not err by denying defendant's motion for a directed verdict. *Tate v. State*, 357 Ark. 369, 167 S.W.3d 655 (2004).

Circuit court erred in denying defendant's motion to dismiss where the state failed to produce substantial evidence that defendant received actual notice of the time and place to appear in court or that she received written notice of the time and place to appear; more had to be offered in the way of documentary proof or a judge's order, either written or verbal, to subject a defendant to a felony conviction for failure to appear. *Stewart v. State*, 362 Ark. 400, 208 S.W.3d 768 (2005).

Defendant's motion for directed verdict with respect to the charge of premeditated and deliberated capital murder was properly denied where there was evidence that defendant acted with premeditation and deliberation in the murder and that he aided, agreed to aid, or attempted to aid the principal in the commission of the murder. *Woods v. State*, 363 Ark. 272, 213 S.W.3d 627 (2005).

Denial of defendant's motion for a directed verdict was proper as the victim's testimony that he performed oral sex on defendant after being threatened and that defendant performed oral sex on him was sufficient to convict defendant under § 5-14-103(a)(1)(C)(i). *Williams v. State*, 363 Ark. 395, 214 S.W.3d 829 (2005).

Defendant's motion for directed verdict was properly denied where there was substantial evidence to support the jury's finding that defendant committed the crime of false imprisonment against her daughter by exercising excessive and unreasonable restraint that created a substantial risk of serious physical injury; there was no merit to defendant's argument that, as a parent, she could not be held liable for criminal conduct committed against her daughter because she had the lawful authority to consent to restraint of her child. *Dick v. State*, 364 Ark. 133, 217 S.W.3d 778 (2005).

Evidence was sufficient to convict defendants of breaking or entering and theft of property where (1) a prosecution witness testified that she saw defendants break into an apartment and take a table; (2) a police officer observed that the security door had been pried open and the wooden door was kicked in; and (3) a defense witness testified that they took the table for their own use, that none of them owned it, and that there was an owner, but no one knew where the owner was. *Bush v. State*, 90 Ark. App. 373, 206 S.W.3d 268 (2005).

There was substantial evidence to support defendant's conviction for intimidating a witness where, after learning that the witness told police that she observed defendant's son commit murder, defendant threatened to kill the witness, burn her house down, and harm her children; hence, the trial court did not err in denying defendant's motion to dismiss after the state presented its case-in-chief. *Reed v. State*, 91 Ark. App. 267, 209 S.W.3d 449 (2005).

Denial of defendant's motion for directed verdict and defendant's conviction under § 12-12-904(a)(1) were affirmed because defendant had previously been ordered to register as a sex offender in Louisiana, and his failure to do so in Arkansas was sufficient to support his conviction. *Flowers v. State*, 92 Ark. App. 337, 213 S.W.3d 648 (2005).

Court did not err in denying defendant's motions for a directed verdict because defendant's silence, knowledge, concealment, and failure to inform law enforcement officers of the sexual assaults committed against her daughter by two men who had resided with defendant made her an accomplice to those assaults under § 5-2-403(a)(1); there was no doubt that defendant was aware that the men were raping her daughter at various times

when the girl was between eight or nine and 15 years of age. *Hutcheson v. State*, 92 Ark. App. 307, 213 S.W.3d 25 (2005).

In defendant's trial on charges of abuse of an adult, there was sufficient evidence from which the jury could have found that the victim was an endangered or impaired adult, or both, that he suffered from a physical or mental defect, or both, and that as a consequence was unable to protect himself from the repeated abuse that he was subjected to or to remove himself from defendant's care and control; thus, defendant's motion for directed verdict was properly denied. *Thomas v. State*, 92 Ark. App. 425, 214 S.W.3d 863 (2005).

Where a deputy found that defendant had an improvised weapon hidden in his sock while incarcerated at the county jail, the state was not required to show how defendant intended to use the weapon in order to convict him of possession of a weapon by an incarcerated person; thus, defendant's motion for a directed verdict was properly denied. *Owens v. State*, 92 Ark. App. 480, 215 S.W.3d 681 (2005).

At the time the offense was committed, § 5-36-106 provided that theft by receiving of a credit card was designated as a class C felony, but theft by receiving of a debit card was not; thus, where the state failed to show that the card was a credit card, there was insufficient evidence to support the conviction for theft by receiving as a class C felony and defendant's conviction was reduced to a misdemeanor in accordance with § 5-36-106(e)(3). *Withers v. State*, 93 Ark. App. 276, 218 S.W.3d 386 (2005).

Defendant's motion for directed verdict was properly denied where there was sufficient evidence to convict defendant of residential burglary, § 5-39-201(a)(1), and third degree assault, § 5-13-207(a); defendant took steps to hinder the victim's ability to summon help by turning off the power and pulling out the phone lines, and the fact that defendant had a potentially deadly weapon on his person could at least raise an inference that he intended to, at the very least, place victim in fear for her physical well-being. *Diggs v. State*, 93 Ark. App. 332, 219 S.W.3d 654 (2005).

Trial court did not err by denying defendant's motion for a directed verdict on his capital murder conviction because the evidence was sufficient to support defendant's conviction of the underlying felony, aggravated robbery, even after eliminating the testimony of one of defendant's accomplices. Evidence showed that: (1) defendant had the purpose of committing a theft with the use of physical force, as he and three other individuals went to a witness's house to acquire ammunition for their firearm; (2) the fourth individual testified that defendant and three men arrived at his trailer where defendant



displayed a gun, and that he provided ammunition for the gun; (3) a second witness, one of the three men who accompanied defendant, testified that he heard two gunshots fired after the two other men left the victim's apartment after the struggle between defendant and the victim ensued; and (4) the chief medical examiner testified that the victim died from a gunshot wound. *Gardner v. State*, 362 Ark. 413, 208 S.W.3d 774 (2006).

Circuit court did not err in denying defendant's motion for directed verdict where defendant never requested that the circuit court declare co-defendant an accomplice as a matter of law, nor did defendant ask that the circuit court give a jury instruction on the question of whether co-defendant was an accomplice as a matter of fact; therefore, defendant's accomplice-corroboration challenge was barred and the accomplice-corroboration principles of § 16-89-111(e)(1) did not apply. *Price v. State*, 365 Ark. 25, 223 S.W.3d 817 (2006).

Defendant's conviction for rape of his infant daughter and the denial of his motion for a directed verdict were affirmed as the child showed signs of sexual abuse immediately after being left with defendant, and defendant's semen was found on the child's diaper; all evidence, both direct and circumstantial, supported defendant's conviction for rape. *Terry v. State*, 366 Ark. 441, 236 S.W.3d 495 (2006).

Because the sales tax should not have been included in computing the value of the generator, and the state failed to prove that the warranty was stolen along with the generator, defendant's Class C felony conviction could not stand; however, defendant did not challenge the sufficiency of the evidence showing that he was generally guilty of theft by receiving and, as the value of the generator was at most \$499.99, defendant still stood convicted of a Class A misdemeanor. *Russell v. State*, 367 Ark. 557, 242 S.W.3d 265 (2006).

Trial court properly denied defendant's motion for directed verdict where substantial evidence existed to support a conclusion that defendant had the intent to possess and deliver 520 grams of cocaine rather than the 12.7914 grams that he actually possessed and, thus, the jury properly sentenced defendant under § 5-64-401(a)(1)(i). *Strong v. State*, 368 Ark. 23, 242 S.W.3d 620 (2006).

Defendant's motion for directed verdict was properly denied where the evidence showed that defendant signed the ticket to pawn a gun, which constituted circumstantial evidence that defendant constructively possessed the firearm; the pawn ticket indicated that defendant had given a security interest in the gun, and the pawn shop owner's testimony made it clear that only defendant could

have redeemed the pawn ticket and retrieved the gun. *Loar v. State*, 368 Ark. 171, 243 S.W.3d 923 (2006).

Motion for a directed verdict was denied in a case involving second-degree sexual assault as evidence was sufficient to support defendant's conviction where the victim and a witness both testified that defendant pulled down the victim's pants and was touching her, despite defendant's contention that he was merely examining a bug bite when he removed the clothes. *Hull v. State*, 96 Ark. App. 280, 241 S.W.3d 302 (2006).

There was substantial evidence to convict defendant of arson because (1) a firefighter stated that, while responding to the fire, he saw defendant walking away from the crime scene; (2) the daughter-in-law of the victim's next door neighbor saw a pedestrian trying to hide his face from her as she drove past him, and she testified that defendant would have known her truck because she was at her mother-in-law's home about three days a week; (3) a reserve deputy who handled bloodhounds testified that his select-scent dog tracked defendant's scent 1.8 miles from a county road to the back door of the victim's mobile home; (4) there were spermatozoa cells present in the victim's rectum, which could generally live only 24 hours there, which gave rise to an inference that defendant had sexual relations with the victim close to the time she died; (5) defendant's DNA was present on the rectal swab and the probability of selecting an individual at random from the general population having the same genetic markers as those from defendant would be one in one trillion; (6) medical evidence showed that the victim was dead before the fire began, implying that she did not start it; and (7) the lead investigator on the fire ruled out any electrical malfunction as the cause of the fire. Therefore, the trial court did not err in denying defendant's motion for a directed verdict. *Wright v. State*, 368 Ark. 629, 249 S.W.3d 133 (2007).

Defendant's sufficiency argument was not preserved for appeal because his directed-verdict motions were not specific and did not advise the circuit court or the state as to which element of the state's case was missing. In short, defendant's directed-verdict motions were too general in nature. *Eastin v. State*, 370 Ark. 10, 257 S.W.3d 58 (2007).

Where a victim testified that defendant put something inside of her body after he touched her private area, and she saw him covering up his private area when she turned around, a motion for a directed verdict was properly denied since there was sufficient evidence to support a rape conviction under § 5-14-103(a)(1)(C)(i). Other evidence supporting the conviction included a videotape of the victim's minor sister entering and exiting a shower,

along with evidence of defendant's flight after being named a suspect. *Ward v. State*, 370 Ark. 398, 260 S.W.3d 292 (2007).

Directed verdict was properly denied because a jury entered a general verdict; therefore, it was impossible which part of § 5-10-101 defendant was convicted under. Since defendant's sufficiency challenge only went to proof of the underlying felony, there was sufficient evidence regarding the other elements of capital murder where defendant shot her husband while he slept and took his property. *Terry v. State*, 371 Ark. 50, 263 S.W.3d 528 (2007).

Directed verdict was properly denied in a case involving robbery and capital murder because defendant shot the victim while he slept with the intent of taking some of his belongings. Therefore, evidence presented to the jury showed that defendant employed or threatened to immediately employ physical force upon the victim with the purpose of committing a felony or misdemeanor theft. *Terry v. State*, 371 Ark. 50, 263 S.W.3d 528 (2007).

Because the failure to register as a sex offender was a strict liability offense under § 12-12-901 et seq. and the state proved that defendant was required to register but failed to do so, the trial court did not err by denying defendant's motion for a directed verdict. *Adkins v. State*, 371 Ark. 159, 264 S.W.3d 523 (2007).

Challenge to the sufficiency of the evidence in a drug case was not preserved for appellate review because defendant failed to renew his motion to dismiss at the close of all evidence. *Champlin v. State*, 98 Ark. App. 305, 254 S.W.3d 780 (2007).

Motion to dismiss was properly denied in a case involving possession with intent to use drug paraphernalia because a crack pipe constituted paraphernalia under § 5-64-101(14)(C); further, there was sufficient evidence of intent where defendant admitted the pipe was his, cocaine residue was found on the pipe, and defendant admitted to using it to smoke cocaine in the past. *White v. State*, 98 Ark. App. 366, 255 S.W.3d 881 (2007).

In a case involving the possession with intent to use drug paraphernalia as a Class C felony, the state is required to show that the possession of the drug paraphernalia facilitated that objective, or made the commission of the offense easier; therefore, defendant's motion for a directed verdict was denied, and he was properly convicted of a Class C felony for a crack pipe being used in the furtherance of a felony where the pipe and the drugs were both found on his person, and he testified that he had previously used that same pipe to ingest cocaine. *White v. State*, 98 Ark. App. 366, 255 S.W.3d 881 (2007).

There was sufficient evidence to support a

residential burglary conviction under § 5-39-201 based on defendant's act of helping to remove stolen items, transport, and sell them, even though he did not enter a residence himself. Therefore, a motion for a directed verdict was properly denied. *Hickman v. State*, 99 Ark. App. 363, 260 S.W.3d 747 (2007).

On appeal of defendant's conviction of second-degree assault, the court held that defendant's motion for a directed verdict was properly denied because defendant admitted that the victim's testimony was clearly so unbelievable that reasonable minds could differ thereon, and therefore the trial court properly submitted the issue to the jury. The evidence was sufficient to support defendant's conviction because the victim testified that defendant touched her vagina with his finger and rubbed her buttocks; the fact that there was no physical evidence of trauma did not prevent the jury from finding defendant guilty. *Brown v. State*, 100 Ark. App. 172, 265 S.W.3d 772 (2007).

Appellate court declined to address a defendant's argument as to the sufficiency of DNA evidence because defendant's motion for directed verdict did not specifically raise this issue, but rather argued generally that the State was unable to prove the elements of the criminal charges against him. *Gillard v. State*, 372 Ark. 98, 270 S.W.3d 836 (2008).

Trial court did not err by denying defendant's motion for a directed verdict on the capital murder charge because: (1) but for defendant's aggravated robbery, speeding, and fleeing from the police, the trooper would not have been in the roadway attempting to retrieve stop sticks and would not have been struck by another trooper's vehicle; (2) the State presented sufficient evidence that defendant acted under circumstances manifesting an extreme indifference to the value of human life, as it showed that defendant robbed the victim with a gun, fled with his accomplice and the loot in a stolen car on a busy interstate, and initiated a high-speed chase while being pursued by several law enforcement officers with their lights and sirens blaring, thereby engaging in life-threatening activity; and (3) the phrase "under circumstances manifesting extreme indifference to the value of human life" was not void for vagueness, as the cases interpreting the phrase provided fair warning that it involved a life-threatening activity. *Jefferson v. State*, 372 Ark. 307, 276 S.W.3d 214 (2008).

Defendant's motion for directed verdict was properly denied as substantial evidence supported the capital-murder and aggravated robbery convictions. *Moore v. State*, 372 Ark. 579, 279 S.W.3d 69 (2008).

Defendant's sufficiency of the evidence challenge was not preserved for appeal because a



clear and specific motion for a directed verdict was not made to the trial court, as required by this rule; the defendant's directed-verdict motion failed to state with specificity what the flaws were or why certain witnesses lacked credibility. *Elkins v. State*, 374 Ark. 399, 288 S.W.3d 570 (2008).

Where defendant crossed the center line twice, the state trooper noticed that his breath smelled of alcohol, and he did not pass field-sobriety tests; within two hours of the traffic stop, defendant's breath-test results were more than 0.08. These facts alone were sufficient to support his conviction of driving while intoxicated pursuant to § 5-65-103(a); the trial court did not err in denying his motion for a directed verdict. *Hayden v. State*, 103 Ark. App. 32, 286 S.W.3d 177 (2008).

Court rejected defendant's claim of error in the denial of defendant's motion for a directed verdict in her driving while intoxicated (DWI) case, and contrary to defendant's claim, proof of blood-alcohol content, although admissible as evidence tending to prove intoxication, was not necessary to sustain a DWI conviction, as under § 5-65-206(a)(2), a blood alcohol level of more than .04 but less than .08 did not give rise to a presumption of intoxication, but could be considered with other evidence in determining intoxication; based on the eyewitness testimony, defendant's admission to drinking, her blood-alcohol reading, the failure of her field tests, the manner in which she drove the vehicle, and the witnesses' observations regarding her inebriated condition, the jury could have reasonably concluded that she was driving while intoxicated, as defined in § 5-65-102(2), and (1) the jury could have discounted testimony by defendant's son that he was driving the car, and (2) the fact that defendant was not cited for refusal to submit was of no moment because she did not refuse to submit to testing but instead deliberately delayed an officer in obtaining a successful test result by interfering with the testing. *Blair v. State*, 103 Ark. App. 322, 288 S.W.3d 713 (2008).

Trial court did not err in denying defendant's motion for a directed verdict as there was sufficient evidence to support his conviction for the rape of a nine-year-old, in violation of § 5-14-103(a)(3)(A); the victim's testimony constituted substantial evidence that defendant penetrated her vagina with his penis. *Kelley v. State*, 375 Ark. 483, 292 S.W.3d 297 (2009).

Where three eyewitnesses testified and identified defendant as the person who fired the shot that killed the victim, his car also matched the description of the car driven by the shooter. The Supreme Court of Arkansas held that the evidence was sufficient to sustain the jury's verdict finding him guilty of murder; the trial court did not err by denying

defendant's motion for a directed verdict. *Page v. State*, 2009 Ark. 112, 313 S.W.3d 7 (2009).

Substantial evidence was presented to the jury to support a capital murder verdict under § 5-10-101(a)(4) and a finding that defendant murdered the victim with premeditation and deliberation, given that (1) a witness testified to seeing defendant and the victim fighting, then they split up, then defendant went back inside his house a second time before emerging with a shotgun, (2) as the victim began to drive away, defendant fired, and (3) the victim's death was caused by the shotgun pellet; the court rejected defendant's claim that the trial court erred in denying his motions for a directed verdict. *Adams v. State*, 2009 Ark. 375, 326 S.W.3d 764 (2009).

In defendant's capital murder trial arising out of the beating death of the two-year-old child of defendant's girlfriend, the trial court did not err in denying defendant's motion for a directed verdict because the evidence, although circumstantial, was sufficient to support his conviction where it established that the child was in good physical condition when entrusted to defendant's care and that she suffered fatal injuries while in defendant's sole custody. The jury did not err in rejecting defendant's testimony that the child slipped and fell, hitting her head on the floor, because the doctors who treated the child testified that this explanation was implausible and was inconsistent with the head injuries suffered by the child; further, the child suffered extensive injuries over her entire body, and defendant offered no explanation for the origin of the many other significant injuries, which the doctors testified were the result of blunt force trauma. *Smith v. State*, 2009 Ark. 453, 343 S.W.3d 319 (2009).

Defendant was convicted of possessing drug paraphernalia with intent to manufacture, in violation of § 5-64-403(b)(5)(A); based on the evidence of defendant's proximity to the manufacturing paraphernalia, the circuit court did not err in denying defendant's directed-verdict motion. *Holt v. State*, 2009 Ark. 482, 348 S.W.3d 562 (2009).

Based upon the evidence, the circuit court's denial of defendant's directed-verdict motion on the offense of maintaining a drug premise was proper. *Holt v. State*, 2009 Ark. 482, 348 S.W.3d 562 (2009).

Trial court did not err in denying defendants' motions for a directed verdict because the victim's testimony stood as substantial evidence to support the jury's verdict; the victim specifically identified defendants as the ones who committed the acts of battery and kidnapping. The victim stated that defendants pointed guns at the victim while the

victim was forced to undress and was bound. *Watkins v. State*, 2009 Ark. App. 124, 302 S.W.3d 635 (2009).

Where the victim testified that defendant drove her to an unfamiliar area, poured each of them a shot glass of liquor, and forced her to have sexual intercourse with him against her will, the victim's testimony was sufficient to support defendant's conviction for rape in violation of § 5-14-103(a)(1). The trial court did not err by denying defendant's motion for a directed verdict. *Goodman v. State*, 2009 Ark. App. 262, 306 S.W.3d 443 (2009).

Trial court did not err in denying defendant's motion for a directed verdict during his trial for the rape of his niece through marriage, in violation of § 5-14-103(a)(4)(A)(ii), because the familial relationship extended to a relationship by affinity as well as a blood relationship; DNA testing confirmed that defendant was the biological father of the 15-year-old niece's child. *Wade v. State*, 2009 Ark. App. 346, 308 S.W.3d 178 (2009).

Informant and a drug task force officer both testified that the informant was given cash by the officer, the informant called defendant to set up a purchase, defendant arrived in a car, the informant presented the controlled-drug-buy money to defendant, and was given small off-white rocks that contained a cocaine base. The evidence was sufficient to support defendant's conviction for delivery of cocaine; the trial court did not err in denying his motions for directed verdict. *Green v. State*, 2009 Ark. App. 589, — S.W.3d —, 2009 Ark. App. LEXIS 737 (2009).

Neither of defendant's motions to dismiss satisfied the requirements of this rule where they did not give sufficient indication as to which elements of the offenses defendant believed the state failed to prove and the motions failed to even state which offense was being referenced. *Lasker v. State*, 2009 Ark. App. 591, — S.W.3d —, 2009 Ark. App. LEXIS 742 (2009).

Trial court did not err in refusing to direct the verdicts where defendant took actions to conceal the harm to the child, and failed to take action to secure appropriate care for the child; the jury could conclude that defendant rubbing a substance known to cause skin irritation on the face of a toddler where Superglue had already adhered would cause, at the very least, the impairment of physical condition or a visible mark associated with the physical trauma. *Price v. State*, 2009 Ark. App. 664, 344 S.W.3d 678 (2009).

Evidence of a defendant's previous sales of ecstasy and his possession of firearms provided substantial evidence of defendant's intent to deliver, § 5-64-401(d), and although defendant was not home at the time of the search, defendant had constructive-possession of the items, § 5-64-401(c), as well as

simultaneous possession, § 5-74-106(d), because the items were found in defendant's locked bedroom and there was no evidence that anyone other than defendant had a key to defendant's locked bedroom. *Felipe Nevarez Ibarra v. State*, 2009 Ark. App. 707, — S.W.3d —, 2009 Ark. App. LEXIS 887 (2009).

Where defendant admitted that he inappropriately touched an eleven-year-old girl while she was sleeping, the jury could infer that his actions were motivated by a desire for sexual gratification. The evidence was sufficient to support his conviction for sexual assault in the second degree in violation of § 5-14-125(a)(3); the trial court did not err by denying his motion for a directed verdict under subsection (a) of this rule. *Davis v. State*, 2009 Ark. App. 753, — S.W.3d —, 2009 Ark. App. LEXIS 952 (2009).

Trial court did not err in denying defendant's motion to dismiss the charge of possession of cocaine with intent to deliver in violation of § 5-64-401(a)(1)(A) because the evidence was sufficient to support defendant's conviction when a search of his vehicle revealed two containers of food, one of which contained a clear bag of off-white, rock-like items and some powder that later tested positive for cocaine base and cocaine hydrochloride, and on defendant's person, police officers found five one-hundred dollar bills, fourteen twenty-dollar bills, and one dollar and forty-three cents, totaling \$781 in cash; both the passenger of the vehicle and an officer testified as to a bag of cocaine that was found inside the vehicle, and although there was conflicting evidence as to whether the cocaine was found in a container or in a bag, the factfinder had the sole authority to evaluate the credibility of witnesses and to apportion the weight to be given to the evidence. *Brown v. State*, 2009 Ark. App. 873, — S.W.3d —, 2009 Ark. App. LEXIS 1018 (2009).

Directed verdict was not appropriate under subsection (a) of this rule because the testimony of a trooper that defendant was obviously impaired and that he had observed defendant's vehicle swerve on the highway, along with defendant's admission that he had consumed enough alcohol to register above the legal limit constituted substantial evidence sufficient to sustain defendant's conviction for third-offense driving while intoxicated. *Heathman v. State*, 2009 Ark. App. 601, — S.W.3d —, 2009 Ark. App. LEXIS 1062 (Sept. 23, 2009).

Pursuant to subsection (a) of this rule, motions for a directed verdict had to state specific grounds or identify the respect in which the evidence was allegedly deficient. Such motions that only asserted the state failed to meet its burden of proof did not preserve defendant's challenges on appeal to



the sufficiency of the evidence. *Thomas v. State*, 2010 Ark. App. 708, — S.W.3d —, 2010 Ark. App. LEXIS 747 (Oct. 27, 2010).

Defendant's conviction for the delivery of crack cocaine was proper because his directed-verdict motion was too general to preserve his arguments on that charge. A general motion that merely asserted that the state failed to prove its case was inadequate to preserve the issue for appeal. *Conley v. State*, 2011 Ark. App. 597, — S.W.3d —, 2011 Ark. App. LEXIS 629 (Oct. 5, 2011).

Defendant's conviction for possession of marijuana was proper because his directed-verdict motion was too general to advise the trial court of the exact element of the crime he believed the state had failed to prove, which was constructive possession. Thus, he failed to preserve a challenge to the sufficiency of the evidence for his conviction of possession of marijuana. *Conley v. State*, 2011 Ark. App. 597, — S.W.3d —, 2011 Ark. App. LEXIS 629 (Oct. 5, 2011).

Defendant's argument challenging the sufficiency of the evidence to support his conviction was not preserved for appeal as defendant's directed verdict motion under this rule did not specify the manner in which the evidence was insufficient. *Fowler v. State*, 2011 Ark. App. 321, — S.W.3d —, 2011 Ark. App. LEXIS 350 (May 4, 2011).

Motion for a directed verdict as to one rape charge against appellant relating to penetration by a penis was insufficient to challenge the sufficiency of a conviction for rape by digital penetration under subsection (c) of this rule; even if the issue was preserved, a victim's testimony was sufficient and substantial evidence to support a conviction. *Clayton v. State*, 2012 Ark. App. 199, — S.W.3d —, 2012 Ark. App. LEXIS 299 (Mar. 7, 2012).

#### **Timeliness.**

Appellate court affirmed the denial of defendant's motion to dismiss and her conviction for violating § 5-27-221 because there was evidence that defendant knew her son was being abused by her husband and she did nothing to prevent it. *Graham v. State*, 365 Ark. 274, 229 S.W.3d 30 (2006).

Neither the denial of defendant's motion for a directed verdict or his motion for a mistrial was preserved for review; the motion for a directed verdict was untimely because it was renewed after the jury had been charged, and defense counsel failed to move contemporaneously for a mistrial when his objections to the prosecution's questioning of a witness were sustained. *Ellis v. State*, 366 Ark. 46, 233 S.W.3d 606 (2006).

Denial of defendant's motion for directed verdict was proper where the record supported that defendant was convicted of violating the amended statute, and he failed to challenge the sufficiency of the evidence sup-

porting that conviction. *Barnes v. State*, 94 Ark. App. 321, 230 S.W.3d 311 (2006).

Trial court did not err in denying defendant's motion for a directed verdict where there was sufficient evidence under the constructive-possession inquiry to link defendant to the contraband, crack cocaine, under the driver's seat and in the back seat of a vehicle; the vehicle was not only registered in defendant's name, but defendant also insured it. *Tubbs v. State*, 370 Ark. 47, 257 S.W.3d 47 (2007).

#### **Waiver.**

The sufficiency of the evidence issue was waived by defendant's failure to move for a directed verdict at the close of the case, and, therefore, the issue was not considered on appeal. *Andrews v. State*, 305 Ark. 262, 807 S.W.2d 917 (1991); *Cole v. State*, 307 Ark. 41, 818 S.W.2d 573 (1991); *Jones v. State*, 308 Ark. 555, 826 S.W.2d 233 (1992); *McArthur v. State*, 309 Ark. 196, 830 S.W.2d 842 (1992).

Defendant waived his right to have the sufficiency of the evidence considered on appeal where he made his motion for a directed verdict at the end of the state's case but failed to do so at the conclusion of all the evidence. *Ferrell v. State*, 305 Ark. 511, 810 S.W.2d 29 (1991); *DeWitt v. State*, 306 Ark. 559, 815 S.W.2d 942 (1991); *Henry v. State*, 309 Ark. 1, 828 S.W.2d 346 (1992); *Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992).

A defendant who goes forward with the production of additional evidence after a directed verdict motion is overruled, waives any further reliance upon the former motion. *Crawford v. State*, 309 Ark. 54, 827 S.W.2d 134 (1992).

Defendant waived his right to challenge the sufficiency of the evidence by failing to make a motion for directed verdict at the close of the state's case before presenting evidence on his behalf, and in addition, defendant again waived this argument when at the close of all evidence, he merely made "the usual motions." *Middleton v. State*, 311 Ark. 307, 842 S.W.2d 434 (1992).

A defendant who goes forward with the production of additional evidence after a directed verdict motion is overruled waives any further reliance upon the former motion. *Thomas v. State*, 315 Ark. 504, 868 S.W.2d 483 (1994).

This rule specifically requires that a defendant who wishes to challenge the sufficiency of the evidence move for a directed verdict at the close of the state's case and at the close of the whole case; failure to do so constitutes waiver of any question pertaining to the sufficiency of the evidence. *Cummings v. State*, 315 Ark. 541, 869 S.W.2d 17 (1994), questioned *Dale v. State*, 935 S.W.2d 274 (1996).

Where defense counsel moved for a directed verdict at the end of the state's case, which

was denied, but failed to renew the motion at the end of all the evidence as required by this rule, the issue was not preserved for appeal. *Jackson v. State*, 316 Ark. 405, 871 S.W.2d 591 (1994), questioned *Dale v. State*, 935 S.W.2d 274 (1996).

That defendant made a specific motion at the close of the state's case in chief was of no consequence because by presenting evidence in his defense, he waived his former motion for a directed verdict; it was, therefore, incumbent upon defendant to move for a directed verdict at the close of the case in order to give the trial court an opportunity to consider the motion in light of the total proof presented, and by failing to do this, the issue of the sufficiency of the evidence presented was waived. *Davis v. State*, 320 Ark. 329, 896 S.W.2d 438 (1995).

Because defendant did not move for a directed verdict or object to the submission of the aggravating circumstance to the jury until after the jury returned the verdict, this point was procedurally barred. *Willett v. State*, 322 Ark. 613, 911 S.W.2d 937 (1995), questioned *Robbins v. State*, 356 Ark. 225, 149 S.W.3d 871 (2004), criticized *Jones v. State*, 329 Ark. 62, 947 S.W.2d 339 (1997).

In prosecution for first-degree murder, defendant's failure to move for a directed verdict because of insufficiency of the evidence at the conclusion of all the evidence resulted in waiver of the issue on appeal under former ARCrP 36.21 (now see this rule and RAP—Crim 8). *Smith v. State*, 324 Ark. 74, 918 S.W.2d 714 (1996).

The right to challenge the sufficiency of the evidence was waived where defendant moved for a directed verdict at the end of the State's case on the counts of kidnapping and residential burglary only and then failed to make any directed-verdict motion at the close of the case. *Diemer v. State*, 340 Ark. 223, 9 S.W.3d 490 (2000).

An attorney waived his challenge to the sufficiency of the evidence on appeal of a contempt finding against him where he failed to make a timely motion for directed verdict or dismissal at the close of the evidence and did not even submit a proposed order containing his arguments for a finding of not guilty until after the court requested it. *Etoch v. State*, 343 Ark. 361, 37 S.W.3d 186 (2001).

Defendant was not entitled to dismissal on grounds of insufficiency of the evidence where the defendant moved for dismissal as part of closing argument, rather than at the close of evidence, as required by ARE 33.1. *State v. Holmes*, 347 Ark. 689, 66 S.W.3d 640 (2002).

The right to challenge the sufficiency of the evidence was waived where defense counsel moved for a directed verdict at the end of the state's case on a charge of capital murder but failed to make a motion for a directed verdict

after both sides rested their case. *Romes v. State*, 356 Ark. 26, 144 S.W.3d 750 (2004).

Where defendant was convicted of arson and capital murder, the appellate court was not permitted to review his claim regarding the admission of testimony at trial concerning the origin of the fire; this specific argument was not made to the circuit court as part of defendant's motions for directed verdict. *Meadows v. State*, 358 Ark. 396, 191 S.W.3d 527 (2004).

In a rape case, defendant waived his challenge to the sufficiency of the evidence where defendant's motion requesting a directed verdict was a general challenge to the sufficiency of the evidence, his attorney failed to identify a specific element of the crime that was not established by the state, and the motion did not assert a specific flaw in the state's case; thus, it did not inform the trial court of the specific issues in the state's case that were being challenged and did not comply with the requirements of this rule. *Pratt v. State*, 359 Ark. 16, 194 S.W.3d 183 (2004).

In a drug case, defendant failed to preserve for review the issue of the sufficiency of the evidence where the general motion made at trial was insufficient to apprise the trial court of any alleged deficiencies of the state's case; regarding the possession of pseudoephedrine charge, defendant merely argued that "the state failed to prove that defendant possessed those pills." *Nelson v. State*, 92 Ark. App. 275, 212 S.W.3d 31 (2005).

Where defendant failed to renew his motion for a directed verdict after the presentation of his sub-rebuttal evidence, which was the last evidence submitted, he waived any question pertaining to the sufficiency of the evidence to support his rape conviction. *Hamm v. State*, 365 Ark. 647, 232 S.W.3d 463 (2006).

Defendant's arguments regarding his motion to suppress were not properly preserved for appeal because the argument that the affidavit disclosed no specific items to be found on the property, contained an insufficient time frame, and alluded to nothing more than a bare assertion of past criminal conduct were never raised to the circuit court. In addition, although defendant's argument regarding the reliability of the confidential informant was raised in his motion to suppress, his argument was never developed before the circuit court, and he failed to obtain a specific ruling on the issue. *Eastin v. State*, 370 Ark. 10, 257 S.W.3d 58 (2007).

Defendant's conviction for negligent homicide was appropriate because she failed to preserve for appellate review her contention that the judge erred in finding that she engaged in criminally negligent conduct and that the conduct caused the death of the pedestrian victim because the evidence was insufficient to support the conviction. Even



though defendant's counsel made a specific argument to the judge, he never asked for dismissal but argued instead that the state had not met its burden of proving negligence, causation, beyond a reasonable doubt; the reasonable-doubt language was associated with a closing argument and not a motion to dismiss under this rule, where substantial evidence was the test. *Grube v. State*, 2010 Ark. 171, — S.W.3d —, 2010 Ark. LEXIS 209 (Apr. 15, 2010).

Since defendant failed to make a specific directed-verdict motion at the close of the state's case and at the close of the evidence, as required by subsection (a) of this rule, none of the sufficiency arguments raised in his appeal were preserved for appeal. *Bryant v. State*, 2011 Ark. App. 348, — S.W.3d —, 2011 Ark. App. LEXIS 388 (May 11, 2011).

**Cited:** *Dupree v. State*, 50 Ark. App. 271, 906 S.W.2d 315 (1995); *Whitney v. State*, 326 Ark. 206, 930 S.W.2d 343 (1996); *Meeks v. State*, 55 Ark. App. 220, 936 S.W.2d 555 (1996); *Dulaney v. State*, 327 Ark. 30, 937 S.W.2d 162 (1997); *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997), modified 328 Ark. 393, 945 S.W.2d 383 (1997); *Reyes v. State*, 329 Ark. 539, 954 S.W.2d 199 (1997); *Rankin v. State*, 57 Ark. App. 125, 942 S.W.2d 867 (1997); *Willis v. State*, 334 Ark. 412, 977 S.W.2d 890 (1998); *Sweeney v. State*, 69 Ark. App. 7, 9 S.W.3d 529 (2000); *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000); *Smith v. Russ*, 70 Ark. App. 23, 13 S.W.3d 920 (2000); *Sharkey v. State*, 71 Ark. App. 50, 25 S.W.3d

458 (2000); *General v. State*, 79 Ark. App. 219, 86 S.W.3d 15 (2002); *Porter v. State*, 82 Ark. App. 589, 120 S.W.3d 178 (2003), rev'd 145 S.W.3d 376 (2004); *Nelson v. State*, 84 Ark. App. 373, 141 S.W.3d 900 (2004); *Flowers v. State*, 362 Ark. 193, 208 S.W.3d 113 (2005); *Tillman v. State*, 364 Ark. 143, 217 S.W.3d 773 (2005); *LaFort v. State*, 98 Ark. App. 202, 254 S.W.3d 27 (2007); *Bell v. State*, 371 Ark. 375, 266 S.W.3d 696 (2007); *Rohrbach v. State*, 374 Ark. 271, 287 S.W.3d 590 (2008); *Foster v. State*, 2009 Ark. 454, — S.W.3d —, 2009 Ark. LEXIS 625 (2009); *Davis v. State*, 2009 Ark. 478, 348 S.W.3d 553 (2009); *Ray v. State*, 2009 Ark. 521, 357 S.W.3d 872 (2009); *Cockrell v. State*, 2009 Ark. App. 700, — S.W.3d —, 2009 Ark. App. LEXIS 889 (2009); *Lawshea v. State*, 2009 Ark. 600, 357 S.W.3d 901 (2009); *Moseby v. State*, 2010 Ark. App. 5, — S.W.3d —, 2010 Ark. App. LEXIS 12 (2010); *Buffalo v. State*, 2010 Ark. App. 127, — S.W.3d —, 2010 Ark. App. LEXIS 118 (Feb. 11, 2010); *Cowan v. State*, 2010 Ark. App. 715, — S.W.3d —, 2010 Ark. App. LEXIS 764 (Oct. 27, 2010); *Riley v. State*, 2011 Ark. App. 511, — S.W.3d —, 2011 Ark. App. LEXIS 542 (2011); *Strain v. State*, 2012 Ark. 42, — S.W.3d —, 2012 Ark. LEXIS 58 (Feb. 2, 2012); *McPeak v. State*, 2012 Ark. App. 234, — S.W.3d —, 2012 Ark. App. LEXIS 347 (Apr. 4, 2012); *Sipe v. State*, 2012 Ark. App. 261, — S.W.3d —, 2012 Ark. App. LEXIS 388 (Apr. 18, 2012); *Carruth v. State*, — Ark. App. —, — S.W.3d —, 2012 Ark. App. LEXIS 432 (May 2, 2012).

## Rule 33.2. Sentencing and entry of judgment.

Upon the return of a verdict of guilty in a case tried by a jury, or a finding of guilty in a case tried by a circuit court without a jury, sentence may be pronounced and the judgment of the court may be then and there entered, or sentencing and the entry of the judgment may be postponed to a date certain then fixed by the court, not more than thirty (30) days thereafter, at which time probation reports may be submitted, matters of mitigation presented or any other matter heard that the court of the defendant might deem appropriate to consider before the pronouncement of sentence and entry of the formal judgment. The defendant may file a written demand for immediate sentencing, whereupon the trial judge may cause formal sentence and judgment to be made of record. At the time sentence is pronounced and judgment entered, the trial judge must advise the defendant of his right to appeal, the period of time prescribed for perfecting the appeal, and either fix or deny bond. (Amended May 30, 1989, effective July 1, 1989; amended October 29, 1990, effective January 1, 1991; adopted and amended December 4, 1995.)

**Publisher's Notes.** Former ARCrP 33.2 has been renumbered as ARCrP 33.5.

The October 29, 1990 Per Curiam order of the Arkansas Supreme Court provided: "On May 30, 1989, by Per Curiam order, this court

abolished Criminal Procedure Rule 37 and amended Criminal Procedure Rule 36.4, effective July 1, 1989. As we said in *Whitemore v. State*, 299 Ark. 55, 771 S.W.2d 266 (1989), the primary reason for abolishing Rule 37 was

our concern that post-conviction remedies were drawn out extensively, and unnecessarily, before cases were concluded. It was our thought to accelerate post-conviction procedures and at the same time have a system which protects the defendant's constitutional and fundamental rights. Rule 36.4 was amended to provide a means by which a convicted defendant could assert claims of ineffective assistance of counsel within thirty days of judgment. Rule 36.4 also provided a procedure to consolidate the direct appeal of a judgment with the appeal of the denial by the trial court of post-conviction relief. (We would add that other states, such as Missouri, have adopted a similar consolidated direct appeal/post-conviction procedure in an attempt to expedite criminal appeals and post-conviction procedures.) The scope of the remedy afforded by Rule 36.4 was more limited than that which had been afforded by Rule 37.

"Members of the bench and bar have offered comments, and we have now had a period of some fifteen months to assess the procedure under Rule 36.4. We realize that any modification has its weaknesses and strengths, but we have presently settled on a procedure we believe will afford defendants their constitutional rights while substantially expediting his or her direct appeal and post-conviction remedies. The procedure is embodied in a

modification of Rule 37 which, while it embraces the scope of Rule 37, places some limitations on the remedy which were not formerly a part of the rule; in particular, the time for filing a petition for postconviction relief under the rule has been reduced from three years to ninety days in cases where the defendant pleaded guilty or did not elect to appeal and sixty days where an appeal was taken.

"We reinstate Criminal Procedure Rule 37 as modified and publish it in its revised form and amend Criminal Procedure Rule 36.4 and publish it. We also amend Rule 26.1 and publish it. The modified Rule 37 and the amended Rule 26.1(a) and Rule 36.4 shall become effective January 1, 1991. We invite comments from the bench, bar and public on the revision of Rule 37 and amendment of Rule 26.1 and Rule 36.4. Comments may be addressed to:

Arkansas Supreme Court

Attn: Criminal Procedure Rules 37 and 36.4

625 Marshall Street

Little Rock, Arkansas 72201

#### **Reporter's Notes to Rule 33.2 (1995):**

This rule is former ARCrP 36.4, with grammatical changes. At one time, it had been proposed to appear as Rule 2 of the Arkansas Rules of Appellate Procedure — Criminal.

### **1987 Unofficial Supplementary Commentary to Former Rule 36.4 [now Rule 33.2]**

#### **Rule Not Mandatory.**

On at least three occasions appellants have unsuccessfully argued that a judgment not entered within thirty days as provided in Rule 36.4 is void. The Arkansas Supreme Court has rejected this interpretation of the Rule. *Hogan v. State*, 289 Ark. 402, 712 S.W.2d 295 (1986); *Hoke v. State*, 270 Ark. 134, 603 S.W.2d 412 (1980); *Lovett v. State*, 267 Ark. 912, 591 S.W.2d 683 (1979).

It should be noted, however, that in *Lovett* the Court implied that a convicted defendant might be entitled to relief if he could show

inconvenience or prejudice from a belated entry of a nunc pro tunc judgment. In denying claimant's request for relief, the Court stated:

Moreover, appellant has not shown in any way how he has been inconvenienced or prejudiced by the belated entry of the nunc pro tunc judgment. ... It is clear from this record that when the trial court was advised that judgment had not been entered on the jury's verdict, the court immediately entered a nunc pro tunc judgment.

*Lovett* at 914-15, 591 S.W.2d at 684-85.

### **CASE NOTES**

#### **ANALYSIS**

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Motion for new trial.

Right to appeal.

Right to counsel.

Rule not mandatory.

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#### **Construction.**

This rule is not mandatory, not only because it specifies that the sentencing and judgment "may" be postponed for not more than 30 days, but also because the nunc pro tunc entry of judgments actually rendered earlier has long been the practice in Arkansas and it cannot have been the intent of the rule to permit a convicted felon to escape punishment altogether merely because the judgment



was not reduced to writing within 30 days; accordingly, a conviction for manslaughter was not void merely because the judgment was not entered within 30 days. *Hoke v. State*, 270 Ark. 134, 603 S.W.2d 412 (1980).

#### **Purpose.**

The court's purpose in making the 1989 change in post-conviction procedure was to shorten, or compact, the period in which a convicted defendant may claim ineffective assistance of counsel. If a defendant does not make such an allegation within the thirty (30) day period of limitation, he is barred from asserting such a claim in state court. *Mobbs v. State*, 303 Ark. 98, 792 S.W.2d 601 (1990).

#### **Compliance.**

Motion not filed by defendant's counsel within 30 days, alleging ineffective assistance of counsel, was not in compliance with this rule. *Matthews v. State*, 305 Ark. 207, 807 S.W.2d 29 (1991).

#### **Constitutionality of Conviction.**

Allegations which challenge the constitutionality of a circuit court judgment should be raised at trial and subsequently on direct appeal, not in a petition for post-conviction relief. *Bailey v. State*, 312 Ark. 180, 848 S.W.2d 391 (1993).

#### **Ineffective Counsel.**

ARCrP 37 was abolished effective July 1, 1989, but persons who had been convicted and sentenced during the existence of ARCrP 37 could still proceed under that rule. Additionally, this rule was amended to provide that a defendant may assert his or her claim of ineffective counsel on direct appeal. *Whitmore v. State*, 299 Ark. 55, 771 S.W.2d 266 (1989) (decision prior to 1990 amendment).

While this rule is intended to address claims of ineffective assistance of counsel predicated on a motion for new trial that alleges errors made at the trial level, the rule also requires the assertion of "facts sufficient to raise an issue whether a defendant's counsel was ineffective" in order for a hearing on the issue to be held. *Mays v. State*, 303 Ark. 505, 798 S.W.2d 75 (1990) (decision prior to 1990 amendment).

To prevail on a claim of ineffective assistance of counsel, the petitioner must show first that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. Second, the petitioner must show that the deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Mays v. State*, 303 Ark. 505, 798 S.W.2d 75

(1990) (decision prior to 1990 amendment), *Porter v. State*, 308 Ark. 137, 823 S.W.2d 846 (1992).

The purpose of ARCrP 37 was to provide a procedural method by which one's constitutionally guaranteed right to effective assistance of counsel could be protected. The only manner in which that right can now be protected in state court is by the procedure provided in this rule. *Looney v. State*, 32 Ark. App. 191, 798 S.W.2d 452 (1990) (decision prior to 1990 amendment).

Claims of ineffective assistance of counsel were insufficient. *Cox v. State*, 305 Ark. 244, 808 S.W.2d 306 (1991).

Defendant made a timely claim of ineffective assistance of counsel, and therefore, new counsel should have been appointed to represent him in his direct appeal from a capital murder conviction and with respect to any other proceedings in connection with his claim for post conviction relief. *Cox v. State*, 305 Ark. 488, 807 S.W.2d 665 (1991).

The appointment of new counsel to prosecute the defendant's motion for a new trial further in that forum was not required where defendant's allegations were conclusory and he did not raise sufficient facts to support an issue of ineffective counsel. *Cravey v. State*, 306 Ark. 487, 815 S.W.2d 933 (1991) (decision under law prior to 1990 amendment).

The trial court's denial of defendant's motion for a new trial was not erroneous after finding that defendant had received effective assistance of counsel, and that defendant voluntarily entered his guilty plea with knowledge and understanding of the consequences. *Thompson v. State*, 307 Ark. 492, 821 S.W.2d 37 (1991) (decision under law prior to 1990 amendment).

In the absence of something in the record showing the contrary, it will be presumed that the court informed defendant of his right to assert ineffective assistance of counsel. *Meekins v. State*, 34 Ark. App. 67, 806 S.W.2d 9 (1991).

Where defendant was represented by the assistant public defender, and the co-defendant, whose interests were in conflict with the defendant's, was represented by the public defender, there was no conflict of interest since the attorneys worked together only part-time, their offices were in two different cities, they made a conscious effort to sever the cases, and they worked independently for their respective clients. *White v. State*, 39 Ark. App. 52, 837 S.W.2d 479 (1992).

Motion for a new trial following a capital murder conviction, alleging defense counsel ineffective, denied. *Cox v. State*, 313 Ark. 184, 853 S.W.2d 266 (1993).

#### **Motion for New Trial.**

Where defendant challenged his trial attorney's representation when he filed his motion

for a new trial, but failed to appeal the denial of that motion to the state Supreme Court, defendant failed to comply with the state procedural rules, and thus, defendant's federal claim was procedurally barred unless he could establish the requisite cause and prejudice. *Harris v. Norris*, 864 F. Supp. 96 (E.D. Ark. 1994).

Where a motion for a new trial is filed asserting facts sufficient to raise an issue as to whether defendant's counsel was ineffective, the time for filing a notice of appeal will not expire until 30 days after the disposition of the motion. *Gidron v. State*, 316 Ark. 352, 872 S.W.2d 64 (1994).

#### **Right to Appeal.**

Petitioner was never advised by the trial court of his right to appeal and, therefore, was granted leave to appeal. *Easter v. Lockhart*, 773 F. Supp. 1226 (E.D. Ark. 1991).

#### **Right to Counsel.**

A proceeding under former ARCrP 36.4 is a critical stage of a defendant's criminal proceedings, entitling defendant to representation by separate counsel under the Sixth Amendment. *Robinson v. Norris*, 60 F.3d 457 (8th Cir. 1995), cert. denied 517 U.S. 1115, 116 S. Ct. 1344, 134 L. Ed. 2d 492 (1996).

The fact that defendant continued to be represented by trial counsel throughout the thirty-day period for filing a motion under former ARCrP 36.4 was of no consequence because defendant was entitled to separate counsel to pursue his ineffective assistance claim. *Robinson v. Norris*, 60 F.3d 457 (8th Cir. 1995), cert. denied 517 U.S. 1115, 116 S. Ct. 1344, 134 L. Ed. 2d 492 (1996).

#### **Rule Not Mandatory.**

This rule is not mandatory. *Hogan v. State*, 289 Ark. 402, 712 S.W.2d 295 (1986).

#### **Validity of Conviction.**

Where the defendant failed to show how he was inconvenienced or prejudiced by the belated entry of the nunc pro tunc judgment, 116 days after his conviction for criminal attempt to commit rape, the court's failure to enter a judgment within the 30 days pre-

scribed by the rule did not affect the validity of the defendant's conviction. *Lovett v. State*, 267 Ark. 912, 591 S.W.2d 683 (1979).

This rule is directory rather than mandatory and the court's failure to enter a judgment within the 30 days prescribed by the rule does not affect the validity of the proceedings resulting in the conviction of a defendant. *Lovett v. State*, 267 Ark. 912, 591 S.W.2d 683 (1979).

#### **Waiver of Irregularities.**

Where sentencing was not in conformity with § 16-90-105 or this rule and the record did not clearly set forth the sentence as required by §§ 16-90-106, 16-90-402 and 16-90-406 but there was no objection by either party and no appeal from the sentence, such irregularities were waived. *Cooper v. State*, 278 Ark. 394, 645 S.W.2d 950 (1983).

**Cited:** *Nash v. State*, 267 Ark. 870, 591 S.W.2d 670 (1979); *Coble v. State*, 274 Ark. 134, 624 S.W.2d 421 (1981); *Wesson v. State*, 280 Ark. 98, 655 S.W.2d 401 (1983); *Conley v. State*, 286 Ark. 388, 691 S.W.2d 868 (1985); *Hill v. State*, 293 Ark. 310, 737 S.W.2d 636 (1987); *Fitzhugh v. State*, 293 Ark. 315, 737 S.W.2d 638 (1987); *Franz v. Lockhart*, 700 F. Supp. 1005 (E.D. Ark. 1988); *Abdullah v. State*, 301 Ark. 235, 783 S.W.2d 58 (1990); *Preston v. State*, 303 Ark. 106, 792 S.W.2d 599 (1990); *Cozad v. State*, 303 Ark. 137, 792 S.W.2d 606 (1990); *Harrison v. State*, 303 Ark. 247, 796 S.W.2d 329 (1990); *Traylor v. State*, 303 Ark. 287, 795 S.W.2d 361 (1990); *Looney v. State*, 32 Ark. App. 191, 798 S.W.2d 452 (1990); *Coulter v. State*, 304 Ark. 527, 804 S.W.2d 348 (1991), cert. denied 502 U.S. 829, 112 S. Ct. 102, 116 L. Ed. 2d 72 (1991); *Phillips v. State*, 304 Ark. 656, 803 S.W.2d 926 (1991); *Brown v. State*, 305 Ark. 53, 805 S.W.2d 73 (1991); *Preston v. State*, 306 Ark. 408, 815 S.W.2d 389 (1991); *Meekins v. State*, 34 Ark. App. 67, 806 S.W.2d 9 (1991); *Hill v. State*, 34 Ark. App. 125, 806 S.W.2d 627 (1991); *Dawan v. Lockhart*, 980 F.2d 470 (8th Cir. 1992), criticized *Harris v. Norris*, 864 F. Supp. 96 (E.D. Ark. 1994); *Hadley v. State*, 322 Ark. 472, 910 S.W.2d 675 (1995).

### **Rule 33.3. Post-trial motions.**

(a) A person convicted of either a felony or misdemeanor may file a motion for new trial or any other application for relief. Such pleadings shall include a statement that the movant believes the action to be meritorious and is not offered for the purpose of delay. A copy of any such motion shall be served on the representative of the prosecuting party. The trial court shall designate a date certain, if a hearing is requested or found to be necessary, to take evidence, hear, and determine all of the matters presented. The hearing shall be held within ten (10) days of the filing of any motion or application unless circumstances justify that the hearing or determination be delayed.



(b) All posttrial motions or applications for relief must be filed within thirty days after the date of entry of judgment. A posttrial motion or application filed before the entry of judgment shall become effective and be treated as filed on the day after the judgment is entered.

(c) Upon the filing of a posttrial motion or application for relief in the trial court, the time to file a notice of appeal shall not expire until thirty (30) days after the disposition of all motions or applications. If the trial court neither grants nor denies a posttrial motion or application for relief within thirty (30) days after the date the motion or application is filed, the motion or application shall be deemed denied as of the 30th day. (Adopted and amended December 4, 1995; amended February 15, 2001.)

**Publisher's Notes.** Former ARCrP 33.3 has been renumbered as ARCrP 33.6.

**Reporter's Notes to Rule 33.3 (1995):** This rule is former ARCrP 36.22 with a new title. At one time, it had been proposed that it appear as Rule 10 of the Arkansas Rules of Appellate Procedure — Criminal. See RAP—Crim 2, as to when a notice of appeal must be filed.

**Addition to Reporter's Notes, 2001 Amendment:** The rule has been reorganized and divided into three subdivisions. The second sentence of subdivision (b) is new and effectively overturns a line of cases which held that a post-trial motion that is filed prior to the entry of the judgment is untimely and

ineffective. See *Brown v. State*, 333 Ark. 698, 970 S.W.2d 287 (1998); *Davies v. State*, 64 Ark. App. 12, 977 S.W. 2d 900 (1998); *Hicks v. State*, 324 Ark. 450, 921 S.W.2d 604 (1996); and *Webster v. State*, 320 Ark. 393, 896 S.W.2d 890 (1995). The second sentence of subdivision (c) provides that a motion not ruled on by the court within 30 days of its filing (or within 30 days of the date it is treated as filed) is “deemed denied as of the 30th day.” This provision also appears in Rule 2(b)(1) of the Rules of Appellate Procedure — Criminal. The time within which to file a notice of appeal is found in Rule 2 of the Rules of Appellate Procedure — Criminal.

## RESEARCH REFERENCES

**ALR.** Prejudicial Effect of Juror Misconduct Arising from Internet Usage. 48 ALR 6th 135.

Claims of Ineffective Assistance of Counsel in Death Penalty Proceedings - United States Supreme Court Cases. 31 ALR Fed. 2d 1.

Adequacy of Defense Counsel's Representation of Criminal Client Regarding Entrapment Defense - Federal Cases. 42 ALR Fed. 2d 145.

**Ark. L. Rev.** Recent Developments, Criminal Procedure — Post-trial Motions, 57 Ark. L. Rev. 1015.

**U. Ark. Little Rock L. Rev.** Hart & Dudley, Available Post-Trial Relief After a State Criminal Conviction When Newly Discovered Evidence Established “Actual Innocence,” 22 U. Ark. Little Rock L. Rev. 629.

## CASE NOTES

### ANALYSIS

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### Construction.

The terms of former ARCrP 33.6 (now see this rule) are broad and include a motion for reconsideration of the denial of post-convic-

tion relief. *Collins v. State*, 324 Ark. 322, 920 S.W.2d 846 (1996).

Where defendant pleaded guilty to a terrorist act and manslaughter, but before sentencing filed a motion challenging the trial court's authority to enter a sentence as to the terrorist act, the motion did not constitute a post-trial motion by operation of this rule. *Seibs v. State*, 357 Ark. 331, 166 S.W.3d 16 (2004).

State could not appeal under Ark. R. App. P. Crim. 3 simply on the ground that the trial court erred in acquitting defendant upon defendant's posttrial motion, but where the state contended that the trial court acted without jurisdiction, the appellate court

treated state's appeal as a petition for a writ of certiorari; under subsection (c) of this rule, posttrial motions were deemed denied on the 30th day after judgment was filed and, because defendant's posttrial motion was deemed denied on January 26, 2004, the trial court lost jurisdiction to rule on the merits of the motion after that date, thus, the trial court's ruling made on April 6, 2004, which resulted in the entry of an order of acquittal, was of no legal effect. *State v. Markham*, 359 Ark. 126, 194 S.W.3d 765 (2004).

While the time periods enumerated in subsection (a) of this rule are discretionary, the time restrictions of subsection (c) of this rule are mandatory. *Wright v. State*, 359 Ark. 418, 198 S.W.3d 537 (2004).

#### **Appeal to Circuit Court.**

Where defendant convicted of a misdemeanor in municipal court filed a motion to proceed as a pauper in circuit court, this rule did not stay the time for appeal pursuant to AICR 9 [now ADCR 9], since the motion to proceed as a pauper in circuit court was not one of the specified posttrial motions, and it was not pending in the trial court. *Smith v. State*, 316 Ark. 32, 870 S.W.2d 716 (1994).

#### **Effect on Post-Conviction Relief.**

Where a defendant was convicted of manslaughter in February, 1980, and filed a petition in October, 1981, pursuant to ARCrP 37.2, for permission to file a motion for a new trial based on newly discovered evidence, the petition could not be granted since both this rule and § 16-91-105 fix the time for filing a motion for a new trial as that allowed for the filing of a notice of appeal, which is 30 days; accordingly, a motion filed 20 months after judgment is obviously too late. *Chisum v. State*, 274 Ark. 332, 625 S.W.2d 448 (1981).

A "deemed denied" ruling on a posttrial motion for a new trial is an insufficient order from which to raise on direct appeal a claim of ineffective assistance of counsel. *Dodson v. State*, 326 Ark. 637, 934 S.W.2d 198 (1996).

Defendant's motion for a belated appeal was denied because the appeal was not filed within 30 days of the date defendant's motion for a new trial was overruled by operation of law and defendant's attorney did not accept responsibility for the late filing; however, the court indicated that the motion would be granted if defendant's attorney filed a motion and affidavit within 30 days accepting responsibility. *Jones v. State*, 353 Ark. 121, 111 S.W.3d 853 (2003), criticized *McDonald v. State*, 146 S.W.3d 883 (2004).

#### **Excusable Tardiness.**

Where judgment of conviction was entered on January 17, 1977, without notice to defendant, and where defendant's counsel discovered on February 17, 1977 that the judgment had been entered and filed notice of appeal on

the same date, there was good reason shown for the one day tardiness in filing the notice of appeal. *Goodwin v. State*, 261 Ark. 926, 552 S.W.2d 233 (1977).

#### **Hearing.**

Although this rule states that a hearing is required when it is requested, the rule provides no sanction for when a hearing is not afforded a party; a new trial is certainly not contemplated under the terms of the rule as a sanction for failure to hold a hearing. *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996).

Where a hearing was requested but the trial judge made its ruling in the absence of a hearing, there was no error committed by the trial court in its refusal to grant a hearing because the hearing would have been superfluous. *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996).

There was no abuse of the trial court's discretion in denying without a hearing defendant's motion for a new trial because a hearing under subsection (a) of this rule was mandatory only when requested. A hearing was not requested, and the trial court's lengthy order was well considered and well reasoned. *Sanders v. State*, 2009 Ark. App. 833, — S.W.3d —, 2009 Ark. App. LEXIS 1045 (2009).

#### **Ineffective Assistance of Counsel.**

Motion for a new trial asserting ineffective assistance of counsel denied. *McDonald v. State*, 42 Ark. App. 37, 852 S.W.2d 833 (1993).

Appellate counsel filed the notice of appeal four days after the judgment and, therefore, could have timely raised ineffective assistance of counsel in a motion for a new trial; defendant's argument, that the appellate court should have address claims of ineffective assistance first raised on direct appeal where it was apparent from the face of the record that an appellant received ineffective assistance of counsel and there was no possibility that the ineffectiveness was due to trial strategy, was without merit. *Ratchford v. State*, 357 Ark. 27, 159 S.W.3d 304 (2004).

Defendant failed to present the appellate court with a sufficient order from which to consider allegations of trial counsel's ineffectiveness where defendant's claims were not raised or developed during the trial, further, the facts surrounding defendant's claims were not developed after trial because a hearing on defendant's posttrial motion was never held; thus, because defendant's motion was deemed denied, there was no order in which the trial court evaluated counsel's effectiveness. *Maxwell v. State*, 359 Ark. 335, 197 S.W.3d 442 (2004).

When someone driving appellant's car fled from an officer and ran into the woods, items used to manufacture methamphetamine were found in the car and appellant's girlfriend



testified that he was driving; a jury found appellant guilty of manufacturing methamphetamine, possessing drug paraphernalia with intent to manufacture methamphetamine, and fleeing. He was not entitled to postconviction relief under Ark. R. Crim. P. 37.1 based on counsel's failure to move for a new trial under this rule when he received a letter in which appellant's girlfriend recanted her testimony; the letter was received more than thirty days after the judgment was entered, and a motion for new trial at that point would have been without merit. *Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290 (2009).

#### **Motion for New Trial.**

In a prosecution for first-degree assault and second-degree battery, the trial court did not abuse its discretion in denying the defendant a new trial on his motion that one of the prosecuting witnesses would recant his testimony, where no written motion for new trial was filed on that basis. *Newberry v. State*, 262 Ark. 334, 557 S.W.2d 864 (1977).

Where the defendant's motion for a new trial on a second degree battery charge was filed within 30 days after a mitigation hearing, but not within 30 days of the first pronouncement of his sentence, the motion was still timely made since the ultimate pronouncement of his sentence occurred on the date of the mitigation hearing, and the time for filing a notice of appeal and thus for moving for a new trial commenced that date rather than the date of the original pronouncement. *Currie v. State*, 267 Ark. 1178, 594 S.W.2d 56 (1980).

Motion for new trial held untimely. *Uteley v. State*, 308 Ark. 622, 826 S.W.2d 268 (1992).

In a motion for new trial alleging jury misconduct and lack of a fair trial, this rule and § 16-91-105 have set the time frame, 30 days from date of judgment, and they have effectively superseded and taken precedence over § 16-89-130; therefore, defendant's motion was not timely when filed nearly 90 days after conviction was entered. *Cigainero v. State*, 310 Ark. 504, 838 S.W.2d 361 (1992).

Motion for a new trial held timely. *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997), modified 328 Ark. 393, 945 S.W.2d 383 (1997).

Where a criminal defendant files a motion for a new trial, a motion for arrest of judgment, or any other application for relief prior to the time fixed to file a notice of appeal and requests a hearing, the court must designate a date certain for a hearing. *Crouch v. State*, 62 Ark. App. 33, 968 S.W.2d 643 (1998).

Trial court did not abuse its discretion in failing to hold a hearing on defendant's motion for a new trial where defendant failed to set out any new evidence; judicial economy would not have been served by holding a hearing. *Brooks v. State*, 76 Ark. App. 164, 61 S.W.3d 916 (2001).

Defendant's motion for a new trial in a capital murder case based on newly discovered evidence was properly denied because the witness's statement regarding the position of a victim's body and the time of death was not credible based on the physical evidence; moreover, the witness did not offer the story until after the trial had begun. *Smart v. State*, 352 Ark. 522, 104 S.W.3d 386 (2003).

Even though the trial court erred when it determined that it did not have jurisdiction to hear defendant's motion for a new trial, where no action was taken on the motion, it was deemed denied 30 days after it was filed. *Smith v. State*, 354 Ark. 226, 118 S.W.3d 542 (2003).

Trial court erred in denying defendant's motion for a new trial without granting defendant a hearing on defendant's claim of ineffective assistance of counsel because by denying the motion without allowing defendant to develop the claim, the trial judge precluded defendant from presenting the issue on direct appeal. *Rounsaville v. State*, 374 Ark. 356, 288 S.W.3d 213 (2008).

Denial of defendant's motion for a new trial after he had been convicted of rape was appropriate because statements commenting on the lack of evidence were clearly directed towards rebutting the defensive strategy and did not constitute impermissible references to defendant's failure to testify. Because the remarks were not improper, counsel was not ineffective for failing to preserve an argument that those remarks were improper. *Rounsaville v. State*, 2011 Ark. 236, — S.W.3d —, 2011 Ark. LEXIS 218 (May 26, 2011).

In an aggravated robbery case, an issue relating to a motion for a new trial was preserved for appellate review because an oral motion prior to the entry of the judgment and commitment order was made in open court, the state was aware that the motion had been made, and the state was given an opportunity to respond. However, because appellant received a sentence within the statutory range short of the maximum, he was not prejudiced by a victim-impact statement, and a new trial was not warranted; appellant received a 60-year term of imprisonment, but the maximum he could have received was life in prison. *Walden v. State*, 2012 Ark. App. 307, — S.W.3d —, 2012 Ark. App. LEXIS 427 (May 2, 2012).

#### **Notice of Appeal.**

Under former ARCrP 36.9(a)(2), the time for taking an appeal is within 30 days from the date of entry of an order denying a post-trial motion under this rule; the trial judge's decision from the bench denying appellant's motion does not become effective until the date of filing. *Nance v. State*, 318 Ark. 758, 891 S.W.2d 26 (1994), cert. denied, 519 U.S. 847, 117 S. Ct. 134, 136 L. Ed. 2d 83 (1996).

The jurisdictional consequences for failing to timely file a motion for a new trial should mirror those which result from failing to timely file a notice of appeal, since the limitations period of § 16-91-105(b)(1) and former ARCrP 36.22 is specifically defined by reference to that set forth in former ARCrP 36.9(a); accordingly, compliance with the thirty-day filing period contemplated by § 16-91-105 and former ARCrP 36.22 is not a jurisdictional prerequisite to the state court's consideration of a motion for a new trial based upon newly discovered evidence. *Perry v. Norris*, 879 F. Supp. 1503 (E.D. Ark. 1995), *aff'd* 107 F.3d 665 (8th Cir. 1997).

The timely filing of a notice of appeal is jurisdictional. *Henry v. State*, 49 Ark. App. 16, 894 S.W.2d 610 (1995).

A notice of appeal filed prior to the disposition of a post-trial motion has no effect, and a new notice of appeal must be filed within the prescribed time dated from the entry of the order dealing with the post-trial motion or from the expiration of the 30 days allowed in the absence of a ruling. *Henry v. State*, 49 Ark. App. 16, 894 S.W.2d 610 (1995).

Although defendant filed his motion for a new trial five days before his original conviction was entered, his notice of appeal was timely filed, because he had thirty additional days from the trial court's denial of his new trial motion to file his notice of appeal. *McIntosh v. State*, 340 Ark. 34, 8 S.W.3d 506 (2000).

Where defendant failed to renew his notice of appeal after the trial court failed to rule on his motion for reconsideration, none of the arguments raised in defendant's motion for reconsideration were preserved for review; however, notwithstanding defendant's failure to preserve the arguments in the motion for reconsideration, the appellate court could still consider the issue of the right to a jury trial on appeal. *Ayala v. State*, 365 Ark. 192, 226 S.W.3d 766 (2006).

#### **Time Limitations.**

Where 31 days after defendant's motion for a new trial was deemed denied defendant filed a second notice of appeal from his judgment of conviction, his failure to timely file an amended notice of appeal, as required by Ark. R. App. P. Crim. 2(b)(2), meant that his appeal of the denial of his motion for a new trial was not properly before the court because the time period in subsection (c) of this rule is mandatory. *Wright v. State*, 359 Ark. 418, 198 S.W.3d 537 (2004).

Where the state claimed on appeal that the trial court lacked jurisdiction to grant defendant's post trial motion to correct court costs, the appellate court treated the appeal as a petition for writ of certiorari under Ark. R. App. P. Crim. 3 and found that, under subsection (b) of this rule, defendant's motion was filed six days after the 30-day deadline and

was thus untimely. *State v. Boyette*, 362 Ark. 27, 207 S.W.3d 488 (2005).

Appellant's attorney was clearly at fault when he filed a motion for new trial more than 30 days after entry of the judgment and commitment order, and the attorney could not shift the responsibility for timely perfecting an appeal to the trial court clerk for his or her failure to send him copy of the judgment; this rule did not permit the addition of five days for service of the judgment under Ark. R. Crim. P. 1.4. *Woods v. State*, 368 Ark. 131, 243 S.W.3d 258 (2006).

#### **Writ of Coram Nobis.**

A writ of coram nobis cannot be granted on the basis of newly discovered evidence. *Smith v. State*, 301 Ark. 374, 784 S.W.2d 595 (1990).

Inmate's petition for a writ of coram nobis was properly denied where the DNA test results from vaginal swabs allegedly not disclosed by the state to defense counsel were not exculpatory because defendant had been convicted of oral rape. *Cloird v. State*, 357 Ark. 446, 182 S.W.3d 477 (2004).

Supreme Court of Arkansas declined to recall its mandate denying petitioner's request for post-conviction relief and writ of error coram nobis as petitioner's claims of juror misconduct did not fall within any of the categories of errors for which error coram nobis could provide relief; further, petitioner's claim of juror misconduct brought over a decade after his conviction was untimely as the matter could have been brought in a motion for new trial immediately after the verdict and conviction. *Echols v. State*, 360 Ark. 332, 201 S.W.3d 890 (2005).

Petition for a writ of coram nobis was denied in a rape case as inmate failed to show that evidence was withheld, the victim's subsequently recanted testimony was not necessary due to the DNA evidence, and inmate failed to exercise due diligence since the petition was not filed for five years. *Thomas v. State*, 367 Ark. 478, 241 S.W.3d 247 (2006).

Appellant's motion for reconsideration filed after a denial of a writ of error coram nobis did not operate to extend the time for filing a notice of appeal. The deemed-denied provision of this rule did not apply to appellant's postconviction proceeding, rendering appellant's notice of appeal untimely under Ark. R. App. P. Crim. 2(a)(3). *McJames v. State*, 2010 Ark. 74, — S.W.3d —, 2010 Ark. LEXIS 104 (Feb. 18, 2010).

Because an inmate was convicted as an accomplice to a homicide and claimed that the inmate's sentence violated the Eighth Amendment, the inmate was not entitled to a writ of error coram nobis as the claim did not fit with the four categories of relief that were afforded in the writ. *Cox v. State*, 2011 Ark. 96, — S.W.3d —, 2011 Ark. LEXIS 78 (Mar. 3, 2011).

**Cited:** *Goodwin v. State*, 263 Ark. 856, 568



S.W.2d 3 (1978); *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3 (1982), cert. denied 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982); *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984), criticized *Magby v. State*, 72 S.W.3d 508 (2002); *State v. Thurman*, 305 Ark. 448, 808 S.W.2d 762 (1991); *Giacona v. State*, 39 Ark. App. 101, 839 S.W.2d 228 (1992); *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied 520 U.S. 1244, 117 S. Ct. 1853,

137 L. Ed. 2d 1055 (1997); *Higgins v. State*, 326 Ark. 1030, 936 S.W.2d 740 (1996); *Mosley v. State*, 333 Ark. 273, 968 S.W.2d 612 (1998), cert. denied 525 U.S. 1073, 119 S. Ct. 808, 142 L. Ed 2d 668 (1999); *State v. Rowe*, 374 Ark. 19, 285 S.W.3d 614 (2008); *Maldonado v. State*, 2009 Ark. 432, — S.W.3d —, 2009 Ark. LEXIS 597 (2009); *State v. Short*, 2009 Ark. 630, 361 S.W.3d 257 (2009).

**Rule 33.4. Custody and restraint of defendants and witnesses.**

Defendants and witnesses shall not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to maintain order. If the trial judge orders such restraint, he shall enter into the record of the case the reasons therefor. Whenever physical restraint of a defendant or witness occurs in the presence of jurors trying the case, the judge shall upon request of the defendant or his attorney instruct the jury that such restraint is not to be considered in assessing the proof and determining guilt.

**Publisher’s Notes.** This rule is former ARCrP 33.1. Former ARCrP 33.4 has been renumbered as ARCrP 33.7.

**Comment to Rule 33.4**

This section does not purport to designate physical restraint as the sole permissible manner of dealing with recalcitrant defendants or witnesses. Accordingly, a judge may,

in his sound discretion, take any constitutionally permissible alternative action should it become necessary to do so.

**CASE NOTES**

**ANALYSIS**

- Discretion of judge.
- Handcuffs.
- Jury instructions.
- Use of restraints improper.
- Use of restraints upheld.
- Witnesses.

**Discretion of Judge.**

This rule leaves the issue of whether to subject a defendant or a witness to physical restraints while in the courtroom to the discretion of the trial judge. *Woods v. State*, 40 Ark. App. 204, 846 S.W.2d 186 (1993).

The trial court has discretion to use physical restraints on a defendant for security purposes and to maintain order in the courtroom. *Stanley v. State*, 324 Ark. 310, 920 S.W.2d 835 (1996).

**Handcuffs.**

Where it was clear from the nature of defendant’s outbursts and the fact that it took six officers to restrain him that the handcuffs were reasonably necessary to maintain order, both at the time of his ouster from the courtroom and continuing after his return; and

where the judge instructed the jury to disregard the outbursts in assessing the defendant’s innocence or guilt, there was no denial of the right to a fair trial. *Terry v. State*, 303 Ark. 270, 796 S.W.2d 332 (1990).

It is not prejudicial, per se, when the defendant is brought into a courtroom handcuffed or legcuffed, where defendants were charged with violent offenses, engaged in disruptive behavior, or attempted escape, and there was no evidence of anything but a brief, inadvertent sighting by only some of the jurors. *Townsend v. State*, 308 Ark. 266, 824 S.W.2d 821 (1992).

Where each defendant received the maximum sentence and were regarded by the jury as first offenders, the placing of one of the defendants in restraints throughout the trial and for no compelling reason, within full view of the jury, had a telling effect on the jury in assessing punishment. *Townsend v. State*, 308 Ark. 266, 824 S.W.2d 821 (1992).

**Jury Instructions.**

Defendant’s failure to request that the judge instruct the jury that use of a restraint is not to be considered in assessing the proof

and determining guilt would not inure to defendant's benefit where defendant contended it was error to order him to appear in the courtroom wearing handcuffs. *Stanley v. State*, 324 Ark. 310, 920 S.W.2d 835 (1996).

**Use of Restraints Improper.**

Defendant had no record of prior criminal history, had not caused any previous disruptions in court, and there was no evidence of an attempted escape, thus, allowing defendant to be placed before a jury in the black-and-white jail uniform and leg restraints was inherently prejudicial. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

**Use of Restraints Upheld.**

It was not prejudicial to put restraints on defendant charged with escape in the second degree and aggravated robbery; use of restraints has been upheld where the defendant has been charged with violent offenses, engaged in disruptive behavior, and attempted escape. *Stanley v. State*, 324 Ark. 310, 920 S.W.2d 835 (1996).

Because defendant continued to interrupt the prosecutor's closing argument even after being reprimanded by the trial court, the trial court did not err in gagging defendant, which was reasonably necessary to maintain order under this rule, and the trial court properly

explained its reasons, as required, for its decision. *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003).

Where defendant was charged with four counts of attempting to commit capital murder and one count of attempting to commit first-degree murder, the trial court did not abuse its discretion in ordering that defendant be restrained during the proceedings; defendant was prone to fleeing from authorities, it took several officers to get him handcuffed and it was not easy to subdue defendant even with the use of mace. *Steward v. State*, 95 Ark. App. 6, 233 S.W.3d 180 (2006).

**Witnesses.**

Defendant was not prejudiced by plexiglass screen placed around witness stand during trial to protect witnesses from defendant who was acting as his own attorney. *Parker v. State*, 300 Ark. 360, 779 S.W.2d 156 (1989), cert. denied 498 U.S. 883, 111 S. Ct. 218, 112 L. Ed. 2d 186 (1990).

Restraint of witness was reasonable because of the witness's prior felony convictions and the two pending charges of aggravated robbery for which he was being held in jail. *Woods v. State*, 40 Ark. App. 204, 846 S.W.2d 186 (1993).

**Rule 33.5. Note-taking by jurors.**

Jurors may take notes regarding the evidence presented to them during the course of a trial and keep the notes when the jury retires for its deliberations. Any notes so taken shall be treated as confidential, disclosure of the notes or their nature being permissible only between the juror making them and his fellow jurors.

**Publisher's Notes.** This rule is former ARCrP 33.2.

**Rule 33.6. Instructions to be delivered to jury.**

In the trial of all cases in courts of record wherein juries are employed, upon request of counsel for any party, or of a juror, it shall be the duty of the presiding judge to deliver to the jury immediately prior to its retirement for deliberation, a typewritten copy of the oral instructions given to the jury. The instructions shall be returned to the court by the foreman of the jury when the jury is dismissed.

**Publisher's Notes.** This rule is former ARCrP 33.3.

**1987 Unofficial Supplementary Commentary to Rule 33.6**

The trial court should deliver a copy of the instructions to the jury on motion of defense counsel, even if the motion comes an hour after the jury retires. *Oliver v. State*, 286 Ark.

198, 691 S.W.2d 842 (1985). See, also, *Parker v. State*, 270 Ark. 897, 606 S.W.2d 746 (1980), where the Court held that the rule "means exactly what it says," *id.* at 901, 606 S.W.2d at



748, and held that it was prejudicial error for the court to fail to deliver instructions as requested.

A corollary to the rule's requirement that the trial court deliver the instructions to the jury upon request is that proposed typewritten instructions be submitted by counsel to the court. The Arkansas Court of Appeals has held that a trial court does not commit error by refusing to read an instruction not submit-

ted in typewritten form. *Willett v. State*, 18 Ark. App. 125, 712 S.W.2d 925 (1986) (appellant's counsel submitted model criminal jury instruction book to court with request that the court read AMCI 204 to jury). See, also, *Henry v. State*, 18 Ark. App. 115, 710 S.W.2d 849 (1986) (motion to give AMCI jury instruction insufficient to preserve issue on appeal where copy of instruction not submitted to court).

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey of Arkansas Law, Criminal Law, 5 U. Ark. Little Rock L.J. 115.

## CASE NOTES

### ANALYSIS

Construction.

Failure to deliver.

Failure to preserve error.

Preservation of issue.

Rule mandatory.

### Construction.

This Rule does not contravene or modify § 16-89-125, which provides that when evidence is concluded, the court shall, on motion of either party, instruct the jury on the law applicable to the case. *Bennett v. State*, 302 Ark. 179, 789 S.W.2d 436, cert. denied 498 U.S. 851, 111 S. Ct. 144, 112 L. Ed. 2d 110 (1990).

### Failure to Deliver.

Since it is the expressed duty of the court to deliver typewritten instructions to the jury prior to its retirement, when requested to do so, it is prejudicial error for the court to fail to do so. *Parker v. State*, 270 Ark. 897, 606 S.W.2d 746 (1980).

Where the trial judge failed, over a specific objection by the defendant, to give the jury a copy of the instructions, the defendant's conviction had to be reversed. *Oliver v. State*, 286 Ark. 198, 691 S.W.2d 842 (1985).

### Failure to Preserve Error.

Where the text of the proposed instruction on criminal trespass did not appear in the abstract or in the transcript, the Court of Appeals would not consider assigned error for refusal to give the instruction. *Henry v. State*, 18 Ark. App. 115, 710 S.W.2d 849 (1986).

In order to preserve for appeal an objection

to the trial court's failure to give an instruction, the appellant must make a proffer of the instruction to the judge in accordance with the procedural rules of that court; therefore, where the proffered instruction was not typewritten, any error was not preserved. *Willett v. State*, 18 Ark. App. 125, 712 S.W.2d 925 (1986); *Hart v. State*, 301 Ark. 200, 783 S.W.2d 40 (1990); *Pharo v. State*, 30 Ark. App. 94, 783 S.W.2d 64 (1990).

An appellant cannot assign as error the failure to instruct on any issue unless he has submitted a proposed instruction on that issue; a request for an instruction is insufficient. *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994).

### Preservation of Issue.

Where counsel for defendant requested that trial judge provide written copy of instructions to the jury it was up to defense counsel to obtain a clear ruling in order to preserve the issue for appeal. *Hamm v. State*, 301 Ark. 154, 782 S.W.2d 577 (1990).

### Rule Mandatory.

Ark. Const., Art. 7, § 23 and this rule make it mandatory that the trial judge, when requested by a party or a juror, deliver to the jury a typewritten copy of the oral instructions given to the jury. *Henry v. State*, 18 Ark. App. 115, 710 S.W.2d 849 (1986).

In a criminal case, upon request by counsel for any party, or by a juror, the trial judge must supply a written copy of the instructions to the jury. *Hamm v. State*, 301 Ark. 154, 782 S.W.2d 577 (1990).

## Rule 33.7. Additional instructions.

(a) If, after retiring for deliberation, a jury desires additional instructions it shall be conducted to a court room designated by the judge.

(b) The court shall give additional instructions in response to a jury's request unless:

(i) the jury may be adequately informed by directing its attention to some portion of the original instructions;

(ii) the request concerns matters not in evidence or questions not pertaining to the law of the case; or

(iii) the request would require the judge to express an opinion as to factual matters that the jury must determine.

(c) In order to avoid giving undue prominence to additional instructions, the court in its discretion may repeat instructions previously given.

(d) The judge may recall the jury after it has retired to deliberate and give it additional instructions in order to:

(i) correct or withdraw an erroneous instruction;

(ii) clarify an ambiguous instruction; or

(iii) inform the jury on a point of law which should have been covered by the original instructions.

(e) Should additional instructions be given, the judge in his discretion may allow additional argument by counsel.

**Publisher's Notes.** This rule is former ARCrP 33.4.

#### CASE NOTES

##### ANALYSIS

Discretion of court.

Elaborating on instructions.

Resolving misunderstanding.

##### Discretion of Court.

Because the additional instruction was supported by the evidence, was given after the other instructions were given and before the closing arguments were made, and was authorized by both case law and subsection (d) of this rule, even if the jury had retired to deliberate, there was no abuse of the court's discretion in giving the additional instruction. *Donovan v. State*, 26 Ark. App. 224, 764 S.W.2d 47 (1989).

##### Elaborating on Instructions.

A trial judge, once instructing a jury, should refrain from elaborating on his instructions, for such remarks, if in error, can lead to the necessity for a new trial. *Sumlin v. State*, 266 Ark. 709, 587 S.W.2d 571 (1979).

No abuse of discretion found where judge

clarified a term in the jury instruction instead of rereading the entire instruction in light of the clarification, especially where appellant failed to request at that time that the entire instruction be reread. *Ashe v. State*, 57 Ark. App. 99, 942 S.W.2d 267 (1997).

##### Resolving Misunderstanding.

Where jury returning to courtroom was polled and stated unanimity as to guilt on charges of aggravated robbery, rape and kidnapping, but one juror stated that she had not agreed to the amount of time to be served and thus had not voted on the sentence, it was not error for the court to seek to eliminate a misunderstanding and send the jury back to the jury room to fix the sentence under this rule; thus, there was no coercion and no error in accepting the verdict under these circumstances. *Ashby v. State*, 271 Ark. 884, 611 S.W.2d 512 (1981).

**Cited:** *Howard v. State*, 291 Ark. 633, 727 S.W.2d 830 (1987); *Hopes v. State*, 294 Ark. 319, 742 S.W.2d 561 (1988).

#### Rule 33.8. Questions by Jurors.

Jurors shall not be permitted to pose questions to witnesses, either directly or through written questions submitted to the judge or to the parties. (Adopted and effective February 22, 2007.)

**Reporter's Notes, 2007 Addition of Rule 33.8:** Permitting jurors to question wit-

nesses may cause delay, prejudice, or error. Rule 33.8 was added in 2007 to bar the



practice.

## RULE 34. JUROR ORIENTATION

### Rule 34.1. Juror orientation.

Prospective jurors shall receive an orientation which informs them of the nature of their duties and introduces them to trial procedure and legal terminology, but which does not include anything to be regarded by the jurors as instructions of law to be applied in any case or anything that may prejudice a party or mislead the jurors. This orientation may be accomplished by the use of juror handbooks and by supplementary oral instruction if and to the extent deemed necessary by the court.

## RULE 35. JUDICIAL COMMENT

### Rule 35.1. Judicial comment on verdict.

While it is appropriate for the court to thank the jurors at the conclusion of a trial for their public service, such comments shall not include praise or criticism of their verdict.

## ARTICLE X. APPEAL AND OTHER POST-CONVICTION PROCEEDINGS

### RULE 36. APPEALS FROM DISTRICT COURT TO CIRCUIT COURT

[Note: For appeals in civil cases, see **Rule 9 of the District Court Rules.**]

(a) *Right to Appeal.* A person convicted of a criminal offense in a district court, including a person convicted upon a plea of guilty, may appeal the judgment of conviction to the circuit court for the judicial district in which the conviction occurred. The state shall have no right of appeal from a judgment of a district court.

(b) *Time for Taking Appeal.* An appeal from a district court to the circuit court shall be filed in the office of the clerk of the circuit court having jurisdiction of the appeal within thirty (30) days from the date of the entry of the judgment in the district court. The 30-day period is not extended by the filing of a post-trial motion under Rule 33.3.

(c) *How Taken.* An appeal from a district court to circuit court shall be taken by filing with the clerk of the circuit court a certified record of the proceedings in the district court. Neither a notice of appeal nor an order granting an appeal shall be required. The record of proceedings in the district court shall include, at a minimum, a copy of the district court docket sheet and any bond or other security filed by the defendant to guarantee the defendant's appearance before the circuit court. It shall be the duty of the clerk of the district court to prepare and certify such record when the defendant files a written request to that effect with the clerk of the district court and pays any fees of the district court authorized by law therefor. The defendant shall serve a copy of the written request on the prosecuting attorney for the judicial district and shall file a certificate of such service

with the district court. The defendant shall have the responsibility of filing the certified record in the office of the circuit clerk. Except as otherwise provided in subsection (d) of this rule, the circuit court shall acquire jurisdiction of the appeal upon the filing of the certified record in the office of the circuit clerk.

(d) *Failure of clerk to file record.* If the clerk of the district court does not prepare and certify a record for filing in the circuit court in a timely manner, the defendant may take an appeal by filing an affidavit in the office of the circuit clerk, within forty (40) days from the date of the entry of the judgment in the district court, showing (i) that the defendant has requested the clerk of the district court to prepare and certify the record for purposes of appeal and (ii) that the clerk has not done so within thirty (30) days from the date of the entry of the judgment in the district court. The defendant shall promptly serve a copy of such affidavit upon the clerk of the district court and upon the prosecuting attorney. The circuit court shall acquire jurisdiction of the appeal upon the filing of the affidavit. On motion of the defendant or the prosecuting attorney, the circuit court may order the clerk of the district court to prepare, certify, and file a record in the circuit court.

(e) *Bond.* When an appeal is taken from a district court to circuit court, the district court may require the defendant to post a bond or other security to guarantee the appearance of the defendant before the circuit court, provided that an appearance bond originally posted with the district court to guarantee the appearance of the defendant before that court shall serve to guarantee the appearance of the defendant before the circuit court on appeal. The approval of the bond or other security to guarantee the appearance of the defendant before the circuit court shall stay the imposition of the judgment imposed by the district court. The clerk of the district court shall transmit any bond or other security to the circuit court. The failure of the defendant to post a bond or other security with the district court shall not prevent the circuit court from acquiring jurisdiction of the appeal. After acquiring jurisdiction of the appeal, the circuit court may modify the bond or other security.

(f) *Notice.* When the record of the proceeding in the district court is filed in the office of the circuit clerk, the circuit clerk shall promptly give written notice thereof to the prosecuting attorney and to the circuit judge to whom the appeal is assigned.

(g) *Trial De Novo.* An appeal from a judgment of conviction in a district court shall be tried de novo in the circuit court as if no judgment had been rendered in the district court.

(h) *Default Judgment.* The circuit court may affirm the judgment of the district court if (i) the defendant fails to appear in circuit court when the case is set for trial; or (ii) the clerk of the district court fails to prepare and certify a record for filing in the circuit court as provided in subsection (c) of this rule and the defendant fails to move the circuit court for an order to compel the filing of the record within thirty (30) days after filing the affidavit provided in subsection (d) of this rule.

(i) *District court without clerk.* If a district court has no clerk, any reference in this rule to the clerk of a district court shall be deemed to refer to the judge of the district court. (Adopted May 11, 2006, effective June 1, 2006; amended February 22, 2007.)



Criminal Procedure have been recodified in the Revised Rules of Appellate Procedure — Criminal or elsewhere in the Rules of Criminal Procedure. To that extent Rules 36.1 through 36.26 are deemed superseded.”

**Reporter’s Notes:** Prior to the adoption of Rule 36 appeals from limited jurisdiction courts to circuit court were governed by District Court Rule 9 (formerly Inferior Court Rule 9) and various statutory provisions in Title 16, Chapter 9, Subchapter 5. Although District Court Rule 1 limited the scope of the rules to “civil actions in district courts and county courts,” the Supreme Court ruled that District Court Rule 9 also governed criminal appeals. *Bocksnick v. City of London*, 308 Ark. 599, 825 S.W.2d 267 (1992).

Subsection (a) incorporates Ark. Code Ann. § 16-96-501 (shown as superseded) and Arkansas Code Ann. § 16-96-502 (repealed in 2005). See, also, Amendment 80, § 7(A) of the Arkansas Constitution, which establishes district courts as trial courts of limited jurisdiction, subject to the right of appeal to circuit court.

Subsection (b) substantially restates District Court Rule 9(a).

Subsection (c) is based on District Court Rule 9(b). Because appearance bonds are unique to criminal appeals, the sentence requiring the record to include any bond or other security to guarantee the defendant’s appearance in circuit court is not found in District Court Rule 9(b). Ark. Code Ann. § 16-96-505, which describes the transcript in a criminal case, was not included in this subsection because § 16-96-505 is shown as superseded by the Code Revision Commission.

Subsection (d) is based on District Court Rule 9(c). A defendant has two ways to perfect an appeal from district court to circuit court. The usual method will be to file the certified record with the circuit court, as described in subsection (c). Alternatively, if the district court clerk does not prepare and certify the district court record, the defendant can vest the circuit court with jurisdiction by filing the affidavit described in subsection (d). *Velek et al. v. State (City of Little Rock)*, — Ark. —, — S.W.3d — (2006). If the district court record is not filed within thirty days but is filed within forty days, the circuit court does not acquire

jurisdiction of the appeal unless the defendant also files an affidavit to the effect that the record was requested but not prepared and certified within thirty days by the district court clerk.

Subsection (e) is derived from on District Court Rule 9(d) and repealed Ark. Code Ann. § 16-96-504. The sentence providing that an appearance bond posted with the district court shall serve to guarantee the appearance of the defendant before the circuit court is consistent with Arkansas Rule of Criminal Procedure 9.2(e). The next to last sentence of the subsection codifies the holding of *Velek, supra*. In that case the Supreme Court ruled that the circuit court acquired jurisdiction upon filing of the affidavit described in subsection (d) even though the district court clerk refused to prepare the record because the defendant failed to post an appeal bond.

Subsection (f) ensures that both the prosecuting attorney and the circuit judge are aware that an appeal to circuit court has been filed and should reduce the number of cases in which the defendant fails to receive the speedy trial required by Arkansas Rule of Criminal Procedure 28. There is nothing comparable to this subsection in current law.

Subsection (g)’s provision for *de novo* review of a district court judgment on appeal to circuit court is required by Amendment 80, § 7(A) of the Arkansas Constitution. See, also, Ark. Code Ann. § 16-96-507.

Subsection (h) is based loosely on Ark. Code Ann. § 16-96-508. The collection and disposition of fines, penalties, forfeitures, or costs in the event of a default judgment in circuit court will continue to be governed by Ark. Code Ann. § 16-96-403.

**Addition to Reporter’s Notes, 2007 Amendments:** The 2007 amendments clarified the contents of the record that must be filed with the circuit court in order to vest that court with jurisdiction of the appeal. *Compare McNabb v. State*, 367 Ark. 93, — S.W.3d — (2006) rehearing denied — Ark. —, — S.W.3d —. After acquiring jurisdiction of the appeal, the circuit court can, if necessary or desirable, order additional documents or pleadings filed in the district court to be made a part of the record on appeal.

## CASE NOTES

### Time Limitations.

Because defendant failed to file a certified record of the district court proceedings on his driving while intoxicated trial with the circuit court clerk within 30 days of the district court judgment, as required by subsection (b) of this rule, the circuit court had no jurisdiction over

his appeal, even though defendant’s right to jury trial was thereby lost. *Roberson v. State*, 2010 Ark. 433, — S.W.3d —, 2010 Ark. LEXIS 535 (Nov. 11, 2010).

**Cited:** *State v. C.W.*, 374 Ark. 116, 286 S.W.3d 118 (2008).

## RULE 37. OTHER POST-CONVICTION PROCEEDINGS AND RELIEF

**Publisher's Notes.** The Per Curiam of Dec. 19, 1994, provided: "This court frequently acts on motions filed in the course of appeals of orders denying post-conviction relief pursuant to Arkansas Criminal Procedure Rule 37, Ark. Code Ann. § 16-90-111 (Supp. 1991), statutes which govern the issuance of writs of habeas corpus and mandamus as well

as legal remedies such as error coram nobis proceedings and others. As there is no provision in the prevailing rules of procedure for a motion for reconsideration to be filed after this court has denied a motion which stems from a post-conviction matter, such motions will no longer be filed."

### Commentary to Rule 37 of Article X

#### Post-Conviction Proceedings.

Two fundamental principles underlie Rule 37, *Post-Conviction Proceedings and Relief*. First, a defendant may waive a defense by deliberately or inexcusably failing to assert it at the appropriate time during trial of a case or on appeal. *Ballew v. State*, 249 Ark. 480, 459 S.W.2d 577 (1970). Second, a final determination of an issue of fact or law should foreclose further inquiry on the subject. Rule 37.2(b).

Arkansas' procedure respecting post-conviction remedies was brought in line conceptually with ABA *Standards, Post-Conviction Remedies* (Approved Draft: 1968), hereafter cited *Standards, Post-Conviction Remedies* or *Standards*, when the Arkansas Supreme Court promulgated Rule 1 of the Rules for Criminal Procedure on October 18, 1965. The Commission has, accordingly, decided to retain the language of Rule 1 as its proposed Rule 37, the proposed rule differing from the current only in arrangement of sections.

Rule 37.1, in the process of detailing the scope of the remedy conferred by the rule, provides that the prisoner is the appropriate moving party in a post-conviction proceeding. To this extent, 37.1 is consistent with *Standards, Post-Conviction Remedies* § 1.3(a).

Rule 37 departs from *Standards* recommendations, however, when, in Rule 37.3 (c), the prosecuting attorney for the circuit in which the court sits is designated the proper respondent. *Standards, Post-Conviction Remedies* § 1.3(b) suggests that:

[b]ecause of the nature of post-conviction claims and their probable pervasive importance to criminal process in any state, it is preferable to charge the office of the attorney general or comparable official with basic responsibility for representing the state in such cases. ... [S]uch an office will develop a greater expertise on the manifold phases of this type of litigation than can be expected in most local prosecutors' offices. *Id.* at 27, 28.

The Commission feels that the approach currently established by Rule 1 is more desirable for a number of reasons. For example,

the prosecuting attorney presumably enjoys the advantages of being conversant with the facts of each case and having some knowledge respecting the credibility of the witnesses involved. A representative of the attorney general's office would have to duplicate investigative work already done by the prosecutor in order to be in position to adequately represent the state.

The scope of the remedy, set out in broad terms by Rule 37.1(a)-(d), appears to be in accord with, though not as broad as, that of the *Standards*.

Implicit in the first clause of Rule 1, here Rule 37.1, is the notion that eligibility for relief extends only to incarcerated persons — not, for example, to persons who have completed terms of imprisonment or who have received suspended sentences. *See, Wallace v. State*, 251 Ark. 445, 473 S.W.2d 184 (1971). This being so, Rule 37 is at variance with its *Standards* corollary, § 2.3. In Arkansas, persons not in custody are left to those remedies available via writ of error coram nobis. *Wallace, supra*.

Rule 37.2(a) provides that, where a conviction was appealed originally, a circuit court may not entertain proceedings with respect to that case under this rule without prior approval of the Supreme Court. No counterpart of this rule appears in *Standards, Post-Conviction Remedies*.

The scope of the remedy available under Rule 37 is clarified and circumscribed by Rule 37.2(b) which excludes from consideration all grounds either finally adjudicated or intelligently waived in previous proceedings. *See, also, Davis v. State*, 253 Ark. 484, 486 S.W.2d 904 (1972).

Rule 37.3 makes summary disposition possible under certain circumstances and makes provision for appointment of counsel or the holding of evidentiary hearings when summary disposition is inappropriate.

In allowing for summary disposition without a hearing, the rule conforms to *Standards, Post-Conviction Remedies* § 4.2(b), although Rule 37.3(a) may allow dismissal upon



a showing which would not support such a disposition under the *Standards* language. *See, Standards, Post-Conviction Remedies* §§ 4.2, 4.3(e).

Rule 37.4 sets out the forms of relief which

may be granted by a circuit court pursuant to post-conviction proceedings.

Rule 37.5 provides for awards of attorney's fees to counsel for indigent petitioners.

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Hart & Dudley, Available Post-Trial Relief After a State Criminal Conviction When Newly Discovered Evidence Established "Actual Innocence," 22

**U. Ark. Little Rock L. Rev.** 629.

Annual Survey of Caselaw, Criminal Procedure, 26 **U. Ark. Little Rock L. Rev.** 891.

## CASE NOTES

### ANALYSIS

Custody requirement.

Double jeopardy.

Error coram nobis proceedings.

Federal habeas relief.

Findings.

— Written findings mandatory.

Granting of relief inappropriate.

Hearings.

Ineffective assistance claim.

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Records on appeal.

### Custody Requirement.

Summary judgment was properly awarded to the State of Arkansas and a prosecuting attorney on petitioner's complaint for a declaratory judgment that a statute was unconstitutional because petitioner was not in custody; because petitioner was on probation, and therefore not in custody, petitioner was not entitled to any postconviction relief. *Neely v. McCastlain*, 2009 Ark. 189, 306 S.W.3d 424 (2009).

### Double Jeopardy.

Defendant's petition under this rule was properly denied because his convictions for aggravated robbery, attempted capital murder, and aggravated battery did not violate the prohibitions against double jeopardy as first-degree battery was not a lesser included offense of aggravated robbery, and aggravated robbery was not a lesser-included offense of attempted capital murder. *Clark v. State*, 373 Ark. 161, 282 S.W.3d 801 (2008).

### Error Coram Nobis Proceedings.

Writ of error coram nobis was granted for a trial court to consider proof that the state suppressed material evidence that a witness was granted full immunity from a rape charge for testifying in a petitioner's criminal case; the matter was raised in petitioner's postconviction hearing and was not cognizable under this rule, but it could be raised in a coram nobis proceeding. *Sanders v. State*, 374 Ark. 70, 285 S.W.3d 630 (2008).

Granting of petitioner's, an inmate's, peti-

tion to reinvest jurisdiction in the trial court to consider the petition for a writ of error coram nobis was proper, in part because it made no sense that a Brady violation for prosecutorial misconduct would be barred by a petition under this rule since such a Brady claim was not cognizable under this rule. Material evidence withheld by the prosecutor was one of the fundamental errors in a trial that warranted error coram nobis relief. *Howard v. State*, 2012 Ark. 177, — S.W.3d —, 2012 Ark. LEXIS 204 (Apr. 26, 2012).

### Federal Habeas Relief.

Statutory tolling under 28 U.S.C.S. § 2244(d)(2) applied to the timely-filed post-conviction relief petition that petitioner inmate filed shortly after his direct criminal appeal was denied. *Ben-Yah v. Norris*, 570 F. Supp. 2d 1086 (E.D. Ark. 2008).

Petitioner inmate failed to show that any good grounds existed for reconsidering an order dismissing his 28 U.S.C.S. § 2254 habeas corpus petition on the ground that it was untimely filed: (1) the court concluded that the inmate's state post-conviction relief petition under this rule did not statutorily toll the limitations period under 28 U.S.C.S. § 2244(d)(2) because the state petition was not properly filed, as the state supreme court had dismissed the petition on the ground that it was not properly verified by the inmate; (2) the Arkansas verification requirement was both firmly established and regularly followed; and (3) the inmate did not properly raise an equitable tolling claim before his habeas petition was dismissed, but even if he had, the claim would fail because the application of the Arkansas petition verification rule in the inmate's case was not an extraordinary circumstance, which was required for equitable tolling. *Nelson v. Norris*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 62562 (E.D. Ark. Aug. 4, 2008).

Petitioner's argument for statutory tolling failed because, if a state court found that a motion failed to comply with filing requirements, that motion was not "properly filed,"

regardless of whether those filing requirements were firmly established and regularly followed, and the Arkansas Supreme Court had specifically held that petitioner's petition under this rule was not properly verified because petitioner did not execute the verification (because the Arkansas Supreme Court affirmed and found petitioner's petition invalid, that was the end of the matter); petitioner's unverified petition under this rule did not toll the running of the one-year statute of limitations for filing a federal habeas petition because the petition was not filed in accordance with this rule's verification requirement. *Nelson v. Norris*, 618 F.3d 886 (8th Cir. 2010).

### Findings.

#### —Written Findings Mandatory.

Where appellant was convicted of possession of methamphetamine, manufacturing methamphetamine, and possession of paraphernalia with the intent to manufacture methamphetamine, he filed a petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1, alleging: (1) that he was subjected to double jeopardy; (2) that his trial counsel was ineffective for failing to make an accomplice-corroboration argument; and (3) that his trial counsel was ineffective for failing to object to the affidavit supporting the search warrant for his residence. The circuit judge erred by denying appellant's petition without a hearing and without making findings of fact, because the allegations complained of in the petition under this rule could have been raised on direct appeal; there was an exception to the waiver rule for allegations of fundamental error such as double jeopardy and ineffective assistance of counsel. *Reed v. State*, 375 Ark. 277, 289 S.W.3d 921 (2008).

Denial of appellant's, an inmate's, petition for postconviction relief pursuant to this rule was appropriate because the circuit court's written findings complied with Ark. R. Crim. P. 37.3. In part, the inmate himself submitted a portion of the record with his petition and the circuit court, in its order, stated that it reviewed the pleadings and transcripts in denying the inmate's petition for postconviction relief; in doing so, the circuit court outlined the inmate's claims and the reasons for its denial of those claims. *Henington v. State*, 2012 Ark. 181, — S.W.3d —, 2012 Ark. LEXIS 205 (Apr. 26, 2012).

#### Granting of Relief Inappropriate.

Granting of an inmate's petition under this rule for postconviction relief was inappropriate because prejudice was not shown as a matter of law when the inmate received less than the maximum sentence for the charge of first-degree battery. *State v. Smith*, 368 Ark. 620, 249 S.W.3d 119 (2007).

A defendant's pro se petition for postconvic-

tion relief filed in the trial court in which the defendant was convicted of rape was not properly verified in accordance with subsection (d) of this rule because the petition completely lacked a verification statement. Thus, the defendant's motions for an extension of time to file his brief-in-chief, for access to the record, and for appointment of counsel were moot, and the case was dismissed. *Oden v. State*, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 223 (Apr. 10, 2008).

### Hearings.

In postconviction proceedings, appellant filed a petition under this rule alleging that trial counsel was ineffective because he failed to file a timely notice of appeal. Before deciding whether appellant could file a belated appeal, the circuit court was directed to conduct a hearing and make findings as to whether appellant timely advised counsel to appeal the judgment convicting him for possession of a controlled substance with intent to deliver. *Henderson v. State*, 370 Ark. 521, 262 S.W.3d 143 (2007).

It was not clear whether the testimony of a psychologist regarding the state death-row inmate's social history would have been admissible pursuant to § 5-4-602(4)(B) at the penalty phase of the inmate's capital murder trial without other witnesses providing a factual foundation for his opinions; although, at the time of the inmate's trial, expert testimony presenting social history as mitigating evidence at the penalty phase of Arkansas capital cases was not uncommon, other witnesses, usually the inmate, also testified and provided a factual foundation for the expert's opinions. While the federal district court allowed this evidence at the inmate's evidentiary hearing under 28 U.S.C. § 2254(e)(2), the state trial court in a evidentiary proceeding under this rule was in the best position to consider this issue. *Williams v. Norris*, 576 F.3d 850 (8th Cir. 2009).

### Ineffective Assistance Claim.

Defendant complained on appeal about an alleged conflict of interest involving his attorney, but the court's research had not revealed a single case where the court considered an ineffective assistance conflict of interest argument on direct appeal in the absence of a proper objection in the trial court; because defendant failed to raise his argument in the trial court, the court held that he failed to preserve this issue for review, and defendant himself had conceded that it could have been that the resolution of the matter was to occur in a proceeding under this rule, as many of the relevant decisions on the point came in postconviction proceedings. *Rackley v. State*, 371 Ark. 438, 267 S.W.3d 578 (2007).

Order denying an inmate's motion for postconviction relief under this rule was affirmed



because defense counsel's decision not to call a certain shaky witness who had a criminal history went to counsel's trial strategy and was not an omission resulting in ineffective assistance of counsel. *Gaye v. Ark.*, 2009 Ark. 201, 307 S.W.3d 1 (2009).

Order granting an inmate's petition for postconviction relief in accordance with this rule based on ineffective assistance of counsel was reversed because circuit court failed to inquire if the disclosure of a calendar ahead of trial would have changed the evidence before the jury in such a manner as to create a reasonable probability of an acquittal. *State v. Brown*, 2009 Ark. 202, 307 S.W.3d 587 (2009).

#### **Jurisdiction.**

Circuit court was without jurisdiction to entertain an inmate's second petition under this rule, and the court was likewise without jurisdiction to hear an appeal from any decision of the circuit court in the matter because the inmate failed to ask to court to recall its mandate and reopen postconviction proceedings. *Kemp v. State*, 2009 Ark. 631, — S.W.3d —, 2009 Ark. LEXIS 831 (Dec. 17, 2009).

Circuit court properly dismissed defendant's appeal of convictions in a district court

because defendant failed to perfect the appeal in a timely manner; hence, the circuit court did not have jurisdiction to try defendant's case de novo. *Williams v. State*, 2009 Ark. App. 525, 334 S.W.3d 873 (2009).

#### **Records on Appeal.**

Because the appeal transcript provided by defendant did not refer to the charges that defendant was appealing, and because defendant's inability to read did not relieve defendant of the responsibility of knowing what the docket sheet reflected and what documents defendant had filed to perfect defendant's appeal, the appeal was properly dismissed under subsection (c) of this rule. *Risner v. State*, 2011 Ark. App. 549, — S.W.3d —, 2011 Ark. App. LEXIS 588 (Sept. 21, 2011).

**Cited:** *Hill v. State*, 363 Ark. 505, 215 S.W.3d 586 (2005); *Hill v. State*, 89 Ark. App. 126, 206 S.W.3d 300 (2005), reversed 363 Ark. 505, 215 S.W.3d 586 (2005); *Lee v. State*, 2009 Ark. 255, 308 S.W.3d 596 (2009); *Maldonado v. State*, 2009 Ark. 432, — S.W.3d —, 2009 Ark. LEXIS 597 (2009); *Wilmoth v. State*, 2009 Ark. App. 432, — S.W.3d —, 2009 Ark. App. LEXIS 385 (2009).

### **Rule 37.1. Scope of remedy [Reinstated and revised — See Publisher's Notes].**

(a) A petitioner in custody under sentence of a circuit court claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:

(i) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or

(ii) that the court imposing the sentence was without jurisdiction to do so; or

(iii) that the sentence was in excess of the maximum sentence authorized by law; or

(iv) that the sentence is otherwise subject to collateral attack; may file a petition in the court that imposed the sentence, praying that the sentence be vacated or corrected.

(b) The petition shall state in concise, nonrepetitive, factually specific language, the grounds upon which it is based. The petition, whether handwritten or typed, shall be clearly legible, and shall not exceed ten pages of thirty lines per page and fifteen words per line, with left and right margins of at least one and one-half inches and upper and lower margins of at least two inches. The circuit court or appellate court may dismiss any petition that fails to comply with this subsection.

(c) The petition shall be accompanied by the petitioner's affidavit, sworn to before a notary or other officer authorized by law to administer oaths, in substantially the following form:

## AFFIDAVIT

The petitioner states under oath that (he) (she) has read the foregoing petition for postconviction relief and that the facts stated in the petition are true, correct, and complete to the best of petitioner's knowledge and belief.

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Petitioner's signature

Subscribed and sworn to before me the undersigned officer this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

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Notary or other officer

(d) The circuit clerk shall not accept for filing any petition that fails to comply with subsection (c) of this rule. The circuit court or any appellate court shall dismiss any petition that fails to comply with subsection (c) of this rule.

(e) In addition to filing the petition with the clerk of the court, the petitioner shall (i) send a letter to the judge of the circuit court that imposed the sentence notifying the judge that the petition has been filed and (ii) file with the clerk a copy of the letter notifying the judge that the petition has been filed. The letter to the judge shall enclose all copies of pleadings and documents relating to the petition and shall reflect service on the prosecuting attorney. Filings pursuant to this subsection (e) shall be used solely for purposes of Administrative Order No. 3, and failure to comply with this subsection (e) shall not be grounds for dismissing the petition. (Amended October 1, 1984; amended June 5, 1989; abolished May 30, 1990 and effective July 1, 1990; reinstated and revised October 29, 1990 and effective January 1, 1991; subsection (e) amended November 14, 1994; amended February 2, 2006, effective March 1, 2006; amended September 27, 2007.)

**Reporter's Notes, 2006 Amendment:** Rule 37.1 formerly stated that a petition for postconviction relief had to be "verified." The 2006 amendments added subsections (c) and (d) to reduce the likelihood that the verification requirement would be overlooked by the petitioner or the courts.

**Publisher's Notes.** This rule was abolished by the May 30, 1989, Per Curiam of the Arkansas Supreme Court, effective July 1, 1989 and was subsequently reinstated and revised by the October 29, 1990, Per Curiam of the Arkansas Supreme Court, effective January 1, 1991.

The May 30, 1989, Per Curiam provided that "persons who have been convicted and sentenced during the time the rule was in effect may proceed in accordance with the rule as it existed prior to that date."

The October 29, 1990, Per Curiam order of the Arkansas Supreme Court provided: "On May 30, 1989, by Per Curiam order, this court abolished Criminal Procedure Rule 37 and amended Criminal Procedure Rule 36.4, effective July 1, 1989. As we said in *Whitmore v. State*, 299 Ark. 55, 771 S.W.2d 266 (1989), the

primary reason for abolishing Rule 37 was our concern that post-conviction remedies were drawn out extensively, and unnecessarily, before cases were concluded. It was our thought to accelerate post-conviction procedures and at the same time have a system which protects the defendant's constitutional and fundamental rights. Rule 36.4 was amended to provide a means by which a convicted defendant could assert claims of ineffective assistance of counsel within thirty days of judgment. Rule 36.4 also provided a procedure to consolidate the direct appeal of a judgment with the appeal of the denial by the trial court of post-conviction relief. (We would add that other states, such as Missouri, have adopted a similar consolidated direct appeal/post-conviction procedure in an attempt to expedite criminal appeals and post-conviction procedures.) The scope of the remedy afforded by Rule 36.4 was more limited than that which had been afforded by Rule 37.

"Members of the bench and bar have offered comments, and we have now had a period of some fifteen months to assess the procedure under Rule 36.4. We realize that any modifi-



cation has its weaknesses and strengths, but we have presently settled on a procedure we believe will afford defendants their constitutional rights while substantially expediting his or her direct appeal and post-conviction remedies. The procedure is embodied in a modification of Rule 37 which, while it embraces the scope of Rule 37, places some limitations on the remedy which were not formerly a part of the rule; in particular, the time for filing a petition for postconviction relief under the rule has been reduced from three years to ninety days in cases where the defendant pleaded guilty or did not elect to appeal and sixty days where an appeal was taken.

"We reinstate Criminal Procedure Rule 37 as modified and publish it in its revised form and amend Criminal Procedure Rule 36.4 and publish it. We also amend Rule 26.1 and publish it. The modified Rule 37 and the

amended Rule 26.1(a) and Rule 36.4 shall become effective January 1, 1991. We invite comments from the bench, bar and public on the revision of Rule 37 and amendment of Rule 26.1 and Rule 36.4. Comments may be addressed to:

Arkansas Supreme Court  
Attn: Criminal Procedure Rules 37 and 36.4  
625 Marshall Street  
Little Rock, Arkansas 72201"

**Addition to Reporter's Notes, 2007 Amendment:** Subsection (e) was added in 2007. Administrative Order No. 3 requires circuit judges to report cases under advisement for more than 90 days to the Administrative Office of the Courts. The 90-day period does not start to run on a Rule 37 petition until the judge is notified as provided in subsection (e).

### RESEARCH REFERENCES

**Ark. L. Rev.** Rosenzweig, The Crisis in Indigent Defense: An Arkansas Commentary, 44 Ark. L. Rev. 409.

Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

**U. Ark. Little Rock L.J.** Arkansas Law Survey, Irving and Schoen, Criminal Procedure, 9 U. Ark. Little Rock L.J. 129.

Survey — Criminal Procedure, 11 U. Ark. Little Rock L.J. 187.

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#### **In General.**

Post-conviction relief is not a substitute for appeal and is not available while an appeal is pending. *Brewer v. State*, 274 Ark. 38, 621 S.W.2d 698 (1981).

This rule created a method for determining whether an accused's rights with respect to constitutional or statutory requirements had been violated or whether the sentence was otherwise subject to collateral attack, rather than providing for a second trial. *Chisum v. State*, 274 Ark. 332, 625 S.W.2d 448 (1981).

There is no requirement under this rule that a trial judge inform the unsuccessful petitioner in a collateral attack on the judgment that he may appeal. *Hill v. State*, 293 Ark. 310, 737 S.W.2d 636 (1987).

A constitutional violation is not in itself enough to trigger application of this rule. *Cotton v. State*, 293 Ark. 338, 738 S.W.2d 90 (1987).

This rule is not the equivalent of either a second appeal or a petition for rehearing. *Robinson v. State*, 295 Ark. 693, 751 S.W.2d 335 (1988).

This rule does not provide an opportunity to reargue points settled on appeal. *O'Rourke v. State*, 298 Ark. 144, 765 S.W.2d 916 (1989).

Former ARCrP 36.26 applies to appeals of orders denying post-conviction relief. *Miller v. State*, 299 Ark. 548, 775 S.W.2d 79 (1989).

The court will not consider matters which are outside the scope of the petition for post-conviction relief. *Jones v. State*, 308 Ark. 555, 826 S.W.2d 233 (1992).

Where a petition for postconviction relief is denied on procedural grounds in a case in which a sentence of death has been imposed, great care should be taken to assure that the

denial of the petition rests on solid footing. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003).

Although proceedings for postconviction relief from a criminal proceeding are civil in nature, the trial court erred in applying the summary judgment provisions of ARCP 56 to deny a petition for postconviction relief filed by a defendant in a capital murder case who had been sentenced to death on the grounds that defendant had raised no genuine issue of material fact in support of his petition. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003).

Petition for writ of mandamus was moot where the judge explained that faulty internal procedures caused the lengthy delay in the disposition of petitioner's petition for postconviction relief under this rule and then acted on the petition. *Cabral v. Keith*, 364 Ark. 456, 220 S.W.3d 683 (2005).

Issue of alleged prosecutorial misconduct is an issue that should be raised on direct appeal, and is not a claim that may be raised for the first time in an Ark. R. Crim. P. 37 petition. *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006).

#### **Construction.**

When ARCrP 37 was reinstated the provision which had permitted relief in those instances where a ground was sufficient to void the conviction regardless of the timeliness of the petition was removed from the rule; therefore, claims of such a fundamental nature as to render the judgment void will no longer be heard unless filed within the time limit set forth in ARCrP 37.2. *Prince v. State*, 315 Ark. 492, 868 S.W.2d 77, cert. denied 511 U.S. 1093, 114 S. Ct. 1857, 128 L. Ed. 2d 480 (1994).

Where petitioner was convicted while ARCrP 36.4 [now ARCrP 33.2] was in effect but where his conviction was affirmed less than five months after the re-adoption of ARCrP 37, his failure to raise a conflict-of-interest claim in an ARCrP 37 petition after the affirmation of his conviction did not trigger the procedural default doctrine even though he could have sought relief in the state courts. *Cox v. Norris*, 958 F. Supp. 411 (E.D. Ark. 1996).

If a sentence has been entered and placed in execution prior to the filing of a motion to withdraw the guilty plea upon which it was based, the motion must be treated as having been made pursuant to this rule, not ARCrP 26.1, and the provisions of this rule govern the timeliness of the motion. *Johninson v. State*, 330 Ark. 381, 953 S.W.2d 883 (1997), questioned *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003).

Because the time limits set forth in this rule are jurisdictional in nature, a trial court cannot extend the time to file a Rule 37 petition even if a motion for extension of time



is filed before the sixty-day period allowed by Rule 37.2(c) elapses. *Hill v. State*, 340 Ark. 248, 13 S.W.3d 142 (2000).

### **Purpose.**

This rule is not meant to function as a substitute for appeal, as a method of review of mere error in the conduct of the trial, or as a second opportunity to petition for a rehearing; nor is it intended to permit the petitioner to again present questions which were passed upon on direct appeal or to permit a petitioner to raise questions which might have been raised at the trial or on the record on direct appeal, unless they are so fundamental as to render the judgment void and open to collateral attack. *Neal v. State*, 270 Ark. 442, 605 S.W.2d 421 (1980); *Woodard v. State*, 273 Ark. 235, 617 S.W.2d 861, cert. denied 454 U.S. 1068, 102 S. Ct. 618, 70 L. Ed. 2d 603 (1981); *Ruiz v. State*, 275 Ark. 410, 630 S.W.2d 44, cert. denied 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148 (1982); *Holloway v. State*, 276 Ark. 120, 632 S.W.2d 428 (1982); *Bell v. Lockhart*, 795 F.2d 655 (8th Cir. 1986); *White v. State*, 290 Ark. 77, 716 S.W.2d 203 (1986); *Long v. State*, 294 Ark. 362, 742 S.W.2d 942 (1988).

This rule provides for collaterally attacking a judgment and was never intended to provide a means to add evidence to the record or refute evidence adduced at trial. *McDaniel v. State*, 282 Ark. 170, 666 S.W.2d 400 (1984); *Malone v. State*, 294 Ark. 127, 741 S.W.2d 246 (1987); *Taylor v. State*, 297 Ark. 627, 764 S.W.2d 447 (1989).

Even when a petitioner can state a sound basis for an objection, this rule was not designed for the review of mere error made by either the trial court or counsel. *Neff v. State*, 287 Ark. 88, 696 S.W.2d 736 (1985).

This rule was not intended as a substitute for a timely motion for belated appeal addressed to the Supreme Court. *Robbins v. State*, 288 Ark. 311, 705 S.W.2d 6 (1986).

This rule is not meant to be a substitute for direct appeal and is not designed for review of a mere error that occurred at trial. *Coplen v. State*, 298 Ark. 272, 766 S.W.2d 612 (1989).

The purpose of Rule 37 was to provide a procedural method by which one's constitutionally guaranteed right to effective assistance of counsel could be protected. The only manner in which that right can now be protected in state court is by the procedure provided in Rule 36.4. *Looney v. State*, 32 Ark. App. 191, 798 S.W.2d 452 (1990) (decision prior to 1990 amendment).

Promulgating ARCrP 36.4 (now see ARCrP 33.2) and later this rule, the Supreme Court made every effort to afford convicted defendants due process, but at the same time, put a procedure in place that would offer less opportunity to misuse the federal and state systems to develop legal theories that unnecessarily

prolonged meritless cases. *Cherry v. State*, 323 Ark. 733, 918 S.W.2d 125 (1996).

### **Applicability.**

This rule, which has a three-year time limit in most cases, is not available as substitute for a motion under former ARCrP 36.9 for a belated appeal. *Ellis v. Lockhart*, 875 F.2d 200 (8th Cir. 1989).

Post-conviction relief is available under this rule only where a prisoner is in custody under sentence of a circuit court and his case has not been appealed to the Supreme Court or Court of Appeals. *Edwards v. City of Conway*, 300 Ark. 135, 777 S.W.2d 583 (1989).

Under Arkansas law, a claim that could have been raised at trial, or on direct appeal, but was not, is not cognizable in a Rule 37 petition. *McDougald v. Lockhart*, 942 F.2d 508 (8th Cir. 1991).

A Rule 37 petition, filed after January 1, 1991, is timely brought if it is within 60 days of the date the mandate was issued by the appellate court, even if the conviction occurred during the time period when former Rule 36.4 was in effect. *Pogue v. State*, 316 Ark. 428, 872 S.W.2d 387 (1994).

This rule is not available to defendants who are not in custody. *Mason v. State*, 323 Ark. 361, 914 S.W.2d 751 (1996).

Post-conviction relief under this rule cannot be had while an appeal is pending. *Tapp v. State*, 324 Ark. 176, 920 S.W.2d 482 (1996).

This rule did not apply to a motion to modify a condition contained in a judgment of probation since a person on probation is not in custody. *Reeves v. State*, 339 Ark. 304, 4 S.W.3d 41 (1999).

### **Abolishment of Rule.**

#### **—In General.**

ARCrP 37 was abolished effective July 1, 1989, but persons who had been convicted and sentenced during the existence of Rule 37 could still proceed under that rule. Additionally, ARCrP 36.4 was amended to provide that a defendant may assert his or her claim of ineffective counsel on direct appeal. *Whitmore v. State*, 299 Ark. 55, 771 S.W.2d 266 (1989) (decision prior to 1990 amendment).

#### **—Effect.**

When the Supreme Court of Arkansas opted to retroactively grant Rule 37 relief to defendants convicted during this rule's hiatus, it was bound to meet Due Process Clause requirements in executing the remedy it had created; where there was no way even a diligent, well-trained lawyer, much less an indigent inmate, could have foreseen any remedy, much less the time-limited, retroactive nature it would take, no state forum was available to hear defendant's claims, and defendant was entitled to federal court consid-

eration of the merits of his petition. *Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994).

Where the availability of this rule had not been firmly established when defendant needed to pursue it, defendant's Rule 37 default was not adequate to support a denial of federal review of the merits of his constitutional claims. *Pearson v. Norris*, 52 F.3d 740 (8th Cir. 1995).

#### —Reinstatement.

Defendants convicted and sentenced between July 1, 1989, the abolition of this rule and December 31, 1990 who were advised of the right to proceed under former ARCrP 36.4 were obliged to avail themselves of that remedy; those defendants who did not do so are procedurally barred from raising claims for relief under ARCrP 37 after its reinstatement on January 1, 1991. *Burk v. State*, 313 Ark. 652, 856 S.W.2d 14 (1993), questioned *Pearson v. Norris*, 52 F.3d 740 (8th Cir. Ark. 1995). But see *Pearson v. Norris*, 52 F.3d 740 (8th Cir. 1995).

Where state trial court failed to inform defendant of his post-conviction remedy under ARCrP 36.4 (now ARCrP 33.2), and then forced defendant to seek post-conviction relief under new Rule 37 within 90 days of date of reinstatement of Rule 37, defendant was denied constitutional due process. *Cherry v. State*, 323 Ark. 733, 918 S.W.2d 125 (1996).

#### Alternative Remedies.

Where there was a failure to mention that prior conviction might affect parole eligibility, thus defendant's remedy, if any, was an action against the department of corrections rather than a Rule 37 proceeding. *Clark v. State*, 271 Ark. 866, 611 S.W.2d 502 (1981).

Despite the overlapping provisions of this rule and § 16-90-111, the rule and statute are separate, and judges are not required to consider a petition filed under the statute as a petition under the rule. If the trial court concludes that the petitioner has simply mislabeled the petition, it may treat the petition as a Rule 37 petition regardless of the title given it by the petitioner; however, if the trial court chooses to treat a motion labeled a motion to correct illegal sentence under § 16-90-111 as a Rule 37 petition, the court should so state in its order to prevent confusion. *Williams v. State*, 291 Ark. 255, 724 S.W.2d 158 (1987).

The remedy provided by § 16-90-111 is not dependent upon a prior objection. The statute contains a post-conviction remedy, narrowly defined, for the correction of an illegal sentence, and the legislature obviously chose to provide a safeguard for persons aggrieved in this manner that goes beyond the review provided by appeal or even by a Rule 37 petition; if an objection were required, it would in many cases preclude the availability

of the remedy and greatly reduce the effect the statute was intended to have. *Lowery v. State*, 297 Ark. 47, 759 S.W.2d 545 (1988).

#### Appeals.

Postconviction proceedings under this rule are civil in nature; therefore, the state may appeal from the grant of a petition under this rule. *State v. Dillard*, 338 Ark. 571, 998 S.W.2d 750 (1999).

Ark. R. App. P. Civ. 4(c) does not apply to appeals under this rule. *Morgan v. State*, 360 Ark. 264, 200 S.W.3d 890 (2005).

In a murder case, defendant's appeal from the denial of his petition for postconviction relief pursuant to this rule and Ark. R. Civ. P. 60 was dismissed as defendant could not prevail on appeal from the denial order, and Rule 60 did not apply in criminal matters. *McArty v. State*, 364 Ark. 517, 221 S.W.3d 332 (2006).

#### —In General.

Appellate court will reverse the trial court's denial of post-conviction relief only if its findings are clearly erroneous and against the preponderance of the evidence. *Guy v. State*, 282 Ark. 424, 668 S.W.2d 952 (1984), overruled *Ferrell v. State*, 810 S.W.2d 29 (1991); *Robbins v. State*, 288 Ark. 311, 705 S.W.2d 6 (1986); *Whisenhunt v. State*, 292 Ark. 33, 727 S.W.2d 847 (1987); *Branham v. State*, 292 Ark. 355, 730 S.W.2d 226 (1987); *Stephens v. State*, 293 Ark. 231, 737 S.W.2d 147 (1987); *Hudson v. State*, 294 Ark. 148, 741 S.W.2d 253 (1987); *Owens v. State*, 296 Ark. 322, 756 S.W.2d 899 (1988); *Pettit v. State*, 296 Ark. 423, 758 S.W.2d 1 (1988).

Mandamus granted and trial court directed to act on pending Rule 37 petition or set it for a hearing. *Skaggs v. State*, 286 Ark. 189, 690 S.W.2d 354 (1985).

The Supreme Court will not grant a petitioner's request for permission to petition the trial court for post-conviction relief before the Supreme Court's own decision on appeal has become final. *Oliver v. State*, 286 Ark. 198, 691 S.W.2d 842 (1985).

Where issues are not raised in the Rule 37 petition, on appeal, the court will not address alleged errors which the trial court was not given an opportunity to correct in the proceeding from which the appeal has been taken. *Locklear v. State*, 290 Ark. 609, 721 S.W.2d 668 (1986); *Pettit v. State*, 296 Ark. 423, 758 S.W.2d 1 (1988).

Petition for a writ of certiorari may be treated as a request for Rule 37 relief. *Fruit v. Lockhart*, 291 Ark. 198, 723 S.W.2d 372 (1987).

When an issue was raised at trial but not argued as a point for reversal on appeal, it has been waived unless it presents a question so fundamental as to render the judgment of conviction absolutely void. A ground sufficient



to void a conviction is one so basic that the judgment is a complete nullity, and the burden is on the petitioner to demonstrate that the judgment in his case is void. *Shockley v. State*, 291 Ark. 251, 724 S.W.2d 156 (1987).

The trial court may treat a petition which raises Rule 37 grounds as a petition under the rule regardless of the label placed on it by the petitioner, but once the trial court treats the petition as a Rule 37 petition, it will be considered as such on appeal. *Williams v. State*, 291 Ark. 255, 724 S.W.2d 158 (1987).

In review on appeal, conflicts in testimony are for the trial judge to resolve, and the judge is not required to believe any witness's testimony, especially the testimony of the accused, since he has the greatest interest in the outcome of the proceedings. *Owens v. State*, 296 Ark. 322, 756 S.W.2d 899 (1988).

United States Court of Appeals reviews de novo district court's interpretation of Rule 37 petition, and in this regard, the interpretation of the petition is much like the interpretation of a written contract, which is clearly a matter of law, subject to de novo review. *Williams v. Lockhart*, 893 F.2d 191 (8th Cir. 1990).

Appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appeal is wholly without merit. *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996).

Denial of the inmate's petition for postconviction relief was proper where an agreement between parties did not convert an otherwise incognizable claim into a cognizable one; this rule does not provide an avenue to raise matters that could have been raised on direct appeal, including constitutional claims, and a defendant ordinarily does not have a right to appeal a guilty plea, except as provided in ARCrP 24.3(b). *Beulah v. State*, 352 Ark. 472, 101 S.W.3d 802 (2003).

Because the effectiveness of counsel was not objected to nor raised to the trial court in defendant's motion for a new trial, defendant's claims of ineffectiveness of counsel were not preserved for appeal and should be addressed in a post-conviction proceeding under this rule. *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003), cert. denied 540 U.S. 1050, 124 S. Ct. 832, 157 L. Ed 2d 699 (2003).

Although petitioner's death penalty case had been reviewed five times, the Supreme Court of Arkansas found the circumstances of the case were unique and recalled the mandate and reopened the case solely because of: (1) the alleged comparable verdict form deficiency in the *Willett v. State* case; (2) the federal district court's dismissal of the federal habeas corpus petition in order to give state courts the opportunity to explore the issue; and (3) the enhanced scrutiny required in death penalty cases. *Robbins v. State*, 353 Ark. 556, 114 S.W.3d 217 (2003).

Inmate's trial counsel was not ineffective for failing to object properly to the victim impact evidence of the victim's sister during sentencing, and therefore the inmate's motion for relief under Ark. R. Crim. P. 37 was properly denied, because the sister's testimony was not objectionable, as it did not specifically instruct the jury on what she thought it should do; rather, the sister only acknowledged the family's helplessness and the jury's power to make a decision regarding defendant's punishment. *Williams v. State*, 369 Ark. 104, 251 S.W.3d 290 (2007).

Supreme court dismissed a prisoner's appeal of the circuit court's denial of his motion to reconsider the denial of his petition for postconviction relief under this rule because record did not contain an order denying the motion for reconsideration, and the deemed denied provision of the appellate rules did not apply to appeals in proceedings under this rule. The supreme court clerk accepted the record in error because there was no denial of the motion for reconsideration. *Young v. State*, 373 Ark. 264, 283 S.W.3d 188 (2008).

Circuit court did not clearly err in denying a prisoner's petition for postconviction relief. Evidence of third-party guilt the prisoner alleged should have been admitted at his murder trial did no more than create a suspicion or conjecture that two sisters may have played a role in the victim's death. *Armstrong v. State*, 373 Ark. 347, 284 S.W.3d 1 (2008).

Denial of appellant's, an inmate's, petition for postconviction relief pursuant to this rule was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, each of the inmate's allegations were entirely conclusory and there was no factual substantiation to show how counsel's conduct prejudiced his defense; he merely asserted that counsel should have hired experts and failed to significantly cross-examine the state's witnesses but the inmate failed to detail what assistance those experts could have provided or what relevant information could have been obtained through cross-examination. *Davis v. State*, 2011 Ark. 493, — S.W.3d —, 2011 Ark. LEXIS 579 (Nov. 17, 2011).

Denial of appellant's, an inmate's, petition for postconviction relief pursuant to this rule was appropriate because the evidence demonstrated that he was not prejudiced by his trial counsel's failure to properly renew his motion for directed verdict at the close of all the evidence. While the inmate was unable to challenge the sufficiency of the evidence in his direct appeal, there was substantial evidence to support the verdicts, including the inmate himself admitting to hitting his wife's car from behind and then getting out of his truck

and shooting her. *Davis v. State*, 2011 Ark. 493, — S.W.3d —, 2011 Ark. LEXIS 579 (Nov. 17, 2011).

Granting of petitioner's, an inmate's, petition for writ of mandamus was appropriate because the circuit court failed to provide the required rulings on each of the issues raised in his petition under this rule, and because the inmate properly filed a motion for modification to obtain the missing rulings. *Garcia v. Arnold*, 2012 Ark. 253, — S.W.3d —, 2012 Ark. LEXIS 269 (May 31, 2012).

#### —Belated Appeals.

Merely stating in conclusory fashion that the notice of appeal was sent to the wrong place was not a ground for granting a belated appeal from denial of post-conviction relief; ignorance of proper procedure alone is not good cause to permit a belated appeal. *Grain v. State*, 280 Ark. 161, 655 S.W.2d 425 (1983).

Where the defendant claimed that his attorney failed to appeal when requested to do so, he was entitled at most to a belated appeal; however, this rule is not a means of by-passing a motion for belated appeal. *Lomax v. State*, 285 Ark. 440, 688 S.W.2d 283 (1985).

The Supreme Court will grant a belated appeal from an order denying a petition for post-conviction relief if the movant shows good cause for the failure to file a notice of appeal within 30 days of the date the order was entered. *Garner v. State*, 293 Ark. 309, 737 S.W.2d 637 (1987).

Motion to proceed with belated appeal from denial of post-conviction relief denied. *Hill v. State*, 293 Ark. 310, 737 S.W.2d 636 (1987); *Garner v. State*, 293 Ark. 309, 737 S.W.2d 637 (1987); *Kelly v. State*, 301 Ark. 294, 783 S.W.2d 369 (1990).

#### —Issues Considered.

Where petitioner requested relief on the basis of his lawyer's omissions at trial, not on the basis of his lawyer's failure to file a pre-appeal petition for a new trial (even though that petition would have alleged those omissions as well), the district court had no power on remand to address any issues other than the merits of petitioner's Sixth Amendment claims relative to ineffective assistance of counsel. *Pearson v. Norris*, 94 F.3d 406 (8th Cir. 1996).

The Supreme Court may address issues raised for the first time on appeal from a denial of a Rule 37 petition, where prejudice is conclusively shown by the record; such prejudice is shown only when there is an error of such magnitude that it deprived the defendant of the fundamental right to a fair trial, and conversely, where prejudice is not conclusively shown, the issue is procedurally barred and the court may not reach the merits. *Jones v. State*, 340 Ark. 1, 8 S.W.3d 482 (2000).

In death cases, the Arkansas Supreme Court may address issues raised for the first time on appeal from a denial of a Rule 37 petition where prejudice is conclusively shown by the record as an error of such magnitude that it deprived the defendant of the fundamental right to a fair trial. *Jones v. State*, 340 Ark. 1, 8 S.W.3d 482 (2000).

Where defendant requested relief based on a claim of ineffective assistance of counsel, defendant's motion for a sentence reduction under § 16-90-111 should have been considered by the trial court as a petition for post-conviction relief under subsection (a) of this rule. *Gonder v. State*, 2011 Ark. 248, — S.W.3d —, 2011 Ark. LEXIS 228 (June 2, 2011).

#### —Standard of Review.

The standard of review is narrow: the federal appellate court must view the evidence in the light most favorable to the government and sustain the verdict if it is supported by substantial evidence; the government must be given the benefit of all logical inferences. *Hill v. Norris*, 96 F.3d 1085 (8th Cir. 1996).

#### Attorney's Fees.

Rule 37 proceedings are civil in nature and, therefore, a trial court is without authority to require the Public Defender Commission to pay attorney's fees in such a proceeding. *Arkansas Pub. Defender Comm'n v. Greene County Circuit Court*, 343 Ark. 49, 32 S.W.3d 470 (2000).

#### Bias of Trial Judge.

Where trial judge was supposedly biased in that he had recently presided at the trial of another accused of the same offense as defendant, circumstances did not indicate that the judge was so biased as to call for his recusal at a Rule 37 proceeding. *Welch v. State*, 283 Ark. 281, 675 S.W.2d 641 (1984).

This rule does not authorize a litigant to silently await a decision, and then, if the litigant does not like the result, later claim a judge had some personal bias or prejudice. *Orsini v. State*, 287 Ark. 456, 701 S.W.2d 114 (1985).

#### Burden of Proof.

In a hearing on a motion for post-conviction relief, the burden is on the defendant to prove his allegations. *Porter v. State*, 264 Ark. 272, 570 S.W.2d 615 (1978); *Branham v. State*, 292 Ark. 355, 730 S.W.2d 226 (1987); *Ross v. State*, 292 Ark. 663, 732 S.W.2d 143 (1987).

For a petitioner to claim post-conviction relief regarding the deprivation of a constitutional right when the issue was not raised in the trial court, the burden is on petitioner to show why the issue was not raised and the prejudice that resulted. *Bell v. State*, 265 Ark. 596, 579 S.W.2d 586 (1979).

Allegations which are not supported by



facts and a showing of some prejudice to the petitioner do not justify post-conviction relief. *Urquhart v. State*, 275 Ark. 486, 631 S.W.2d 304 (1982).

Allegations which are unsubstantiated and which fail to show prejudice to the defense are not sufficient to warrant postconviction relief. *Taylor v. State*, 297 Ark. 627, 764 S.W.2d 447 (1989).

It is incumbent on the petitioner to show actual prejudice so serious as to deprive him of a fair trial. *O'Rourke v. State*, 298 Ark. 144, 765 S.W.2d 916 (1989).

### Competency to Stand Trial.

Trial court did not err in finding at post-conviction hearing that defendant was competent to stand trial inasmuch as competence depends on the defendant's ability to understand the proceedings against him. *Deason v. State*, 263 Ark. 56, 562 S.W.2d 79, cert. denied 439 U.S. 839, 99 S. Ct. 126, 58 L. Ed. 2 136 (1978).

Allegation by petitioner that he was in a demented mental capacity at the time of his trial to the extent that he was unable to participate in his own defense was merely a conclusory allegation and would not justify the granting of a post-conviction hearing. *Walker v. State*, 277 Ark. 284, 641 S.W.2d 19 (1982).

Although trial counsel's failure to request a competency hearing where there was a substantial doubt about a petitioner's competency may have constituted ineffective assistance of counsel, the failure of the defendant's trial counsel to pursue the issue of his competency did not violate his right to effective assistance of counsel where the defendant did receive a subsequent post-conviction hearing. *Campbell v. Lockhart*, 789 F.2d 644 (8th Cir. 1986).

Denial of the inmate's petition for postconviction relief under this rule was improper as to the competency issue because the supreme court was unable to determine whether there were any results of the mental evaluation of which the parties or the court might have been made aware, whether those results were contested, or whether there was any other resolution settling the issue of the inmate's competency to proceed and enter his plea. *Sandoval-Vega v. State*, 2011 Ark. 393, — S.W.3d —, 2011 Ark. LEXIS 494 (Sept. 29, 2011).

Defendant's appeal of the denial of a post-conviction relief petition was dismissed because defendant could not prevail if the appeal was allowed to proceed; defendant's contention about a history of mental health problems, unaccompanied by any specific evidence that called into question defendant's competency to enter a plea, was insufficient to

warrant postconviction relief. *Little v. State*, 2012 Ark. 194, — S.W.3d —, 2012 Ark. LEXIS 208 (May 3, 2012).

### Constitutionality of Judgment.

Allegations which challenge the constitutionality of a circuit court judgment should be raised at trial and subsequently on direct appeal, not in a petition for post-conviction relief. *Bailey v. State*, 312 Ark. 180, 848 S.W.2d 391 (1993).

The right to trial by a twelve-member jury is a fundamental right, the violation of which renders the judgment void and subject to collateral attack, and therefore a defendant may raise the issue for the first time in Rule 37 proceedings. *Collins v. State*, 324 Ark. 322, 920 S.W.2d 846 (1996).

### Coram Nobis.

Inmate was not entitled to coram nobis relief based on a medical report that was allegedly withheld from the defense because the inmate did not exercise due diligence; there was no authority for the argument that pursuing other types of relief, such as under this rule, excused a delay in seeking coram nobis relief. *Pinder v. State*, 2012 Ark. 45, — S.W.3d —, 2012 Ark. LEXIS 56 (Feb. 2, 2012).

Petitioner failed to establish grounds for reinvesting jurisdiction in the trial court to consider a petition for writ of error coram nobis under this rule, because none of the documents petitioner presented supported his claim of insanity at the time of his trial for discharge of a firearm from a vehicle. *Maxwell v. State*, 2012 Ark. 251, — S.W.3d —, 2012 Ark. LEXIS 272 (May 31, 2012).

### Custody.

A defendant whose conviction is affirmed on appeal is not entitled to remain free merely because he files a petition to proceed under this rule. *Mason v. State*, 285 Ark. 484, 687 S.W.2d 849 (1985).

This rule requires that the defendant be in custody and that the petition be verified by the defendant before allowing the defendant to petition the trial court for post-conviction relief. *Oliver v. State*, 286 Ark. 198, 691 S.W.2d 842 (1985).

Proceedings under this rule are confined to prisoners in custody under sentence of a circuit court. So where defendants were out of custody on their original bonds when they filed their motion, they were not entitled to relief. *Malone v. State*, 294 Ark. 376, 742 S.W.2d 945 (1988).

A prerequisite for relief under this rule is that the convicted party be in custody when his petition is filed. *Coplen v. State*, 298 Ark. 272, 766 S.W.2d 612 (1989).

### Death Penalty.

Generally, the Supreme Court will not consider errors raised for the first time on appeal;

however, in death penalty cases the court will consider errors argued for the first time on direct appeal where prejudice is conclusively shown by the record and the court would unquestionably require the trial court to grant relief under this rule. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

An attack on a death sentence by means of an allegation that an aggravating circumstance has been invalidated after trial constitutes a direct attack on the evidence used to establish the aggravating circumstance which was proved at trial and, as such, cannot be raised under this rule. *Gardner v. State*, 297 Ark. 541, 764 S.W.2d 416 (1989).

Argument that the jury ignored the evidence in mitigation and, therefore, the death sentence cannot stand is a challenge to the sufficiency of the evidence and is a direct, rather than a collateral, attack on the conviction; such attacks are not cognizable under this rule. *O'Rourke v. State*, 298 Ark. 144, 765 S.W.2d 916 (1989).

#### **Direct Appeal.**

An appellant can not simultaneously pursue a direct appeal and Rule 37 relief. *Haynes v. State*, 311 Ark. 651, 846 S.W.2d 179 (1993).

This rule does not provide an opportunity to reargue points settled on direct appeal. *Dunham v. State*, 315 Ark. 580, 868 S.W.2d 496 (1994).

Denial of counsel under the Sixth Amendment is an issue more appropriately raised on direct appeal than by a petition pursuant to this rule; such an issue must be raised on direct appeal or be waived. *Oliver v. State*, 323 Ark. 743, 918 S.W.2d 690 (1996).

Rule 37 does not provide an opportunity to reargue points that were settled on direct appeal. *Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000).

Denial of appellant's, an inmate's, petition for postconviction relief was appropriate because she had actual knowledge of a codefendant's statement when it was introduced into evidence at trial and her lack-of-knowledge argument could have been included in her direct appeal as an additional basis for reversal. Because her lack-of-knowledge argument could have been included in her direct appeal as an additional basis for reversal, it was precluded from being raised in a petition under this rule. *McGahey v. State*, 2009 Ark. 80, — S.W.3d —, 2009 Ark. LEXIS 50 (2009).

Circuit court did not clearly err in denying appellant's petition for postconviction relief. Although appellant argued that the testimony of the investigating officer did not connect him with a handgun, this allegation constituted a challenge to the sufficiency of the evidence, which was an issue raised and decided adversely to appellant on direct ap-

peal. *Leak v. State*, 2011 Ark. 353, — S.W.3d —, 2011 Ark. LEXIS 456 (Sept. 15, 2011).

#### **Discretion of Court.**

Court did not abuse its discretion where petitioner was not diligent in preparing for the post-conviction hearing, and the affidavits of bystanders would have been of no value. *Houff v. State*, 268 Ark. 19, 593 S.W.2d 39 (1980).

It was discretionary and not obligatory on the trial court to allow appellant to change to a Rule 37 proceeding based on a motion to amend filed a few days before the hearing. *Avants v. State*, 293 Ark. 24, 732 S.W.2d 149 (1987).

Trial court abused its discretion in denying counsel's motion for leave to amend defendant's Rule 37 petition; defendant acted with persistence in trying to move the case forward and defendant's counsel did not seek to file an enlarged petition, which was not required by Ark. R. Crim. P. 37.2(e). *Butler v. State*, 367 Ark. 318, 239 S.W.3d 514 (2006).

#### **Double Jeopardy.**

Double jeopardy protection is a fundamental right that can be raised for the first time in a petition under this rule. *Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000).

#### **Evidentiary Hearing.**

Allegations made without a factual basis in a petition for post-conviction relief do not justify an evidentiary hearing. *Blakely v. State*, 283 Ark. 138, 671 S.W.2d 183 (1984); *Jones v. State*, 283 Ark. 363, 676 S.W.2d 738 (1984), cert. denied 469 U.S. 1219, 105 S. Ct. 1204, 84 L. Ed. 2d 347 (1985); *Wilburn v. State*, 292 Ark. 416, 730 S.W.2d 491 (1987); *Ross v. State*, 292 Ark. 663, 732 S.W.2d 143 (1987); *Long v. State*, 294 Ark. 362, 742 S.W.2d 942 (1988).

Evidentiary hearing held warranted. *Sanchez v. State*, 290 Ark. 39, 716 S.W.2d 747 (1986); *Owens v. State*, 292 Ark. 292, 729 S.W.2d 419 (1987).

In ordering a Rule 37 hearing, the court is not bound by the strict rules of evidence and will normally grant such relief when affidavits establish a prima facie showing in support of the petitioner's complaint. Although post-conviction hearings are relatively informal, the rules of evidence still apply; testimony, to be admissible, must be under oath and subject to cross-examination. *Poe v. State*, 291 Ark. 79, 722 S.W.2d 576 (1987).

The defendant was entitled to a new hearing on her motion for postconviction relief where the court improperly refused to exclude her trial counsel from the courtroom during her testimony with regard to his alleged ineffective assistance. *Finch v. State*, 335 Ark. 254, 984 S.W.2d 360 (1998).

Trial court's decision to render its decision denying appellant's petition for postconvic-



tion relief pursuant to this rule without a hearing was not clearly erroneous because the trial court examined the record, found that appellant's ineffective assistance of counsel claims were without merit, entered written findings to that effect, and denied the petition without a hearing. *Richardson v. State*, 2011 Ark. 478, — S.W.3d —, 2011 Ark. LEXIS 556 (Nov. 10, 2011).

#### **Execution of Sentence.**

Allegation could not properly be considered on a petition for post-conviction relief because it attacked the execution of the sentence rather than the validity of the sentence imposed by the trial court; any action the defendant might have as to the correctness of the computation of his sentence and the execution thereof would be against the department of correction. *Bosnick v. State*, 275 Ark. 52, 627 S.W.2d 23 (1982).

Allegations which pertain to events after trial are not within the purview of this rule, which is limited to questions related to the conviction and sentence, not the execution of the sentence. *Taylor v. State*, 297 Ark. 627, 764 S.W.2d 447 (1989).

#### **Federal Writs.**

Defendant's failure to present his double jeopardy claim to the Arkansas courts in accordance with state procedural rules constitutes a procedural default, which can be excused only on a showing of cause for the default and prejudice from the alleged violation of federal law; in addition, his failure to present the claim until his second federal habeas petition constituted an abuse of the writ, for which he also must meet the cause-and-prejudice standard. *Wallace v. Lockhart*, 12 F.3d 823 (8th Cir. 1994).

Arkansas's rule against successive Rule 37 petitions cannot constitute cause for abuse of the federal writ of habeas corpus. *Wallace v. Lockhart*, 12 F.3d 823 (8th Cir. 1994).

#### **Filing of Petition.**

A formal verified petition for post-conviction relief must be filed in appellate court following its affirmation for permission to proceed in the trial court. *Knappenberger v. State*, 278 Ark. 382, 647 S.W.2d 417 (1983); *Knappenberger v. State*, 279 Ark. 453, 652 S.W.2d 25 (1983).

When a petitioner seeks a stay of execution based on the contention that he is entitled to post-conviction relief, he must also file a petition setting out the grounds for that relief; the mere allegation that there are meritorious grounds to be raised is not good cause to grant a stay of execution. *Simmons v. State*, 280 Ark. 542, 659 S.W.2d 758 (1983).

#### **Findings.**

Although both ARCrP 26 and this rule are in the nature of post-conviction relief, the

latter is designed to attack constitutionality, jurisdiction, excess sentences, and other collateral attacks, and requires written findings; whereas the former is designed to correct manifest injustices, and requires no such findings. *Rawls v. State*, 265 Ark. 334, 576 S.W.2d 191 (1979).

Circuit court's order denying postconviction relief complied with the mandates of this rule because it specifically addressed each argument presented by the prisoner independently with a finding of relevant facts and conclusions of law; the trial court was not required to certify the petition and the records of the case. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004).

In a postconviction proceeding, the trial court's lack of written findings of fact and conclusions of law amounted to reversible error because based on the transcript of the plea hearing and the alleged positive misrepresentations of trial counsel regarding defendant's parole eligibility, it could not be said that the files and record conclusively showed that defendant was entitled to no relief. *Olivarez v. State*, 2012 Ark. 24, — S.W.3d —, 2012 Ark. LEXIS 40 (Jan. 26, 2012).

Denial of appellant's, an inmate's, petition for postconviction relief pursuant to Ark. R. Crim. P. 37 was appropriate because the circuit court's written findings complied with Ark. R. Crim. P. 37.3. In part, the inmate himself submitted a portion of the record with his petition and the circuit court, in its order, stated that it reviewed the pleadings and transcripts in denying the inmate's petition for postconviction relief; in doing so, the circuit court outlined the inmate's claims and the reasons for its denial of those claims. *Henington v. State*, 2012 Ark. 181, — S.W.3d —, 2012 Ark. LEXIS 205 (Apr. 26, 2012).

#### **Fundamental Claims.**

Issues not raised at trial or on direct appeal cannot be addressed on the merits in a Rule 37 petition; however, the Arkansas Supreme Court has created an exception for those claims which are so fundamental as to render the judgment void and open to collateral attack. A claim of such a "fundamental" nature could be addressed at either the original petition or in a petition for rehearing. *Woodard v. Sargent*, 567 F. Supp. 1548 (E.D. Ark. 1983), rev'd 753 F.2d 694 (8th Cir. Ark. 1985).

When an issue could have been raised at trial or on appeal, it is not a basis for collateral attack on the conviction under this rule, unless it presents a question so fundamental as to render the judgment of conviction absolutely void. *Campbell v. State*, 288 Ark. 213, 703 S.W.2d 855 (1986); *Madewell v. State*, 290 Ark. 580, 720 S.W.2d 913 (1986); *Troutt v. State*, 292 Ark. 192, 729 S.W.2d 139 (1987); *Ross v. State*, 292 Ark. 663, 732 S.W.2d 143 (1987); *Burnett v. State*, 293 Ark. 300, 737

S.W.2d 631 (1987); *Malone v. State*, 294 Ark. 127, 741 S.W.2d 246 (1987).

Decision did not present a question so fundamental as to render judgment absolutely void. *Dumond v. State*, 294 Ark. 379, 743 S.W.2d 779 (1988).

While even constitutional issues must be raised in the trial court and on direct appeal rather than in Rule 37 proceedings, the Supreme Court has made an exception for errors that are so fundamental as to render the judgment of conviction void and subject to collateral attack, provided the petition is timely filed. *Collins v. State*, 324 Ark. 322, 920 S.W.2d 846 (1996).

Circuit judge erred by dismissing a petition for post-conviction relief pursuant to this rule, because the issues could have been raised on direct appeal. Appellant's allegations of a double jeopardy violation and ineffective assistance of counsel were fundamental errors, for which an exception to the waiver rule applied. *Reed v. State*, 375 Ark. 277, 289 S.W.3d 921 (2008).

Trial court did not err in denying petitioner's motion for postconviction relief; petitioner's claims challenging the sufficiency of the evidence were a direct attack on the judgment and were not cognizable in a postconviction proceeding. *Watson v. State*, 2012 Ark. 27, — S.W.3d —, 2012 Ark. LEXIS 38 (Jan. 26, 2011).

### Grounds Generally.

The issue of the composition of the jury is one which could have been raised in the trial court; as such, it is not a proper ground for a petitioner under this rule. *Urquhart v. State*, 275 Ark. 486, 631 S.W.2d 304 (1982).

This rule is not available to a petitioner who wishes to have a post-conviction hearing only in the hopes of finding some ground for relief. *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648 (1983), cert. denied 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed 2d 726 (1984).

Allegations of mere error are not cognizable under this rule. *Shockley v. State*, 291 Ark. 251, 724 S.W.2d 156 (1987); *Skeels v. State*, 300 Ark. 285, 779 S.W.2d 146 (1989).

A challenge to the validity of an arrest is not cognizable under this rule. *Gunn v. State*, 291 Ark. 548, 726 S.W.2d 278 (1987).

This rule does not prescribe relief for one whose conviction has been affirmed in an opinion that has since, to some extent, been overruled. *Burnett v. State*, 293 Ark. 300, 737 S.W.2d 631 (1987).

An allegation which is general in nature with no showing of actual prejudice to the defense is not deserving of postconviction relief. *Malone v. State*, 294 Ark. 127, 741 S.W.2d 246 (1987).

A Rule 37 petition that merely presents constitutional arguments based upon the record will be denied because Rule 37 is not a

substitute for an appeal or an alternative method of reviewing mere trial errors; an exception exists, however, when the constitutional claim would render the judgment absolutely void. *McDougald v. Lockhart*, 942 F.2d 508 (8th Cir. 1991).

Grounds sufficient to avoid the three year limit are extremely limited; in fact, error sufficient to avoid a conviction under Arkansas law appears to be limited to errors that prevent retrial. *Snell v. Lockhart*, 14 F.3d 1289 (8th Cir.), cert. denied 513 U.S. 960, 115 S. Ct. 419, 130 L. Ed. 2d 334 (1994).

Defendant was properly denied postconviction relief because defendant's claim that the evidence was insufficient to support a kidnapping charge was not a cognizable claim; such a challenge was a direct attack on the judgment. *Thacker v. State*, 2012 Ark. 205, — S.W.3d —, 2012 Ark. LEXIS 223 (May 10, 2012).

Claims of prosecutorial misconduct are not cognizable in a postconviction proceeding. *Scott v. State*, 2012 Ark. 199, — S.W.3d —, 2012 Ark. LEXIS 228 (May 10, 2012).

Direct challenge to the sufficiency of the evidence is not cognizable in a postconviction proceeding. *Scott v. State*, 2012 Ark. 199, — S.W.3d —, 2012 Ark. LEXIS 228 (May 10, 2012).

### —Evidentiary Questions.

Petition alleging newly discovered evidence was denied where it was plainly a direct effort to have judgment vacated rather than a collateral attack. *Chisum v. State*, 274 Ark. 332, 625 S.W.2d 448 (1981); *Dumond v. State*, 294 Ark. 379, 743 S.W.2d 779 (1988).

Insufficiency of the evidence is not a proper ground for post-conviction relief; challenges to the sufficiency of the evidence are a direct, not a collateral, attack on the conviction which must be made at trial or on direct appeal. *McCroskey v. State*, 278 Ark. 156, 644 S.W.2d 271 (1983); *Pride v. State*, 285 Ark. 89, 684 S.W.2d 819 (1985); *Sanchez v. State*, 290 Ark. 39, 716 S.W.2d 747 (1986); *Shockley v. State*, 291 Ark. 251, 724 S.W.2d 156 (1987); *Ross v. State*, 292 Ark. 663, 732 S.W.2d 143 (1987); *Cotton v. State*, 293 Ark. 338, 738 S.W.2d 90 (1987).

Attacks on the nature and sufficiency of the evidence and the credibility of witnesses are direct challenges to the judgment; and, as such, they are not proper challenges under this rule. This rule affords a remedy when the sentence in a case was imposed in violation of the constitution of the United States or of this state or is otherwise subject to collateral attack. *Pitcock v. State*, 279 Ark. 174, 649 S.W.2d 393 (1983); *Fretwell v. State*, 292 Ark. 96, 728 S.W.2d 180 (1987); *Stephens v. State*, 293 Ark. 231, 737 S.W.2d 147 (1987).

Petitioner may not challenge weight and sufficiency of the evidence by framing attack



as an allegation of ineffective assistance of counsel. *Guy v. State*, 282 Ark. 424, 668 S.W.2d 952 (1984), overruled *Ferrell v. State*, 810 S.W.2d 29 (1991); *Hickey v. State*, 287 Ark. 197, 697 S.W.2d 118 (1985); *Gunn v. State*, 291 Ark. 548, 726 S.W.2d 278 (1987); *Stephens v. State*, 293 Ark. 231, 737 S.W.2d 147 (1987).

Challenges to the weight of the evidence are direct attacks on the judgment which must be made at trial and on direct appeal, not in a petition for post-conviction relief. *Jones v. State*, 283 Ark. 363, 676 S.W.2d 738 (1984), cert. denied 469 U.S. 1219, 105 S. Ct. 1204, 84 L. Ed 2d 347 (1985).

Challenges to the weight and sufficiency of the evidence are direct attacks on the conviction and, consequently, may not be raised in Rule 37 petitions. Nor can the argument be raised by way of an allegation of ineffective assistance of counsel. *Robinson v. State*, 295 Ark. 693, 751 S.W.2d 335 (1988).

The only instance in which sufficiency of the evidence is considered within the purview of this rule is when there is absolutely no evidence whatsoever to support the conviction; in such a case the conviction would be void. *Williams v. State*, 298 Ark. 317, 766 S.W.2d 931 (1989).

### Guilty Plea.

Evidence showed that petitioner knowingly, intelligently, and voluntarily entered a plea of guilty and was not entitled to post-conviction relief. *Deason v. State*, 263 Ark. 56, 562 S.W.2d 79, cert. denied 439 U.S. 839, 99 S. Ct. 126, 58 L. Ed. 2 136 (1978); *Scott v. State*, 267 Ark. 628, 593 S.W.2d 27 (1980); *Treadwell v. State*, 271 Ark. 823, 610 S.W.2d 884 (1981); *Abdullah v. State*, 281 Ark. 239, 663 S.W.2d 166 (1984); *Holt v. State*, 281 Ark. 210, 662 S.W.2d 822 (1984).

Where evidence supported the finding that there had been no difference between what the petitioner had bargained for and what the trial court had ordered, any cause of action the petitioner had would only be against the department of correction for the method it used in computing his parole eligibility date. *Houff v. State*, 268 Ark. 19, 593 S.W.2d 39 (1980).

Where the record indicated that the defendant was advised by his attorneys that if he went to trial before a jury in a capital murder case he could be given a death sentence, such advice did not constitute a threat which rendered his confession and guilty plea coerced and invalid, and he was not entitled to post-conviction relief under this rule. *Williams v. State*, 273 Ark. 371, 620 S.W.2d 277 (1981).

A defendant whose conviction is based upon a plea of guilty normally will have difficulty in proving any post-conviction prejudice since his plea rests upon his admission in open court that he did the act with which he is

charged. *Crockett v. State*, 282 Ark. 582, 669 S.W.2d 896 (1984); *Franklin v. State*, 293 Ark. 225, 736 S.W.2d 16 (1987).

A defendant who pleads guilty upon the advice of counsel may not collaterally attack the voluntary and intelligent character of the guilty plea merely by demonstrating that some advice received from counsel was erroneous; rather, the question is whether counsel's advice was competent, taking into account the inherent uncertainty in advising a client about pleading guilty. *Haywood v. State*, 288 Ark. 266, 704 S.W.2d 168 (1986); *Brown v. State*, 291 Ark. 393, 725 S.W.2d 544 (1987).

Where any delay in obtaining counsel was caused by the defendant, the defendant was not coerced into entering guilty pleas by the trial court's denial of his motion for continuance. *Jones v. State*, 288 Ark. 375, 705 S.W.2d 874 (1986).

When a guilty plea is challenged, the sole issue is whether the plea was intelligently and voluntarily entered with the advice of competent counsel. *Huff v. State*, 289 Ark. 404, 711 S.W.2d 801 (1986); *Branham v. State*, 292 Ark. 355, 730 S.W.2d 226 (1987).

A petitioner who attacks his guilty plea is choosing to surrender whatever benefits he may have derived from his plea bargain; the state may charge him with whatever offense is appropriate under the facts of the case so long as the decision to charge with a greater crime is not prompted by vindictiveness on the part of the prosecutor to retaliate against the defendant for successfully attacking his original conviction based on his guilty plea. *James v. State*, 289 Ark. 560, 712 S.W.2d 919 (1986).

A motion to withdraw a guilty plea filed after sentencing may be treated as a post-conviction petition under this rule, regardless of its title. *Brown v. State*, 290 Ark. 289, 718 S.W.2d 937 (1986).

Erroneous advice concerning parole eligibility does not automatically render a guilty plea involuntary. *Garmon v. State*, 290 Ark. 371, 719 S.W.2d 699 (1986).

Trial court's failure to make factual determination when the plea was taken was remedied at the Rule 37 hearing where the factual basis was determined to have existed at the time of the guilty plea. *Muck v. State*, 292 Ark. 310, 730 S.W.2d 214 (1987); *Knee v. State*, 297 Ark. 346, 760 S.W.2d 874 (1988).

A conviction based on a guilty plea is difficult to overturn, because prejudice is difficult to prove. *Morgan v. State*, 296 Ark. 370, 757 S.W.2d 530 (1988).

The threat of the death penalty is not a basis for holding a guilty plea to have been coerced and thus invalid. *Smith v. State*, 300 Ark. 291, 778 S.W.2d 924 (1989).

If evidence at a post-conviction hearing

supplies the factual basis for a plea of guilty, the failure of the trial court to establish it at the plea hearing is not reversible error. *Strafaci v. State*, 300 Ark. 298, 778 S.W.2d 602 (1989).

Even if a factual basis had been wanting at the guilty plea hearing, it can be adequately supplied by testimony at a Rule 37 hearing, which is sufficient. *Gibson v. State*, 301 Ark. 44, 781 S.W.2d 469 (1989).

Trial court clearly instructed appellant that he had a right to a jury and nonjury trial, that certain rights accrue as a result of exercising his right to go to trial and that by pleading guilty he would be waiving such rights. *Cox v. Lockhart*, 970 F.2d 448 (8th Cir. 1992).

Defendant did not qualify for postconviction relief under this rule where, pursuant to Ark. R. Crim. P. 24.5, his guilty plea was voluntary and defendant was not found to be incapacitated; substantial compliance with Ark. R. Crim. P. 24.4 and 24.6 was sufficient to find that defendant understood the sentence ranges and agreement. *Pardue v. State*, 363 Ark. 567, 215 S.W.3d 650 (2005).

In a capital murder case, as defendant failed to show the conviction was invalid on its face or that the trial court lacked jurisdiction, the trial court properly denied his petition for writ of habeas corpus under § 16-112-103; defendant's assertion that his guilty plea was invalid should have been raised in a motion for postconviction relief as this issue required the kind of factual inquiry that went beyond the facial validity of the commitment. *Friend v. Norris*, 364 Ark. 315, 219 S.W.3d 123 (2005).

Appellate court affirmed the denial of inmate's petition for postconviction relief because, while the court did not ask the inmate if he agreed with the facts at the plea hearing, the trial court established that the facts presented were sufficient to find the inmate guilty, as required by Ark. R. Crim. P. 24.6. *O'Connor v. State*, 367 Ark. 173, 238 S.W.3d 104 (2006).

Denial of the inmate's petition for postconviction relief was appropriate because an attempt to mitigate and reduce the agreed-upon term of years could not have resulted in a lower sentence. The inmate would have lost her bargained-for sentence and gone to trial, where she faced possible life imprisonment if convicted of the drug charges. *Jamett v. State*, 2010 Ark. 28, 358 S.W.3d 874 (2010).

Where defendant, while entering a guilty plea, told the trial court that defendant was satisfied with the advice and representation of counsel, defendant was not entitled to claim ineffective assistance in a petition under this rule. *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918 (2010).

Post-conviction relief petition was properly denied because, inter alia, the record did not

show that the inmate was mentally incapable of entering an intelligent and voluntary plea, nor did the petition present factual substantiation to support the inmate's claim; further, the inmate failed to establish ineffective assistance of counsel. The inmate's claims lacked factual substantiation to support a finding of deficient performance. *Biddle v. State*, 2011 Ark. 358, — S.W.3d —, 2011 Ark. LEXIS 438 (Sept. 15, 2011).

Trial court properly denied defendant's petition for postconviction relief because defendant's sufficiency of the evidence, due process, illegal seizure, and severity of the sentence arguments were all subject to dismissal as being non-cognizable due to defendant's guilty plea. *Schniepp v. State*, 2012 Ark. 94, — S.W.3d —, 2012 Ark. LEXIS 108 (Mar. 1, 2012).

### **Habeas Corpus.**

A federal court of appeals is precluded from granting post-conviction habeas corpus relief on the basis of a claim that was not first presented in a state court. *Wallace v. Lockhart*, 701 F.2d 719 (8th Cir. 1983), cert. denied 464 U.S. 934, 104 S. Ct. 340, 78 L. Ed. 2d 308 (1983).

State court will not refuse to consider a timely Rule 37 petition simply because a federal court has already considered a petition for writ of habeas corpus. *Ross v. State*, 292 Ark. 663, 732 S.W.2d 143 (1987).

The rule that certain state-court procedural defaults will bar a petition for federal habeas corpus extends to procedural defaults occurring in the course of state post-conviction proceedings, as well as to procedural defaults occurring at trial or on direct appeal in the state courts. *Williams v. Lockhart*, 873 F.2d 1129 (8th Cir.), cert. denied 493 U.S. 942, 110 S. Ct. 344, 107 L. Ed. 2d 333 (1989).

Where defendant filed a petition under this rule seeking post-petition relief, and state courts dismissed the petition because it was filed more than three years after date of defendant's commitment, and the state Supreme Court had consistently interpreted and applied this three-year limitation, and it was consistently applied in defendant's case, defendant was barred from federal habeas corpus relief. *Williams v. Lockhart*, 873 F.2d 1129 (8th Cir.), cert. denied 493 U.S. 942, 110 S. Ct. 344, 107 L. Ed. 2d 333 (1989).

Procedural defaults do not always bar consideration of the merits of a federal claim by a habeas court, even when cause and prejudice have not been shown. But in order to qualify for such extraordinary treatment, petitioner must show that a constitutional violation has probably resulted in the conviction of one who is actually innocent. *Ellis v. Lockhart*, 875 F.2d 200 (8th Cir. 1989).

In a petition for writ of habeas corpus, the argument that counsel was ineffective at and



after trial attacked neither the facial validity of the judgment nor the court's jurisdiction, but pertained to the attorney's conduct; it could not be redressed by the limited scope of the Arkansas habeas corpus relief. *Dawan v. Lockhart*, 980 F.2d 470 (8th Cir. 1992), criticized *Harris v. Norris*, 864 F. Supp. 96 (E.D. Ark. 1994).

Where the judgment of conviction and order of commitment were void, but the petitioner remained charged with capital murder, the granting of a writ of habeas corpus did not mean that the petitioner had to be set free; the prisoner was released from the Arkansas Department of Correction and placed in the custody of the county sheriff to be held on the charge of capital murder. *Waddle v. Sargent*, 313 Ark. 539, 855 S.W.2d 919 (1993).

Just as Acts 2001, No. 1780 (the Act), codified as §§ 16-112-201 — 16-112-207, does not provide a substitute for proceeding under this rule, the Act does not provide a substitute for a petition for writ of error coram nobis filed in the trial court. *Graham v. State*, 358 Ark. 296, 188 S.W.3d 893 (2004).

Defendant's 28 U.S.C.S. § 2254 habeas petition was properly denied because an independent and adequate state ground existed to bar federal habeas review: (1) defendant had filed a post-conviction relief (PCR) petition, under this rule, challenging the legal assistance rendered by his state trial counsel; (2) the Supreme Court of Arkansas had affirmed a trial court's decision denying defendant's PCR petition because he had failed to comply with Ark. Sup. Ct. & Ct. App. R. 4-2(b)(3), which required him to include, in his appellate brief, relevant abstracts from the record necessary for adequate appellate review of his claims; and (3) the dismissal for failure to comply with the abstracting rule constituted an adequate and independent state ground for federal habeas relief purposes because the abstracting rule was firmly established and regularly enforced in Arkansas. *Clay v. Norris*, 485 F.3d 1037 (8th Cir. 2007).

The inmate's motions after his petition for habeas corpus relief was dismissed seeking to have the brief duplicated and to correct the docket number were properly dismissed as moot because it was clear from the record that the inmate could not prevail on appeal. To the extent that any allegation raised by the inmate was that he was denied effective assistance of counsel, allegations of ineffective assistance of counsel were not cognizable in a habeas proceeding; all of his claims could have been raised at trial and on the record on direct appeal or in a proceeding under this rule. *Smith v. Hobbs*, 2012 Ark. 18, — S.W.3d —, 2012 Ark. LEXIS 23 (Jan. 19, 2012).

Inmate was not entitled to habeas corpus relief based on an allegation of ineffectiveness of counsel because that was not a cognizable

issue; rather, the claim should have been raised in a timely petition under this rule. A petition for a writ of habeas corpus was not a substitute for proceeding under this rule. *Ashby v. State*, 2012 Ark. 48, — S.W.3d —, 2012 Ark. LEXIS 50 (Feb. 2, 2012).

Was clear from the record that the petitioner could not prevail on appeal challenging the denial of his writ of habeas corpus, because allegations of ineffective assistance of counsel were not cognizable in a habeas proceeding, and claims concerning counsel's effectiveness were properly raised pursuant to this rule. *Thomas v. State*, 2012 Ark. 79, — S.W.3d —, 2012 Ark. LEXIS 91 (Feb. 23, 2012).

### **Harmless Error.**

Trial court erred in granting a new trial pursuant to this rule where defendant counsel's inadvertent failure to request a jury instruction regarding accomplice corroboration would not have changed the result of the trial. *State v. Slocum*, 332 Ark. 207, 964 S.W.2d 388 (1998).

### **Illegal Arrest.**

Circuit court did not clearly err in denying appellant's petition for postconviction relief. Although appellant claimed that evidence was obtained as a result of an illegal arrest, appellant did not identify what evidence he was referencing, nor did he specify whose arrest or how the arrest was illegal. *Leak v. State*, 2011 Ark. 353, — S.W.3d —, 2011 Ark. LEXIS 456 (Sept. 15, 2011).

### **Impartial Jury.**

Petitioner could not claim a prejudiced jury or juror where all peremptory challenges had not been used; thus, even if the petitioner were allowed to produce evidence that there was bias on the question of pretrial publicity, that evidence would be irrelevant. *Orsini v. State*, 287 Ark. 456, 701 S.W.2d 114 (1985).

Where, on voir dire, the jurors were asked hypothetical questions to ascertain whether the jurors could convict the defendant based upon circumstantial evidence, and the jurors never committed themselves to do so absolutely, the defendant was not deprived of his right to an impartial jury. *Hobbs v. Lockhart*, 791 F.2d 125 (8th Cir. 1986).

Trial judge was in a far better position than the appellate court to say whether the particular juror was affected by the telephone call. *Holland v. State*, 288 Ark. 435, 706 S.W.2d 375 (1986).

Petitioner's claim of jury misconduct alleging that a jury member responded falsely concerning whether he knew the victim was a direct attack on the verdict and was not a cognizable claim in a postconviction proceeding under this rule. *Burnett v. State*, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 9 (Jan. 15, 2009).

**Ineffective Assistance of Counsel.****—In General.**

A charge of inadequate representation can prevail only if the acts or omissions of an accused's attorney result in making the proceedings a farce and a mockery of justice, shocking the conscience of the court, or the representation is so patently lacking in competence or adequacy that it becomes the duty of the court to be aware of and correct it. *Davis v. State*, 267 Ark. 507, 592 S.W.2d 118 (1980); *Bell v. State*, 269 Ark. 85, 598 S.W.2d 738 (1980); *Neal v. State*, 270 Ark. 442, 605 S.W.2d 421 (1980); *Fretwell v. State*, 299 Ark. 305, 772 S.W.2d 334 (1989).

Petitioner has burden of establishing ineffective assistance of counsel. *Davis v. State*, 267 Ark. 507, 592 S.W.2d 118 (1980); *Campbell v. State*, 283 Ark. 12, 670 S.W.2d 800 (1984); *Jones v. State*, 288 Ark. 375, 705 S.W.2d 874 (1986); *Troutt v. State*, 292 Ark. 192, 729 S.W.2d 139 (1987); *Owens v. State*, 292 Ark. 292, 729 S.W.2d 419 (1987); *Muck v. State*, 292 Ark. 310, 730 S.W.2d 214 (1987); *Branham v. State*, 292 Ark. 355, 730 S.W.2d 226 (1987); *Hudson v. State*, 294 Ark. 148, 741 S.W.2d 253 (1987); *Pettit v. State*, 296 Ark. 423, 758 S.W.2d 1 (1988); *Cox v. State*, 299 Ark. 312, 772 S.W.2d 336 (1989); *Skeels v. State*, 300 Ark. 285, 779 S.W.2d 146 (1989).

Inadequate representation by counsel is a ground for post-conviction relief where there has not been an adequate opportunity to raise the question prior to direct appeal. *Neal v. State*, 270 Ark. 442, 605 S.W.2d 421 (1980).

Defendant's failure to move for dismissal on speedy trial grounds did not waive his right to effective assistance of counsel, and he could raise the claim that failure to move for dismissal constituted ineffective assistance of counsel in a post-conviction relief petition under this rule, although the defendant had to prove prejudice from the claimed error. *Clark v. State*, 274 Ark. 81, 621 S.W.2d 857 (1981).

The proper remedy to challenge the adequacy of an attorney's representation is a petition for post-conviction relief under this rule. *Carrier v. State*, 278 Ark. 542, 647 S.W.2d 449 (1983).

To prevail on an allegation of ineffective assistance of counsel a petitioner must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Lascano v. State*, 282 Ark. 501, 669 S.W.2d 453 (1984); *Neff v. State*, 287 Ark. 88, 696 S.W.2d 736 (1985); *Hicks v. State*, 289 Ark. 83, 709 S.W.2d 87 (1986); *Rode v. Lockhart*, 675 F. Supp. 491 (E.D. Ark. 1987); *McDaniel v. State*, 291 Ark. 596, 726 S.W.2d 679 (1987); *Philyaw v. State*, 292 Ark. 24, 728 S.W.2d 150 (1987), questioned *Thomas v. State*, 954 S.W.2d 255 (1997), overruled *Thomas v. State*, 911 S.W.2d

259 (1995); *Muck v. State*, 292 Ark. 310, 730 S.W.2d 214 (1987); *Wilburn v. State*, 292 Ark. 416, 730 S.W.2d 491 (1987); *Halfacre v. State*, 292 Ark. 331, 731 S.W.2d 179 (1987); *Dumond v. State*, 294 Ark. 379, 743 S.W.2d 779 (1988); *Furr v. State*, 297 Ark. 233, 761 S.W.2d 160 (1988); *White v. State*, 301 Ark. 74, 781 S.W.2d 478 (1989); *Vick v. State*, 301 Ark. 296, 783 S.W.2d 365 (1990).

Petitioner must show that assistance or advice he received was not within the range of competence demanded from attorneys in criminal cases. *Campbell v. State*, 283 Ark. 12, 670 S.W.2d 800 (1984); *Haywood v. State*, 288 Ark. 266, 704 S.W.2d 168 (1986); *Jones v. State*, 288 Ark. 375, 705 S.W.2d 874 (1986); *McDaniel v. State*, 291 Ark. 596, 726 S.W.2d 679 (1987); *Muck v. State*, 292 Ark. 310, 730 S.W.2d 214 (1987).

Petitioner must show actual prejudice arising from counsel's conduct. *Cavin v. State*, 284 Ark. 363, 681 S.W.2d 913 (1984); *Isom v. State*, 284 Ark. 426, 682 S.W.2d 755 (1985); *Brents v. State*, 285 Ark. 199, 686 S.W.2d 395 (1985).

Neither mere error nor bad advice on the part of counsel is tantamount to a denial of a fair trial. *Isom v. State*, 284 Ark. 426, 682 S.W.2d 755 (1985).

The Arkansas Supreme Court does not recognize cumulative error in allegations of ineffective assistance of counsel. *Isom v. State*, 284 Ark. 426, 682 S.W.2d 755 (1985); *Parks v. State*, 301 Ark. 513, 785 S.W.2d 213 (1990); *Jones v. State*, 308 Ark. 555, 826 S.W.2d 233 (1992).

Counsel has the duty to advise his client of an offer of a negotiated plea, but before an appellate court will order a post-conviction hearing, the petitioner must allege that he would have accepted the plea had he known of it. *Elmore v. State*, 285 Ark. 42, 684 S.W.2d 263 (1985).

To prove ineffective assistance of counsel, the petitioner must show that counsel's performance was deficient in that counsel made errors so serious that he was not functioning as the counsel guaranteed by the U.S. Const. Amend. 6. In addition, the deficient performance must have resulted in prejudice so pronounced as to have deprived the petitioner of a fair trial whose outcome cannot be relied on as just. *Orsini v. State*, 287 Ark. 456, 701 S.W.2d 114 (1985); *Huff v. State*, 289 Ark. 404, 711 S.W.2d 801 (1986); *Robinson v. State*, 295 Ark. 693, 751 S.W.2d 335 (1988); *Pettit v. State*, 296 Ark. 423, 758 S.W.2d 1 (1988); *White v. State*, 301 Ark. 74, 781 S.W.2d 478 (1989); *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992); *Jones v. State*, 308 Ark. 555, 826 S.W.2d 233 (1992).

Where, after the defendant's conviction, his attorney erroneously advised him that if he succeeded on appeal and was granted a new



trial the defendant would again be faced with the possibility of the death penalty, and as a result the defendant did not file a direct appeal, the defendant lost his direct appeal due to his attorney's unprofessional error and his, constitutional right to effective assistance of counsel was violated, even though the defendant was afforded post-conviction proceedings. *Bell v. Lockhart*, 795 F.2d 655 (8th Cir. 1986).

Petitioner must show such prejudice resulting from counsel's errors that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty. *Haywood v. State*, 288 Ark. 266, 704 S.W.2d 168 (1986); *Garmon v. State*, 290 Ark. 371, 719 S.W.2d 699 (1986); *Pettit v. State*, 296 Ark. 423, 758 S.W.2d 1 (1988).

The failure of counsel to perfect an appeal when the defendant desires an appeal amounts to a denial of defendant's right to effective assistance of counsel. *Robbins v. State*, 288 Ark. 311, 705 S.W.2d 6 (1986); *Chandler v. State*, 297 Ark. 432, 762 S.W.2d 796 (1989).

Defendant must show that counsel's representation fell below an objective standard of reasonableness. *Rode v. Lockhart*, 675 F. Supp. 491 (E.D. Ark. 1987); *Philyaw v. State*, 292 Ark. 24, 728 S.W.2d 150 (1987), questioned *Thomas v. State*, 954 S.W.2d 255 (1997), overruled *Thomas v. State*, 911 S.W.2d 259 (1995); *Muck v. State*, 292 Ark. 310, 730 S.W.2d 214 (1987); *Halfacre v. State*, 292 Ark. 331, 731 S.W.2d 179 (1987); *Dumond v. State*, 294 Ark. 379, 743 S.W.2d 779 (1988); *Furr v. State*, 297 Ark. 233, 761 S.W.2d 160 (1988).

If counsel elects to omit an issue which could have been raised on appeal and the convicted defendant later claims under this rule that attorney was ineffective for failing to argue it, petitioner must demonstrate that counsel's decision amounted to an error of such magnitude that it rendered counsel's performance constitutionally deficient. *Troutt v. State*, 292 Ark. 192, 729 S.W.2d 139 (1987).

Defense counsel is not required to advise about post-sentencing alternatives in order to render effective assistance to a defendant facing criminal charges. *Branham v. State*, 292 Ark. 355, 730 S.W.2d 226 (1987).

Counsel cannot be found ineffective for not raising on appeal arguments which were not raised below. *Malone v. State*, 294 Ark. 127, 741 S.W.2d 246 (1987).

Appellant's counsel is presumed competent, and the appellant has the burden of overcoming that presumption. *Owens v. State*, 296 Ark. 322, 756 S.W.2d 899 (1988).

The mere fact that defendant's court-appointed attorney was sitting as a special municipal judge on the same day on some unre-

lated charges would not render him ineffective. *Morgan v. State*, 296 Ark. 370, 757 S.W.2d 530 (1988).

Ineffective assistance of counsel may result when there is a failure on the attorney's part to take reasonable steps to procure the attendance of a witness if material to the defense. When counsel is not given complete information concerning the location of witnesses, the burden of the petitioner to prove ineffective assistance of counsel is more difficult. *Chandler v. State*, 297 Ark. 432, 762 S.W.2d 796 (1989).

Where precise argument had already been rejected to the appellate court, the petitioner's attorney cannot be said to have been ineffective for failing to pursue the argument. *O'Rourke v. State*, 298 Ark. 144, 765 S.W.2d 916 (1989).

There is a presumption that counsel is competent, and the burden is on petitioner who must show more than mere errors, omissions, mistakes, improvident strategy or bad tactics. *White v. State*, 301 Ark. 74, 781 S.W.2d 478 (1989).

The trial court properly denied defendants' petition for relief pursuant to this rule because defendants failed to prove that counsel's conduct fell below the standard of reasonably effective assistance or to establish that they were prejudiced. *Cranford v. State*, 303 Ark. 393, 797 S.W.2d 442 (1990).

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the petitioner has the burden of overcoming that presumption by identifying the acts and omissions of counsel which when viewed from counsel's perspective at the time of trial could not have been the result of reasonable professional judgment and had a prejudicial effect on the actual outcome of the proceeding. *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992).

The allegation that counsel could have shown that the statements made by defendant to the police were inadmissible had he called a specific witness to testify that the statements were coerced, was too weak to overcome the presumption that counsel was effective. *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992).

A petitioner who claims that counsel was ineffective for not calling him to testify must state specifically what the content of his testimony would have been and demonstrate that his failure to testify resulted in actual prejudice to his defense. *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992).

If counsel omits an issue which could have been raised on appeal, and the convicted defendant later claims under this rule that the attorney was ineffective for failing to argue it, the petitioner must demonstrate

that counsel's action amounted to an error of such magnitude that it rendered counsel's performance constitutionally deficient. *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992).

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components: first, the defendant must show that counsel's performance was deficient; second, the defendant must show that the deficient performance prejudiced the defense. *Noble v. State*, 319 Ark. 407, 892 S.W.2d 477 (1995).

Defendant convicted of rape was denied postconviction relief under this rule because he was not denied effective assistance of trial counsel during either the guilt phase or the sentencing phase of the trial. *Helton v. State*, 325 Ark. 140, 924 S.W.2d 239 (1996).

Supplemental opinion was issued by the court to clarify for future cases that the standard for showing prejudice on an ineffective assistance of counsel claim is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would (not could) have been different. *Jones v. State*, 340 Ark. 1, 8 S.W.3d 482 (2000).

Defendant failed to demonstrate that trial counsel was ineffective where there were no facts to show that if counsel had visited the defendant in jail more times, it would have produced a better result at trial, or that counsel's failure to call certain witnesses deprived the defense of vital evidence. *Dansby v. State*, 350 Ark. 60, 84 S.W.3d 857 (2002).

Trial court finding that petitioner was entitled to post-conviction relief under ARCrP 37 was clearly erroneous where there was no showing of prejudice sufficient to deprive petitioner of a fair trial due to counsel's ineffectiveness. *State v. Franklin*, 351 Ark. 131, 89 S.W.3d 865 (2002).

While this rule generally provides the procedure for postconviction relief due to ineffective counsel, defendant did not raise this point below and failed to demonstrate that he was denied counsel on appeal. *McClina v. State*, 354 Ark. 384, 123 S.W.3d 883 (2003).

Defendant's assertion that his counsel had conflicts of interests, including involvement with a contract for a documentary film of the murder and trials and prior representation of parties related to the trial, was unfounded and defendant's income from the film in fact provided funds which aided, rather than prejudiced, the defense; in addition, the court found no merit to claims that defendant's counsel improperly failed to call expert witnesses, to conduct a thorough voir dire, to seek to exclude testimony of an occult expert, to seek a continuance and change of venue, and to present mitigating evidence at sentencing. *Echols v. State*, 354 Ark. 530, 127 S.W.3d 486 (2003).

Inmate who was convicted of murder and denied postconviction DNA testing made 13 claims of ineffective assistance of counsel, none of which met the two-pronged Strickland test of both deficiency and prejudice; among the arguments rejected were that counsel was ineffective for (1) failing to seek suppression of a confession, (2) failing to impeach testimony by defendant's stepmother, identifying blood stained clothing as his, on account of bias, (3) failing to fully proffer testimony and other evidence of a relationship between the victim and another African-American man, (4) failing to obtain the victim's counseling and psychological records, and (5) failing to object properly regarding Brady material. *Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004), cert. denied 543 U.S. 932, 125 S. Ct. 326, 160 L. Ed. 2d 235 (2004).

If an appellant desires to challenge a guilty plea on the ground that the appellant's attorney was ineffective in permitting the plea to be entered because it was coerced or otherwise was not voluntarily given, the matter could, and should, be raised in a petition pursuant to this rule. *Graham v. State*, 358 Ark. 296, 188 S.W.3d 893 (2004).

Trial court did not err in denying postconviction relief where defendant claimed his counsel was ineffective for failing to impeach an informant regarding alleged inconsistent statements by using tape recorded conversations because there was no evidence that the jury would have resolved the credibility determination in defendant's favor such that it would have affected the outcome of his trial. *Cook v. State*, 361 Ark. 91, 204 S.W.3d 532 (2005).

Defendant's petition for postconviction relief was properly denied where, although defendant's trial counsel was not authorized to appear pro hac vice in Arkansas at the time of trial because he did not comply with Ark. R. Admis. Bar XIV, he was a properly licensed attorney in Tennessee, and failure to comply with rule did not rise to a Sixth Amendment violation. *Fisher v. State*, 364 Ark. 216, 217 S.W.3d 117 (2005).

Appellant's challenge to the denial of his postconviction relief petition was dismissed because, although appellant raised different issues than in a previously denied motion for a new trial, appellant failed to show a claim for ineffective assistance of counsel based on inconsistencies in witnesses' testimonies. *Johnson v. State*, 366 Ark. 286, 234 S.W.3d 858 (2006).

Court's earlier mandate denying inmate's postconviction appeal was granted because there was evidence that inmate's counsel, appointed pursuant to Ark. R. Crim. P. 37.5, had been impaired during the hearing and inmate, who had been sentenced to death,



was entitled to a new hearing with competent counsel. *Lee v. State*, 367 Ark. 84, 238 S.W.3d 52 (2006).

Inmate's trial counsel was not ineffective for failing to introduce into evidence the supporting documentation of mitigating evidence relief relied on by a defense expert witness, and therefore the inmate's motion for relief under Ark. R. Crim. P. 37 was properly denied, because the expert testified at trial about each of the mitigating circumstances defendant cited. *Williams v. State*, 369 Ark. 104, 251 S.W.3d 290 (2007).

Inmate's trial counsel was not ineffective for allowing him to be shackled at trial and therefore the inmate's motion for relief under Ark. R. Crim. P. 37 was properly denied, because there was adequate justification for the shackles, as there was testimony at the hearing about defendant's violent acts, including two murders, his past disruptive behavior, and his attempts to escape. *Williams v. State*, 369 Ark. 104, 251 S.W.3d 290 (2007).

Inmate's trial counsel was not ineffective for failing to challenge a juror for cause, and therefore the inmate's motion for relief under Ark. R. Crim. P. 37 was properly denied, because counsel testified that he did not believe he could prevail on such a challenge. While the juror seemed to favor the death penalty, she also replied affirmatively that she could consider the full range of punishment, that she would consider mitigating circumstances and weigh them against aggravating circumstances, and that she would have to listen to the evidence to make a decision. *Williams v. State*, 369 Ark. 104, 251 S.W.3d 290 (2007).

Postconviction relief under Ark. R. Crim. P. 37 was granted in a capital murder case based on ineffective assistance of counsel because failing to present a defense theory and arguing that the State did not meet its burden of proof was deficient; and the outcome would have likely been different if an accidental theory had been submitted to the jury. *State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007).

Circuit court clearly erred in denying defendant's motion for postconviction relief, because the petition provided specific facts to establish actual prejudice due to counsel's conduct at trial and the allegations were not conclusory, when counsel's performance was deficient by failing to suppress defendant's custodial statement as a violation of the Sixth Amendment right to counsel, and the deficient performance prejudiced the defense since the inclusion of defendant's statement as the state's evidence at trial and used in affirming the conviction was sufficient to find that there was a reasonable probability that the decision reached would have been different absent counsel's failure to suppress the statement; the conviction resulted from a

breakdown in the adversary process that rendered the result unreliable. *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008).

Defendant's petition for postconviction relief was properly denied where defendant could not prove that his counsel was ineffective in failing to investigate witnesses and the accomplice testimony was sufficiently corroborated; a copy of the record would not have been beneficial concerning the issues in question. *Woody v. State*, 2009 Ark. 413, — S.W.3d —, 2009 Ark. LEXIS 549 (Sept. 17, 2009).

Where appellant entered negotiated pleas of guilty to kidnapping and additional charges, he was sentenced to 120 months' in prison with an additional 120-month suspended sentence; appellant was not entitled to postconviction relief under this rule, because he could not prove that counsel failed to advise him of a possible life sentence. On the record, counsel indicated that he had advised appellant that he could be subject to a life sentence if he violated the terms of the suspended sentence; appellant's remaining claims were not cognizable in a post-conviction proceeding, because he entered a guilty plea. *French v. State*, 2009 Ark. 443, — S.W.3d —, 2009 Ark. LEXIS 592 (Sept. 24, 2009).

Where petitioner's speedy trial argument was based solely upon the time that elapsed between his arrest and his guilty plea and failed to consider excludable periods resulting from his requests for a psychological evaluation and a continuance, no speedy trial violation occurred, counsel was not ineffective for failing to raise the issue, and petitioner was not entitled to postconviction relief. *Johnson v. State*, 2009 Ark. 553, — S.W.3d —, 2009 Ark. LEXIS 711 (2009).

Trial counsel was not ineffective for failure to object to the charges pending against appellant for the manufacture of methamphetamine and possession of drug paraphernalia with intent to manufacture methamphetamine on the basis that the charges were a violation of the prohibition against double jeopardy. The Supreme Court of Arkansas has held that possession of drug paraphernalia with intent to manufacture methamphetamine is not a lesser-included offense of manufacture of methamphetamine; therefore, appellant was not entitled to postconviction relief under this rule. *Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290 (2009).

When a jury found appellant guilty of manufacturing methamphetamine, possessing drug paraphernalia with intent to manufacture methamphetamine, and fleeing, he was not entitled to postconviction relief under this rule based on his ineffective assistance of counsel claim. The Supreme Court of Arkansas held that counsel was not ineffective for failing to introduce a letter to show that

appellant's girlfriend was a "meth cook;" counsel's did not commit fraud in hiring an investigator; counsel's failure to call the investigator to testify was a matter of trial tactics; and appellant was not prejudiced by counsel's failure to call additional witnesses. *Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290 (2009).

When someone driving appellant's car fled from an officer and ran into the woods, items used to manufacture methamphetamine were found in the car and appellant's girlfriend testified that he was driving; a jury found appellant guilty of manufacturing methamphetamine, possessing drug paraphernalia with intent to manufacture methamphetamine, and fleeing. He was not entitled to postconviction relief under this rule based on counsel's failure to object to evidence that appellant and his girlfriend had been convicted of other crimes related to methamphetamine; the evidence was admissible under Ark. R. Evid. 404(b), as it was independently relevant to the issue of the identity of the driver and his relationship to the passenger. *Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290 (2009).

Denial of the inmate's petition for postconviction relief was appropriate because, to have shown prejudice and proven that she was deprived of a fair trial due to ineffective assistance of counsel, the inmate, who had pled guilty, was required to demonstrate a reasonable probability that, but for counsel's errors, she would not have so pleaded and would have insisted on going to trial. It would have defied all logic for her to have asserted that she would not have entered a plea for the agreed-upon sentence if trial counsel had presented mitigating evidence, as any presentation of mitigating evidence would have occurred subsequent to the inmate entering the guilty plea, which she admitted was entered knowingly and intelligently. *Jamett v. State*, 2010 Ark. 28, 358 S.W.3d 874 (2010).

Trial court did not err in denying appellant's petition under this rule because appellant failed to set forth facts sufficient to sustain a finding that any alleged ineffective assistance of trial counsel resulted in prejudice since appellant could not show prejudice from any alleged error by trial counsel concerning a failure to impeach or discredit a statement of the victim's daughter; the admission of the statement was not prejudicial, and a failure to impeach the statement was not prejudicial because the evidence at trial, aside from the daughter's statement, was overwhelming. *Rodriguez v. State*, 2010 Ark. 78, — S.W.3d —, 2010 Ark. LEXIS 105 (Feb. 18, 2010).

In a case in which an inmate had been convicted of one count of delivery of a controlled substance and received an enhanced sentence pursuant to § 5-64-411(a)(7) (now

§ 5-64-411(a)(8)), he unsuccessfully argued that his trial counsel was ineffective because he failed to adequately investigate the facts underlying the application of the enhancement prior to trial or to flesh them out appropriately during cross-examination. As to the failure to investigate, the inmate made only a conclusory statement, wholly lacking in allegations of prejudice; as to the cross-examination claim, his argument provided him no relief as he was procedurally barred from raising it on appeal. *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (2010).

In an appeal under this rule in which an inmate argued that his trial counsel was ineffective because he violated the inmate's Fifth Amendment right to testify if he so wished by refusing to allow appellant to take the stand, the inmate had not made a Fifth Amendment argument to the trial court. In his original Rule 37.1 petition, the inmate argued that counsel was ineffective because he did not let appellant testify that, at the time of the sale, he was at home with his children, nor did counsel call any witnesses to testify to the same; to the extent he attempted to couch his argument in Fifth Amendment terms, he was barred from doing so on appeal. *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (2010).

Dismissal of appellant's, an inmate's, appeal from the denial of his petition for postconviction relief was proper because he failed to prove that he received the ineffective assistance of counsel; counsel testified, and the record confirmed, that he did question a police officer concerning a relationship with a witness and the inmate did not introduce any evidence or information of such a relationship that counsel might have found from further investigation or that counsel could have used to impeach the officer's testimony. Further, challenges to a witness's credibility were not cognizable claims in proceedings under this rule and allegations that trial counsel did not communicate with the inmate or investigate the case and was unprepared for trial were likewise deficient in factual substantiation. *Dunlap v. State*, 2010 Ark. 111, — S.W.3d —, 2010 Ark. LEXIS 132 (Mar. 4, 2010).

Trial court did not err in denying a prisoner's petition for postconviction relief because the prisoner did not set forth facts sufficient to state a cognizable claim; the prisoner's claims of ineffective assistance of counsel concerning procedural defects in the plea proceedings, failure to comply with Ark. R. Crim. P. 24, and trial counsel's failure to seek suppression of evidence or raise a defense were conclusory, and his other allegations of error, those concerning the negotiation procedures, counsel's inaction in raising issues in the negotiations, and counsel's failure to request jury sentencing, would not have had any impact on appel-



lant's ultimate decision to accept the plea offer that he received. *Shaw v. State*, 2010 Ark. 112, — S.W.3d —, 2010 Ark. LEXIS 129 (Mar. 4, 2010).

Denial of defendant's petition for postconviction relief under this rule was not clearly erroneous where defendant was unable to demonstrate that trial counsel made errors so serious that counsel was not functioning as the counsel guaranteed under U.S. Const., Amend. 6 and that defendant suffered actual prejudice as a result. *Smith v. State*, 2010 Ark. 137, 361 S.W.3d 840 (2010).

In a case in which a pro se inmate appealed the denial of her petition for a writ of coram nobis, to the extent that she claimed trial counsel was ineffective, claims of ineffective assistance of counsel were outside the purview of a coram nobis proceeding. Allegations of ineffective assistance of counsel were properly raised in a timely postconviction proceeding pursuant to this rule, and a petition for writ of error coram nobis was not a substitute for proceeding under this rule or an opportunity to raise new allegations that could have been raised under the rule. *Flanagan v. State*, 2010 Ark. 140, — S.W.3d —, 2010 Ark. LEXIS 166 (Mar. 18, 2010).

Although an inmate claimed trial counsel failed to argue for the admission of a written statement the inmate had given to a fellow inmate, a trial court did not err in finding the inmate failed to demonstrate the prejudice necessary under the second prong of the Strickland test for an ineffective assistance counsel claim because there was other evidence of both the inmate's willing participation in, and his intent to commit murder; the trial attorney effectively cross-examined the fellow inmate by obtaining an admission that the inmate had provided the written statement, with its details of the crime, even though the written statement was not admitted into evidence. *Tavron v. State*, 2010 Ark. 295, — S.W.3d —, 2010 Ark. LEXIS 335 (June 17, 2010).

Inmate's appeal of a judgment denying his petition for postconviction relief under this rule was denied because the inmate did not receive ineffective assistance of trial counsel; counsel made a motion for directed verdict and renewed it at the appropriate time, the inmate did not explain what factual substantiation counsel could have advanced to the trial court in favor of a concurrent sentence, and because the inmate failed to provide any factual substantiation to demonstrate that his dissatisfaction and lack of communication with counsel resulted in particular prejudice to the defense, there was no ground stated to warrant postconviction relief. *Ewells v. State*, 2010 Ark. 407, — S.W.3d —, 2010 Ark. LEXIS 496 (Oct. 28, 2010).

Trial court did not err in denying appel-

lant's petition for postconviction relief under this rule because it correctly determined that appellant did not satisfy the first prong of the Strickland test; under the circumstances and precedent as existed at the time of appellant's trial, counsel's conduct did not fall outside the wide range of reasonable professional assistance since counsel was not ineffective simply because he did not raise an argument that would have been largely against established precedent and would have required exceptionally thoughtful and extensive analysis. *Jones v. State*, 2010 Ark. 470, — S.W.3d —, 2010 Ark. LEXIS 573 (Dec. 2, 2010).

Pro se post-conviction relief petitioner's ineffective assistance of counsel claim was rejected because he did not allege any specific evidence that could have been presented at trial if counsel had conducted an adequate investigation and did not describe any particular witness who could have been presented to change the outcome of his trial. *Shipman v. State*, 2010 Ark. 499, — S.W.3d —, 2010 Ark. LEXIS 597 (Dec. 16, 2010).

Pro se post-conviction relief petitioner's ineffective assistance of counsel claim was rejected because, although petitioner alleged that his counsel failed to object to a violation of the speedy-trial rule, petitioner did not assert that the two periods during which the running of the period under Ark. R. Crim. P. 28.1 was tolled were not properly excluded but merely stated that his attorney should have objected at trial on the basis of the rule. *Shipman v. State*, 2010 Ark. 499, — S.W.3d —, 2010 Ark. LEXIS 597 (Dec. 16, 2010).

Denial of an inmate's motion for postconviction relief against the state under this section was proper because, although the inmate claimed that he received ineffective assistance of counsel, the petition did not name a single witness that the defense should have called, did not state what a more thorough investigation of the prosecution's witnesses might have shown, did not explain in what way trial counsel was unprepared, and he offered nothing to suggest that a challenge to the sufficiency of the evidence would have been successful. *Payton v. State*, 2011 Ark. 217, — S.W.3d —, 2011 Ark. LEXIS 195 (May 12, 2011).

Petitioner's appeal from the denial of a petition under this rule for post-conviction relief was improper, as it was clear that petitioner would not prevail on petitioner's claim of ineffective assistance of counsel; petitioner made no demonstration that counsel's failure to move for separate trials created conflicting interests or prejudiced petitioner's defense. *Carter v. State*, 2011 Ark. 226, — S.W.3d —, 2011 Ark. LEXIS 206 (May 19, 2011).

Denial of appellant's, an inmate's, petition for postconviction relief was appropriate be-

cause he failed to prove that he received the ineffective assistance of counsel. Although the inmate alleged that counsel was ineffective because he declined an opportunity to review the prosecution's notes, to the extent that the inmate asserted that the notes might have contained suppressed exculpatory evidence, he provided no factual basis in support of his claim that the notes were necessary to show prejudice; the inmate did not provide facts that affirmatively supported his claims of an unchallenged Brady violation because he did not demonstrate that the notes might have contained favorable, suppressed evidence and that the prosecution's failure to provide the notes to counsel was improper. *Croy v. State*, 2011 Ark. 284, — S.W.3d —, 2011 Ark. LEXIS 253 (June 23, 2011).

Denial of appellant's, an inmate's, petition for postconviction relief was appropriate after he was convicted of first-degree sexual assault because he failed to prove that he received the ineffective assistance of counsel. In part, there were striking similarities in the testimony of the boys, the evidence in the case was highly probative, and the inmate failed to show that counsel could have prevailed on appeal if the argument regarding witness testimony had been preserved. *Croy v. State*, 2011 Ark. 284, — S.W.3d —, 2011 Ark. LEXIS 253 (June 23, 2011).

Denial of the inmate's petition for postconviction relief was proper because he failed to prove that he received the ineffective assistance of counsel. His motion was conclusory and there was no merit to his argument; even though not all the items recovered at the crime scene and introduced at trial directly linked the inmate to the crime, the items were relevant to the state's case, as they were among things recovered by the investigating officers at the scene of the crime. *Bienemy v. State*, 2011 Ark. 320, — S.W.3d —, 2011 Ark. LEXIS 417 (Sept. 8, 2011).

Denial of appellant's, an inmate's, petition for postconviction relief was proper because he failed to prove that he received the ineffective assistance of counsel. In part, the inmate's argument that the jury's verdict imposing the maximum sentences to run consecutively was a result of passion and prejudice is not persuasive; considering the court's ability to sua sponte reduce the sentence, the trial court did not clearly err in finding that a motion to reduce the sentence under § 16-90-107(e) would have been denied. *Hoyle v. State*, 2011 Ark. 321, — S.W.3d —, 2011 Ark. LEXIS 432 (Sept. 8, 2011).

Denial of appellant's, an inmate's, petition for postconviction relief filed under this rule was appropriate because he failed to prove that he received the ineffective assistance of counsel under U.S. Const. amend VI. Trial counsel was not ineffective for failing to make

a meritless argument with regard to jury instructions and counsel could not be ineffective for failing to make an argument that could not succeed; because methamphetamine was produced and the inmate admitted taking part in manufacturing the substance, he was not entitled to an instruction on the lesser-included offense of attempting to manufacture the substance. *Hatcher v. State*, 2011 Ark. 325, — S.W.3d —, 2011 Ark. LEXIS 431 (Sept. 8, 2011).

Denial of appellant's, an inmate's, petition for postconviction relief was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, the inmate presented nothing to show that a juror was actually biased, and the inmate failed to demonstrate that he was prejudiced by counsel's conduct to the point that he was denied a fair adjudication of his guilt. *Hayes v. State*, 2011 Ark. 327, — S.W.3d —, 2011 Ark. LEXIS 413 (Sept. 8, 2011).

Denial of appellant's, an inmate's, petition for postconviction relief was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, had trial counsel investigated whether a club indeed had metal detectors, any evidence produced would have had little, if any, relevance; whether the inmate had a gun inside of the club was of no moment because the kidnappings and rapes took place in a field outside of the club and in an apartment at a separate location. *Hayes v. State*, 2011 Ark. 327, — S.W.3d —, 2011 Ark. LEXIS 413 (Sept. 8, 2011).

Trial court properly denied defendant's motion for postconviction relief because the evidence showed that defendant's guilty pleas were made on the advice of competent counsel; had defendant not pled guilty, defendant potentially faced up to life in prison for each rape offense and up to 10 years in prison for a failure-to-appear offense, pursuant to § 5-4-401(a)(1), (4). *Henson v. State*, 2011 Ark. 375, — S.W.3d —, 2011 Ark. LEXIS 461 (Sept. 22, 2011).

Denial of appellant's, an inmate's, petition for postconviction relief was proper because, while he was not able to directly appeal any challenge to the sufficiency of the evidence, there was substantial evidence to support his felony-murder conviction. He failed to demonstrate that he was prejudiced by trial counsel's error in failing to make a directed-verdict motion on the lesser-included charge of first-degree felony murder, § 5-10-102(a)(1). *Lockhart v. State*, 2011 Ark. 396, — S.W.3d —, 2011 Ark. LEXIS 487 (Sept. 29, 2011).

Denial of the inmate's petition for postconviction relief under was appropriate because he failed to prove that counsel was ineffective. The claim of prejudice was speculative and bereft of factual support for the assumption



that the jury would have assessed a more lenient sentence than the trial court. *Perry v. State*, 2011 Ark. 434, — S.W.3d —, 2011 Ark. LEXIS 519 (Oct. 13, 2011).

Denial of the inmate's petition for postconviction relief pursuant to this rule was proper because he failed to prove that he received the ineffective assistance of counsel. A juror stated that she had not formed an opinion about the inmate's guilt or innocence, and affirmed that she would base her decision on the evidence; further, trial counsel was not ineffective with regard to an argument for vindictive sentencing because two different judges presided over the inmate's trials, different sentencers imposed the two sentences, and thus, the presumption of vindictiveness did not arise. *Butler v. State*, 2011 Ark. 435, — S.W.3d —, 2011 Ark. LEXIS 530 (Oct. 13, 2011).

Granting of a new trial to appellee inmate based upon his claims of ineffective assistance of counsel in his petition for postconviction relief was inappropriate because, by filing the petition, the inmate put in controversy the professional conduct of counsel, and as a condition of pursuing that petition, he must waive all attorney-client privilege with respect to the issues raised in the petition. *State v. Cantrell*, 2011 Ark. 449, — S.W.3d —, 2011 Ark. LEXIS 539 (Oct. 27, 2011).

Trial court did not err in denying appellant's petition for postconviction relief pursuant to this rule because appellant's trial counsel was not ineffective for failing to object to a wording error contained in a verdict form; because the correct statutory language was consistently used throughout the other pleadings, instructions, and verdict forms, any error on the part of counsel was harmless, and appellant failed to prove prejudice. *Richardson v. State*, 2011 Ark. 478, — S.W.3d —, 2011 Ark. LEXIS 556 (Nov. 10, 2011).

Trial court did not err in denying appellant's petition for postconviction relief pursuant to this rule because appellant's trial counsel was not ineffective for failing to object to the trial court's failure to arraign appellant on the enhanced charge of possessing cocaine within 1,000 feet of a public-housing development; appellant was not prejudiced by the lack of a formal arraignment on the enhancement because he received the same rights at trial as he would have had he been arraigned, and since appellant was tried on the charge, he waived formal arraignment by appearing and announcing that he was ready for trial. *Richardson v. State*, 2011 Ark. 478, — S.W.3d —, 2011 Ark. LEXIS 556 (Nov. 10, 2011).

Denial of appellant's, an inmate's, petition for postconviction relief filed under this rule was appropriate because there was no mandated obligation to obtain an on-the-record waiver. Thus, the failure to make a record of

the inmate's waiver of his right to testify did not constitute the ineffective assistance of counsel. *Williams v. State*, 2011 Ark. 489, — S.W.3d —, 2011 Ark. LEXIS 569 (Nov. 17, 2011).

Denial of appellant's, an inmate's, petition for postconviction relief under this rule was appropriate because trial counsel could not be ineffective for failing to make an objection or argument that was without merit and the inmate failed to show that an objection to the prosecution's failure to produce witnesses would have been successful. *Reese v. State*, 2011 Ark. 492, — S.W.3d —, 2011 Ark. LEXIS 575 (Nov. 17, 2011).

Trial court did not err in denying defendant's petition for postconviction relief after he was convicted of four counts of rape because he did not provide any facts that would support a finding of prejudice with regard to his claims of ineffective assistance of counsel; he made conclusory allegations and failed to identify specific acts or omissions. *Jones v. State*, 2011 Ark. 523, — S.W.3d —, 2011 Ark. LEXIS 599 (Dec. 8, 2011).

Because defendant supported a claim of ineffective assistance of counsel for failure to allow defendant to testify with specific testimony that defendant would have given had defendant taken the stand, the trial court erred in denying defendant's petition for postconviction relief under this rule without a hearing. *Cowan v. State*, 2011 Ark. 537, — S.W.3d —, 2011 Ark. LEXIS 611 (Dec. 15, 2011).

Defendant's petition for postconviction relief was properly denied because defendant failed to show that counsel was ineffective for failing to object to the use of a stun belt as a restraint during trial; defendant admitted that the stun belt was not visible to the jurors and that defendant was not shocked by the stun belt during trial. *Simmons v. State*, 2012 Ark. 58, — S.W.3d —, 2012 Ark. LEXIS 68 (Feb. 9, 2012).

Trial court did not err in denying defendant's petition for postconviction relief after defendant was convicted of two counts of rape because defendant failed to demonstrate prejudice as to any error in counsel's failure to investigate the medical aspects of the case or the need for expert testimony. *Abernathy v. State*, 2012 Ark. 59, — S.W.3d —, 2012 Ark. LEXIS 64 (Feb. 9, 2012).

Defense counsel was not ineffective for not objecting that defendants' convictions violated double jeopardy because possession of drug paraphernalia with intent to manufacture methamphetamine was not a lesser-included offense of manufacturing methamphetamine; hence, postconviction relief was properly denied. *Myers v. State*, 2012 Ark. 143, — S.W.3d —, 2012 Ark. LEXIS 168 (Apr. 5, 2012).

Trial court did not err in denying appellant's petition for postconviction relief under this rule in which he alleged ineffective assistance of counsel during his trial for attempted murder in the first degree, aggravated robbery, and theft of property. Because appellant failed to demonstrate that counsel might have raised a successful challenge to testimony about the gun, testimony about the money, or admission of photographs, none of appellant's grounds for relief demonstrated prejudice. *Lambert v. State*, 2012 Ark. 150, — S.W.3d —, 2012 Ark. LEXIS 170 (Apr. 5, 2012).

Denial of appellant's, an inmate's, petition under this rule was proper because he failed to prove that he received the ineffective assistance of counsel. Had counsel made the objections that the inmate asserted should have been made, they would have been properly overruled because the inmate himself introduced the issue of a Virginia trip and his treatment of the victim's older sister; thus, the inmate opened the door to the very testimony he now found objectionable. *Gilliland v. State*, 2012 Ark. 162, — S.W.3d —, 2012 Ark. LEXIS 183 (Apr. 19, 2012).

Trial court did not err in denying defendant's petition for postconviction relief after he was convicted of sexual assault because counsel was not ineffective for failing to subpoena an unnamed doctor who allegedly could have testified to inconsistent statements by the victim's mother or the mother and victim's hallucinations. *Johnson v. State*, 2012 Ark. 225, — S.W.3d —, 2012 Ark. LEXIS 249 (May 24, 2012).

Circuit court did not err in denying postconviction relief under this rule without a hearing, because appellant failed to demonstrate he was prejudiced by trial counsel's alleged impairment or how her failure to call additional witnesses to testify that appellant's confession was coerced would have changed the outcome of trial. *Charland v. State*, 2012 Ark. 246, — S.W.3d —, 2012 Ark. LEXIS 259 (May 31, 2012).

#### —Burden of Proof.

Where defendant argues that counsel was ineffective during the sentencing phase of the trial because he did not present any mitigating evidence or argument in an attempt to persuade the jury to be lenient in sentencing defendant, defendant has the burden to identify with specificity what mitigating evidence counsel omitted during sentencing. *Helton v. State*, 325 Ark. 140, 924 S.W.2d 239 (1996).

Denial of appellant's, an inmate's, petition for postconviction relief from two judgments entered in 2009 on a number of drug-related charges was proper because he was not credible in his testimony to establish that he would not have entered guilty pleas if counsel had not pressured him by requesting more money for trial. He failed to meet his burden

of showing prejudice from any deficient performance on the part of trial counsel. *Heard v. State*, 2012 Ark. 67, — S.W.3d —, 2012 Ark. LEXIS 79 (Feb. 16, 2012).

#### —Conflict of Interest.

Conflict of interest adversely affected lawyer's performance and entitled defendant to post-conviction relief. *Ingle v. State*, 294 Ark. 353, 742 S.W.2d 939 (1988).

Evidence was insufficient to suggest a conflict of interest among defendants or any actual or potential conflicts which could have been considered prejudicial. *Malone v. State*, 294 Ark. 376, 742 S.W.2d 945 (1988).

Prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance. *Dumond v. State*, 294 Ark. 379, 743 S.W.2d 779 (1988).

Where defendant was denied post-conviction relief after he was convicted as a principal and his co-defendant was convicted as an accomplice, defendant was not prejudiced by the joint representation because both were charged as principals and accomplices, and 3 of the 5 counts in the information pertained solely to defendant. *Cook v. State*, 361 Ark. 91, 204 S.W.3d 532 (2005).

Circuit court did not clearly err in denying appellant's petition for postconviction relief. Although appellant claimed that his attorney was laboring under a conflict of interest, appellant did not specify what conflict of interest existed, nor did he make any allegation as to how counsel's performance was affected. *Leak v. State*, 2011 Ark. 353, — S.W.3d —, 2011 Ark. LEXIS 456 (Sept. 15, 2011).

#### —Direct Appeal.

Although this rule generally provides the procedure for postconviction relief due to ineffective counsel, such relief may be awarded a defendant on direct appeal in limited circumstances. *Missildine v. State*, 314 Ark. 500, 863 S.W.2d 813 (1993).

Where defendant raised an ineffective counsel issue by motion for new trial and a hearing was conducted on the issue, it was proper for defendant to argue this subject on direct appeal. *Missildine v. State*, 314 Ark. 500, 863 S.W.2d 813 (1993).

#### —Evidence.

Evidence established ineffective assistance of counsel warranting post-conviction relief. *Chambers v. State*, 264 Ark. 279, 571 S.W.2d 79 (1978); *Neal v. State*, 270 Ark. 442, 605 S.W.2d 421 (1980); *Clark v. State*, 274 Ark. 81, 621 S.W.2d 857 (1981); *Neal v. State*, 274 Ark. 217, 623 S.W.2d 191 (1981); *Thomas v. Lockhart*, 738 F.2d 304 (8th Cir. 1984); *Rode v. Lockhart*, 675 F. Supp. 491 (E.D. Ark. 1987); *Howard v. State*, 301 Ark. 281, 783 S.W.2d 61



(1990); *Russell v. State*, 302 Ark. 274, 789 S.W.2d 720 (1990).

Evidence insufficient to establish ineffective assistance of counsel warranting post-conviction relief. *Cason v. State*, 271 Ark. 803, 610 S.W.2d 891 (1981); *Swindler v. State*, 272 Ark. 340, 617 S.W.2d 1, cert. denied 454 U.S. 933, 102 S. Ct. 431, 70 L. Ed. 2d 240 (1981); *Moore v. State*, 273 Ark. 231, 617 S.W.2d 855 (1981), criticized *Woods v. State*, 278 Ark. 271, 644 S.W.2d 937 (1983); *Blackmon v. State*, 274 Ark. 202, 623 S.W.2d 184 (1981); *Brown v. State*, 274 Ark. 205, 623 S.W.2d 186 (1981); *Rightmire v. State*, 275 Ark. 24, 627 S.W.2d 10 (1982); *Virgin v. State*, 275 Ark. 457, 631 S.W.2d 285 (1982); *Holloway v. State*, 276 Ark. 120, 632 S.W.2d 428 (1982); *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648 (1983), cert. denied 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984); *Douthitt v. State*, 283 Ark. 177, 671 S.W.2d 746 (1984); *Welch v. State*, 283 Ark. 281, 675 S.W.2d 641 (1984); *Maddox v. State*, 283 Ark. 321, 675 S.W.2d 832 (1984), overruled *King v. State*, 907 S.W.2d 127 (1995); *Travis v. State*, 283 Ark. 478, 678 S.W.2d 341 (1984); *Tackett v. State*, 284 Ark. 211, 680 S.W.2d 696 (1984); *Orsini v. State*, 287 Ark. 456, 701 S.W.2d 114 (1985); *Jones v. State*, 288 Ark. 375, 705 S.W.2d 874 (1986); *Morrison v. State*, 288 Ark. 636, 707 S.W.2d 323 (1986); *Hicks v. State*, 289 Ark. 83, 709 S.W.2d 87 (1986); *Fairchild v. Lockhart*, 675 F. Supp. 469 (E.D. Ark. 1987), aff'd 857 F.2d 1204 (8th Cir. 1988); *Shockley v. State*, 291 Ark. 251, 724 S.W.2d 156 (1987); *Philyaw v. State*, 292 Ark. 24, 728 S.W.2d 150 (1987), questioned *Thomas v. State*, 954 S.W.2d 255 (1997), overruled *Thomas v. State*, 911 S.W.2d 259 (1995); *Fretwell v. State*, 292 Ark. 96, 728 S.W.2d 180 (1987); *Snelgrove v. State*, 292 Ark. 116, 728 S.W.2d 497 (1987); *Hill v. State*, 292 Ark. 144, 728 S.W.2d 510, cert. denied, 479 U.S. 1101, 107 S. Ct. 1331, 94 L. Ed. 2d 182 (1987), 484 U.S. 873, 108 S. Ct. 208, 98 L. Ed. 2d 159 (1987); *Nation v. State*, 292 Ark. 149, 728 S.W.2d 513 (1987); *Troutt v. State*, 292 Ark. 192, 729 S.W.2d 139 (1987); *Owens v. State*, 292 Ark. 292, 729 S.W.2d 419 (1987); *Muck v. State*, 292 Ark. 310, 730 S.W.2d 214 (1987); *Branham v. State*, 292 Ark. 355, 730 S.W.2d 226 (1987); *Franklin v. State*, 293 Ark. 225, 736 S.W.2d 16 (1987); *Wilburn v. State*, 292 Ark. 416, 730 S.W.2d 491 (1987); *Ross v. State*, 292 Ark. 663, 732 S.W.2d 143 (1987); *Stephens v. State*, 293 Ark. 231, 737 S.W.2d 147 (1987); *Robinson v. State*, 294 Ark. 97, 740 S.W.2d 918 (1987); *Hudson v. State*, 294 Ark. 148, 741 S.W.2d 253 (1987); *Robinson v. Lockhart*, 835 F.2d 1271 (8th Cir. 1988), cert. denied 487 U.S. 1238, 108 S. Ct. 2909, 101 L. Ed. 2d 940 (1988); *Dumond v. State*, 294 Ark. 379, 743 S.W.2d 779 (1988); *Smith v. Lockhart*, 921 F.2d 154 (8th Cir. 1990); *Huls v. State*, 301 Ark. 572, 785 S.W.2d 467 (1990);

*Mitchael v. State*, 309 Ark. 151, 828 S.W.2d 351 (1992); *McCuen v. State*, 328 Ark. 46, 941 S.W.2d 397 (1997); *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000); *Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001); *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001).

Mere allegations of ineffective assistance of counsel do not warrant post-conviction relief; allegations must be substantiated by proof. *Gilbert v. State*, 282 Ark. 504, 669 S.W.2d 454 (1984); *Blakely v. State*, 283 Ark. 138, 671 S.W.2d 183 (1984); *Brents v. State*, 285 Ark. 199, 686 S.W.2d 395 (1985); *Scott v. State*, 286 Ark. 339, 691 S.W.2d 859 (1985); *Garmon v. State*, 290 Ark. 371, 719 S.W.2d 699 (1986); *Mock v. State*, 292 Ark. 148, 728 S.W.2d 513 (1987); *Robinson v. State*, 296 Ark. 86, 752 S.W.2d 34 (1988); *Gunn v. State*, 296 Ark. 105, 752 S.W.2d 262 (1988).

If a petitioner under this rule contends that counsel should have raised an issue which turns on factual evidence, he is responsible for citing in his petition facts contained in record which would have supported the argument on appeal. *Troutt v. State*, 292 Ark. 192, 729 S.W.2d 139 (1987).

In determining whether counsel was effective on appeal, court will consider only what was included in the record and the prevailing legal authority at the time counsel made his decision about whether to argue the particular point on appeal. *Troutt v. State*, 292 Ark. 192, 729 S.W.2d 139 (1987).

Factual support must establish that the petitioner suffered actual prejudice from his attorney's conduct. *Ross v. State*, 292 Ark. 663, 732 S.W.2d 143 (1987).

In deciding an ineffectiveness claim, reasonableness of counsel's challenged conduct must be judged on the facts of particular case when viewed as of the time of counsel's conduct. *Dumond v. State*, 294 Ark. 379, 743 S.W.2d 779 (1988).

Petitioner cannot establish that his attorney was ineffective for not securing additional funds merely by reciting testing which could have been done or witnesses which could have been called had there been more money available. *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992).

Belief denied where defendant failed to show that counsel had been ineffective in representation for failing to timely renew the motion for directed verdict. *Thomas v. State*, 330 Ark. 442, 954 S.W.2d 255 (1997).

Trial counsel was ineffective in a first-degree murder prosecution where he failed to object to a jury instruction which stated the elements of second-degree murder and instructed that the jury could find the defendant guilty of first-degree murder based upon those elements. *Reynolds v. State*, 341 Ark. 387, 18 S.W.3d 331 (2000).

Although affidavit for life insurance pro-

ceeds allegedly drafted by petitioner's attorney was used against her, it could not be argued successfully that it was the deciding factor in petitioner's conviction for murder of husband; the affidavit was only one of several pieces of evidence that pointed to petitioner's guilt, and petitioner could not prove that, but for the attorney's alleged errors concerning the affidavit, there was a reasonable probability that petitioner would have been acquitted. *State v. Goff*, 349 Ark. 532, 79 S.W.3d 320 (2002).

Because trial court failed to reasonably investigate the facts, visit the crime scene, interview the state's witnesses, spend time interviewing defendant, make an opening statement, call witnesses for the defense other than defendant, object to defendant being present at trial in distinctive jail clothing, and make a closing argument in the penalty phase, it was obvious that trial counsel did very little in the way of investigating the facts or the law and abandoned defendant's best interests; thus, trial counsel was ineffective because his performance was so deficient and his errors were so serious that defendant was deprived of a fair trial. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

*Pro se* petitioner's appeal from the denial of her petitions for post-conviction relief under this rule was dismissed because she failed to provide factual substantiation for her claims of ineffective assistance of counsel or her claims that she was not competent to stand trial for capital murder. *Robertson v. State*, 2010 Ark. 300, — S.W.3d —, 2010 Ark. LEXIS 342 (June 17, 2010).

Denial of appellant's, an inmate's, petition for postconviction relief was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, counsel was not ineffective for failing to consult with or call an expert witness to testify because such testimony would not have been sufficient to raise the probability that the outcome of the trial would have been different. *Hayes v. State*, 2011 Ark. 327, — S.W.3d —, 2011 Ark. LEXIS 413 (Sept. 8, 2011).

Circuit court did not clearly err in denying appellant's petition for postconviction relief. Although appellant claimed that his attorney did not conduct an adequate investigation, appellant did not set forth any facts in the petition to demonstrate that, had counsel performed further investigation, he could have presented any additional witnesses or evidence so as to change the results of trial. *Leak v. State*, 2011 Ark. 353, — S.W.3d —, 2011 Ark. LEXIS 456 (Sept. 15, 2011).

Circuit court did not clearly err in denying appellant's petition for postconviction relief. Although appellant claimed that his attorney was ineffective because he did not subpoena a particular witness, appellant failed to name

the witness, provide a summary of his testimony, and establish that the testimony would have been admissible into evidence. *Leak v. State*, 2011 Ark. 353, — S.W.3d —, 2011 Ark. LEXIS 456 (Sept. 15, 2011).

Supreme court did not consider appellant's, an inmate's motion to file a belated reply brief after his motion for a belated appeal from the denial of his petition for postconviction relief had been granted because it was clear that the petition for postconviction relief was without merit. In part, the inmate had made only general assertions that did not provide sufficient factual substantiation for his claims of prejudice with regard to the ineffective assistance of counsel; the inmate failed to identify any specific potential evidence that counsel would have discovered if an adequate investigation had been undertaken. *Fernandez v. State*, 2011 Ark. 418, — S.W.3d —, 2011 Ark. LEXIS 511 (Oct. 6, 2011).

Even if defendant's counsel erred in failing to obtain a ruling on defendant's Confrontation Clause objection, defendant did not demonstrate that admitting evidence that the nine-year old victim had chlamydia—without producing the laboratory technician who performed the test—prejudiced the defense; accordingly, the circuit court properly denied defendant's petition for postconviction relief under this rule. *Kelley v. State*, 2011 Ark. 504, — S.W.3d —, 2011 Ark. LEXIS 584 (Dec. 1, 2011).

Defendant's petition for postconviction relief was properly denied because defense counsel was not ineffective for failing to object to or limit the testimony of a pediatrician who examined a child rape victim; the pediatrician did not testify that the pediatrician believed the victim had been sexually abused, and the pediatrician did not comment directly on the veracity of the victim. *Keck v. State*, 2012 Ark. 145, — S.W.3d —, 2012 Ark. LEXIS 165 (Apr. 5, 2012).

Denial of appellant's, an inmate's, petition for writ of certiorari was improper because he failed to prove that he received the ineffective assistance of counsel. In part, the additional evidence at issue would not have been sufficient to raise a reasonable probability that the factfinder's decision would have been different if the jury had heard the inmate's testimony. *Lowe v. State*, 2012 Ark. 185, — S.W.3d —, 2012 Ark. LEXIS 199 (Apr. 26, 2012).

Trial court did not err in denying defendant's petition for postconviction relief because defendant's argument that counsel was ineffective was based on the flawed belief that there was no evidence supporting a charge against defendant; although defendant argued that counsel coerced defendant into pleading guilty, that was nothing more than a



conclusory allegation. *Scott v. State*, 2012 Ark. 199, — S.W.3d —, 2012 Ark. LEXIS 228 (May 10, 2012).

Although petitioner asserted that counsel was ineffective for failure to renew his motion for a directed verdict and for failure to offer instructions on lesser-included offenses, petitioner failed to offer facts to support his conclusion that the failure to move for a directed verdict and offer instructions on lesser-included offenses prejudiced him or his defense. *Mitchell v. State*, 2012 Ark. 242, — S.W.3d —, 2012 Ark. LEXIS 271 (May 31, 2012).

#### —Factors Considered.

The trial court's order granting postconviction relief based upon ineffective assistance of counsel was erroneous because it failed to set forth what, if any, additional information or defenses would have been discovered but for one or any combination of counsel's deficiencies and failed to find that, with the benefit of this additional information, there existed a reasonable probability defendant would have insisted on going to trial rather than pleading guilty. *State v. Herred*, 332 Ark. 241, 964 S.W.2d 391 (1998).

Because defendant failed to preserve two of defendant's claims regarding counsel's alleged ineffectiveness, because counsel's decision to inform the jury about defendant's pending drug charges was one of trial strategy, and because defendant instructed counsel not to introduce any evidence in mitigation at sentencing, defendant failed to show that counsel was ineffective; therefore, defendant's petition for postconviction relief under this rule was properly denied. *Sykes v. State*, 2011 Ark. 412, — S.W.3d —, 2011 Ark. LEXIS 498 (Oct. 6, 2011).

#### —Presumption.

In order to warrant post-conviction relief on the basis of ineffective assistance of counsel, petitioner must overcome presumption of competency by clear and convincing evidence showing that he was prejudiced by counsel's conduct and the prejudice was such as to deny him a fair trial. *Blackmon v. State*, 274 Ark. 202, 623 S.W.2d 184 (1981); *Rightmire v. State*, 275 Ark. 24, 627 S.W.2d 10 (1982); *Urquhart v. State*, 275 Ark. 486, 631 S.W.2d 304 (1982); *Rasmussen v. State*, 280 Ark. 472, 658 S.W.2d 867 (1983); *Jeffers v. State*, 280 Ark. 458, 658 S.W.2d 869 (1983); *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648 (1983), cert. denied 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed 2d 726 (1984); *Guy v. State*, 282 Ark. 424, 668 S.W.2d 952 (1984), overruled *Ferrell v. State*, 810 S.W.2d 29 (1991); *Smith v. State*, 283 Ark. 264, 675 S.W.2d 627 (1984); *Maddox v. State*, 283 Ark. 321, 675 S.W.2d 832 (1984), overruled *King v. State*, 907 S.W.2d 127 (1995); *Mitchell v. State*, 289 Ark. 437, 711

S.W.2d 821 (1986); *Hill v. State*, 292 Ark. 144, 728 S.W.2d 510, cert. denied, 479 U.S. 1101, 107 S. Ct. 1331, 94 L. Ed. 2d 182 (1987), 484 U.S. 873, 108 S. Ct. 208, 98 L. Ed. 2d 159 (1987); *Mock v. State*, 292 Ark. 148, 728 S.W.2d 513 (1987); *Troutt v. State*, 292 Ark. 192, 729 S.W.2d 139 (1987); *Owens v. State*, 292 Ark. 292, 729 S.W.2d 419 (1987); *Branham v. State*, 292 Ark. 355, 730 S.W.2d 226 (1987); *Wilburn v. State*, 292 Ark. 416, 730 S.W.2d 491 (1987); *Ross v. State*, 292 Ark. 663, 732 S.W.2d 143 (1987).

Counsel is presumed to have been competent. *Guy v. State*, 282 Ark. 424, 668 S.W.2d 952 (1984), overruled *Ferrell v. State*, 810 S.W.2d 29 (1991); *Campbell v. State*, 283 Ark. 12, 670 S.W.2d 800 (1984); *Mitchell v. State*, 289 Ark. 437, 711 S.W.2d 821 (1986); *Troutt v. State*, 292 Ark. 192, 729 S.W.2d 139 (1987); *Muck v. State*, 292 Ark. 310, 730 S.W.2d 214 (1987); *Branham v. State*, 292 Ark. 355, 730 S.W.2d 226 (1987); *Wilburn v. State*, 292 Ark. 416, 730 S.W.2d 491 (1987); *Ross v. State*, 292 Ark. 663, 732 S.W.2d 143 (1987); *Dumond v. State*, 294 Ark. 379, 743 S.W.2d 779 (1988).

#### —Speedy Trial.

Where speedy trial issue was never raised in the trial court, it cannot be raised for the first time on appeal. The appellant's remedy is to challenge the adequacy of his attorney's representation in a petition for post-conviction relief under this rule. *Spivey v. State*, 25 Ark. App. 269, 757 S.W.2d 186 (1988).

Denial of appellant's, an inmate's, petition for postconviction relief was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, with regard to his speedy trial claim, the inmate merely stated the length of time that he awaited trial; his petition simply lacked any factual basis for his claim. *Hayes v. State*, 2011 Ark. 327, — S.W.3d —, 2011 Ark. LEXIS 413 (Sept. 8, 2011).

Trial court properly denied defendant's petition for postconviction relief after he was convicted of rape because counsel was not ineffective for failing to assert a violation of his right to a speedy trial; because he was brought to trial within one year from the date of a mistrial, there was no violation of his right to a speedy trial under Ark. R. Crim. P. 28.1(c). *Eubanks v. State*, 2012 Ark. 142, — S.W.3d —, 2012 Ark. LEXIS 162 (Apr. 5, 2012).

#### —Trial Tactics and Strategy.

Matters of trial tactics and strategy, even if proven to be unwise, are not grounds for post-conviction relief. *Neal v. State*, 270 Ark. 442, 605 S.W.2d 421 (1980); *Urquhart v. State*, 275 Ark. 486, 631 S.W.2d 304 (1982); *McDaniel v. State*, 282 Ark. 170, 666 S.W.2d 400 (1984); *Watson v. State*, 282 Ark. 246, 667 S.W.2d 953 (1984); *Campbell v. State*, 283

Ark. 12, 670 S.W.2d 800 (1984); *Tackett v. State*, 284 Ark. 211, 680 S.W.2d 696 (1984); *Neff v. State*, 287 Ark. 88, 696 S.W.2d 736 (1985); *Hill v. State*, 292 Ark. 144, 728 S.W.2d 510, cert. denied, 479 U.S. 1101, 107 S. Ct. 1331, 94 L. Ed. 2d 182 (1987), 484 U.S. 873, 108 S. Ct. 208, 98 L. Ed. 2d 159 (1987); *Dumond v. State*, 294 Ark. 379, 743 S.W.2d 779 (1988).

The calling and questioning of witnesses is a matter of trial tactics which is outside the scope of this rule. *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648 (1983), cert. denied 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984); *McDaniel v. State*, 282 Ark. 170, 666 S.W.2d 400 (1984); *Neff v. State*, 287 Ark. 88, 696 S.W.2d 736 (1985); *Hicks v. State*, 289 Ark. 83, 709 S.W.2d 87 (1986); *Stephens v. State*, 293 Ark. 231, 737 S.W.2d 147 (1987); *Dumond v. State*, 294 Ark. 379, 743 S.W.2d 779 (1988).

The question of whether the accused should take the stand is a question of trial strategy and outside the purview of this rule. *McDaniel v. State*, 282 Ark. 170, 666 S.W.2d 400 (1984); *Lomax v. State*, 285 Ark. 440, 688 S.W.2d 283 (1985); *Robinson v. State*, 295 Ark. 693, 751 S.W.2d 335 (1988); *Johnson v. State*, 325 Ark. 44, 924 S.W.2d 233 (1996).

Advice as to acceptance of plea agreement is a matter of trial tactics and strategy and is outside the purview of this rule. *Lomax v. State*, 285 Ark. 440, 688 S.W.2d 283 (1985); *Jones v. State*, 308 Ark. 555, 826 S.W.2d 233 (1992); *Johnson v. State*, 325 Ark. 44, 924 S.W.2d 233 (1996).

Decision to request a venue change is a matter of trial tactics. *Neff v. State*, 287 Ark. 88, 696 S.W.2d 736 (1985).

Lack of success with trial tactics does not equate with ineffective assistance of counsel. *O'Rourke v. State*, 298 Ark. 144, 765 S.W.2d 916 (1989).

The decision to advise a defendant not to take the stand, even if it proves improvident, is a tactical decision within the realm of counsel's professional judgment, and matters of trial tactics and strategy are not grounds for post-conviction relief. *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992).

Defendant's counsel was not ineffective for failing to renew a motion to hold witness an accomplice as a matter of law where the defense was a complete denial of any participation in the crime. *Vickers v. State*, 320 Ark. 437, 898 S.W.2d 26 (1995).

An ARCrP 37 appeal asserting ineffective assistance of counsel did not provide a forum to debate trial tactics or strategy, even if that strategy proved to be improvident; thus, defendant's counsel was not deficient in failing to call a witness at trial. *Jenkins v. State*, 348 Ark. 686, 75 S.W.3d 180 (2002).

Appellant failed to show that counsel was

ineffective for failing to present significant mitigation testimony at the penalty phase of his capital murder trial; counsel called a mental health professional to explain appellant's mental illness and his refusal to call appellant's mother was clearly a question of trial strategy. *Rankin v. State*, 365 Ark. 255, 227 S.W.3d 924 (2006).

In defendant's trial on a charge of felony possession of drug paraphernalia, trial counsel was not ineffective in failing to request a jury instruction on the lesser-included offense of misdemeanor possession of drug paraphernalia because it was a matter of trial strategy. Petitioner's defense was an all-or-nothing strategy based upon an assertion of complete innocence of the crime, and an instruction on the lesser-included offense would have been inconsistent with this strategy; counsel was not ineffective merely because the all-or-nothing strategy failed. *Johnson v. State*, 2009 Ark. 460, 344 S.W.3d 74 (2009).

In a case in which an inmate had been convicted of one count of delivery of a controlled substance and received an enhanced sentence pursuant to § 5-64-411(a)(7) (now § 5-64-411(a)(8)), he unsuccessfully argued that his trial counsel was ineffective for failing to move for a continuance following the state's amendment of the charging information. While his timeline regarding the informant's controlled buy from him and the police officer's measurement of the distance between the church and the sale location was correct, he failed to cite any authority for the proposition that trial counsel had a duty to ask for a continuance based thereon, and trial counsel made the tactical decision to proceed with the trial as scheduled. *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (2010).

Ineffective assistance of counsel claim based on the cumulative effect of counsel's alleged errors was improper; counsel's decision not to seek analysis of fingerprints at the crime scene may have been based on the prisoner's acknowledgement that the prisoner's fingerprints would be found and on counsel's hope that the jury would be swayed by the prosecution's failure to provide definitive fingerprint evidence. *Anderson v. State*, 2010 Ark. 404, — S.W.3d —, 2010 Ark. LEXIS 498 (Oct. 28, 2010).

Defendant's motion for postconviction relief was properly denied because counsel was not ineffective for failing to object to testimony from a police officer that referenced a photograph of defendant taken at the jail; counsel's decision not to call further attention to the remark by seeking admonition was supported by reasonable professional judgment. *Mitchem v. State*, 2011 Ark. 148, — S.W.3d —, 2011 Ark. LEXIS 135 (Apr. 7, 2011).

As defendant did not demonstrate that counsel's decisions regarding an independent



mental-health evaluation or an involuntary intoxication defense rather than self-defense were not supported by reasonable professional judgment or that defendant was prejudiced as a result, defendant was not entitled to postconviction relief under this rule. *Winston v. State*, 2011 Ark. 264, — S.W.3d —, 2011 Ark. LEXIS 243 (June 16, 2011).

Denial of appellant's, an inmate's, petition for postconviction relief was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, counsel testified that he consciously decided to present evidence concerning a skin tag on the inmate's body later because he sought to deprive the prosecution of any opportunity to rehabilitate the witness testimony from what have been construed as significant omissions; counsel's testimony was that he had concern that the witnesses might have had some knowledge of the growth and given detrimental answers and those actions fell well within the broad range of conduct that a reasonable professional might have chosen. *Croy v. State*, 2011 Ark. 284, — S.W.3d —, 2011 Ark. LEXIS 253 (June 23, 2011).

Trial court did not err in denying defendant's petition for postconviction relief because counsel's decision not to seek further DNA testing after the state's tests indicated a match to defendant was a strategic decision that did not support an ineffective-assistance claim; a second independent DNA test would not have excluded from evidence the victim's testimony that she had been raped 20 times by defendant. *Clarks v. State*, 2011 Ark. 296, — S.W.3d —, 2011 Ark. LEXIS 291 (July 27, 2011).

Denial of appellant's, an inmate's, petition for postconviction relief was proper because he failed to prove that he received the ineffective assistance of counsel. In part, although the inmate might have successfully quashed the amended information, he was not prejudiced by any resulting error, because the prosecutor would have simply refiled the charges since the State's dismissal of a case by *nolle prosequi* did not bar a subsequent prosecution under § 16-89-122; Moreover, trial counsel appeared to have made a well-reasoned tactical decision not to object to the amendment. *Hoyle v. State*, 2011 Ark. 321, — S.W.3d —, 2011 Ark. LEXIS 432 (Sept. 8, 2011).

Denial of appellant's, an inmate's, petition for postconviction relief was proper because he failed to prove that he received the ineffective assistance of counsel. In part, the trial court did not clearly err in finding that counsel made a strategic decision based on reasonable professional judgment not to raise an objection to certain hearsay. *Hoyle v. State*, 2011 Ark. 321, — S.W.3d —, 2011 Ark. LEXIS 432 (Sept. 8, 2011).

Circuit court did not clearly err in denying appellant's petition for postconviction relief. Although appellant claimed that his attorney was ineffective because he did not question the credibility of a prosecution witness, the decision of appellant's counsel not to delve into the matter further was in all likelihood a matter of trial strategy and therefore not within the purview of this rule. *Leak v. State*, 2011 Ark. 353, — S.W.3d —, 2011 Ark. LEXIS 456 (Sept. 15, 2011).

While counsel's persuasive techniques did not rise to the level of coercion, defendant's petition under this rule raised issues that challenged whether counsel's strategic decision to recommend a plea offer was based upon reasonable professional judgment. *Riley v. State*, 2011 Ark. 394, — S.W.3d —, 2011 Ark. LEXIS 493 (Sept. 29, 2011).

Denial of appellant's, an inmate's, petition for postconviction relief was proper because counsel testified that she encouraged the inmate not to testify because the state would ask him about a previous murder conviction; according to trial counsel, the inmate weighed his options, decided to heed her advice, and chose not to testify. In denying the inmate's petition, the circuit court stated that it did not know any attorney who would encourage a client to testify knowing that the jury would learn about a prior murder conviction and on that issue, the supreme court deferred to the circuit court's superior position to resolve credibility issues. *Lockhart v. State*, 2011 Ark. 396, — S.W.3d —, 2011 Ark. LEXIS 487 (Sept. 29, 2011).

Because counsel was not ineffective for failing to raise a speedy-trial argument that was without merit, and because counsel's trial tactics or strategy were supported by reasonable professional judgment, defendant was not entitled to postconviction relief under this rule. *Matthews v. State*, 2011 Ark. 397, — S.W.3d —, 2011 Ark. LEXIS 489 (Sept. 29, 2011).

Denial of appellant's, an inmate's, petition for postconviction relief under this rule was appropriate because he failed to meet his burden of establishing that counsel was ineffective. The fact that there was a witness or witnesses who could have offered testimony beneficial to the defense was not, itself, proof of counsel's ineffectiveness. Further, the record clearly demonstrated that trial counsel's decision not to call any witnesses regarding the inmate's mental status was based on reasonable professional judgment. *Wade v. State*, 2011 Ark. 411, — S.W.3d —, 2011 Ark. LEXIS 501 (Oct. 6, 2011).

Denial of appellant's, an inmate's, petition for postconviction relief was improper, in part, because the circuit court made findings based on assumptions that counsel did not object for strategic reasons and, based on those find-

ings, determined that this allegation presented no basis for relief. However, the supreme court was unable to simply say from the face of the petition or the record that relief was not warranted where there was no evidence to support the circuit court's findings; a hearing was necessary to determine whether counsel's failure to object to testimony was, in fact, a matter of trial strategy. *Montgomery v. State*, 2011 Ark. 462, — S.W.3d —, 2011 Ark. LEXIS 549 (Nov. 3, 2011).

Trial court properly denied defendant's petition for postconviction relief after defendant pled *nolo contendere* to first-degree murder; defendant failed to show prejudice on a claim that counsel was ineffective for failing to object to the trial court's determination that defendant's 300-month sentence was required to run consecutively to a prior sentence. *Scott v. State*, 2012 Ark. 159, — S.W.3d —, 2012 Ark. LEXIS 177 (Apr. 12, 2012).

Trial court properly denied defendant's motion for postconviction relief because counsel was not ineffective for failing to move for a directed verdict on the issue of the amount of restraint used to commit a kidnapping; there was evidence that defendant told the victim defendant was a police officer and showed the victim a badge, which constituted deception. *Prater v. State*, 2012 Ark. 164, — S.W.3d —, 2012 Ark. LEXIS 190 (Apr. 19, 2012).

Appellant's, an inmate's, motions for extension of time in which to file his brief-in-chief and for photocopying at public expense of the transcript from the circuit court's evidentiary hearing were dismissed because it was clear that he could not prevail if his appeal were allowed to proceed. Counsel's advice not to testify was purely one of trial strategy, as was an inmate's ultimate decision not to testify; thus, ineffective-assistance claims based on counsel's advice in such situations were not cognizable under this rule. *Cowan v. State*, 2012 Ark. 229, — S.W.3d —, 2012 Ark. LEXIS 243 (May 24, 2012).

### Instructions to Jury.

The omission of the *actus reus* element from the instruction for attempted rape and attempted kidnapping is not "structural error"; therefore, an argument assigning error to such an omission cannot be considered for the first time in a proceeding under this rule. *Sasser v. State*, 338 Ark. 375, 993 S.W.2d 901 (1999).

Appellant's assertion of error by the trial court in permitting a cautionary instruction to include certain language was not cognizable in a proceeding under this rule. *Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290 (2009).

### Issues Previously Considered.

Issues considered on appeal are not grounds for relief under this rule. *Neal v. State*, 270 Ark. 442, 605 S.W.2d 421 (1980);

*Rowe v. State*, 275 Ark. 37, 627 S.W.2d 16 (1982); *Watson v. State*, 282 Ark. 246, 667 S.W.2d 953 (1984); *Clines v. State*, 282 Ark. 541, 669 S.W.2d 883 (1984), criticized *Echols v. State*, 936 S.W.2d 509 (1996); *Blakely v. State*, 283 Ark. 138, 671 S.W.2d 183 (1984); *Orsini v. State*, 287 Ark. 456, 701 S.W.2d 114 (1985); *Abdullah v. State*, 294 Ark. 547, 744 S.W.2d 727, cert. denied 486 U.S. 1025, 108 S. Ct. 2001, 100 L. Ed. 2d 232 (1988).

This rule was not designed as a substitute for asserting error in accordance with the controlling rules of procedure and does not permit a petitioner to raise a question which might have been raised at trial or on the record on direct appeal, unless the question is so fundamental as to render the judgment void and open to collateral attack. *McCroskey v. State*, 278 Ark. 156, 644 S.W.2d 271 (1983); *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983); *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648 (1983), cert. denied 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984); *Watson v. State*, 282 Ark. 246, 667 S.W.2d 953 (1984); *Orsini v. State*, 287 Ark. 456, 701 S.W.2d 114 (1985); *Madewell v. State*, 290 Ark. 580, 720 S.W.2d 913 (1986); *Benson v. State*, 293 Ark. 513, 739 S.W.2d 163 (1987).

This rule does not provide a method for raising questions which were properly considered at trial and on appeal. *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648 (1983), cert. denied 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984); *Orsini v. State*, 287 Ark. 456, 701 S.W.2d 114 (1985); *Benson v. State*, 293 Ark. 513, 739 S.W.2d 163 (1987).

This rule does not provide a remedy when an issue could have been raised in the trial court or on appeal, unless the issue presents a question so fundamental that the judgment of conviction is rendered absolutely void. *Robinson v. State*, 295 Ark. 693, 751 S.W.2d 335 (1988).

### Jurisdiction of Trial Court.

Defendant was not entitled to post-conviction relief on ground that trial court lacked subject matter jurisdiction or that counsel was ineffective in failing to raise such claim. *Holt v. State*, 281 Ark. 210, 662 S.W.2d 822 (1984).

Once Supreme Court has affirmed a conviction, trial court has lost jurisdiction in the matter. *Edgemon v. State*, 292 Ark. 465, 730 S.W.2d 898 (1987), questioned *Smith v. State*, 784 S.W.2d 595 (1990).

Circuit court lacked jurisdiction to consider an appellant's petitions for postconviction relief from his theft by receiving, possession of a firearm by a felon, robbery, fleeing, and aggravated assault convictions where his first and second petitions were invalid under subsections (d) and (e) of this rule for lack of verification and his third petition was not filed



within the 90-day time limit of Ark. R. Crim. P. 37.2(c). *Shaw v. State*, 363 Ark. 156, 211 S.W.3d 506 (2005).

Dismissal of appellant's, an inmate's, appeal from the denial of his petition for post-conviction relief was appropriate pursuant to this rule and Ark. R. Crim. P.37.2 because, without an original timely petition in compliance with the rules, the trial court had no jurisdiction to consider his later-filed amended petitions. The appeal was dismissed because the trial court was, and therefore, the supreme court was, without jurisdiction to consider the claims. *Williamson v. State*, 2012 Ark. 170, — S.W.3d —, 2012 Ark. LEXIS 191 (Apr. 19, 2012).

Subsection (b) of this rule is not jurisdictional in nature. Once jurisdiction is established by a defendant's timely filing of a verified petition, a circuit court has discretion to allow the defendant to file an amended petition that complies with subsection (b). *Barrow v. State*, 2012 Ark. 197, — S.W.3d —, 2012 Ark. LEXIS 221 (May 10, 2012).

#### **Juveniles.**

The structure and purpose of the juvenile code make it incompatible with relief within the scope of this rule, which contemplates the trial, conviction, and sentencing of an adult prisoner under the criminal code. *Robinson ex rel. Robinson v. Shock*, 282 Ark. 262, 667 S.W.2d 956 (1984).

A juvenile who has been adjudged delinquent and committed to youth services is not a "prisoner in custody," nor is he "under sentence by a circuit court," and, thus, seeking relief for juvenile offenders under this rule is inappropriate. *Robinson ex rel. Robinson v. Shock*, 282 Ark. 262, 667 S.W.2d 956 (1984).

#### **Lesser Included Offenses.**

Pursuant to § 9-27-325, this rule applies to juvenile delinquency proceedings. *Walker v. State*, 330 Ark. 652, 955 S.W.2d 905 (1997).

The right to have the jury instructed on all lesser included offenses supported by the evidence is not a fundamental right that warrants review of the omission of such instructions for the first time in a proceeding under this rule. *Kennedy v. State*, 338 Ark. 125, 991 S.W.2d 606 (1999).

#### **Limitation of Petition.**

A motion for a trial transcript was denied where petitioner failed to demonstrate that he was entitled to a transcript at public expense, where his motion was not attached to or incorporated into a petition for post-conviction relief, and where a petition for post-conviction relief would not have been within the three-year period from the date of commitment. *Washington v. State*, 270 Ark. 840, 606 S.W.2d 365 (1980).

#### **Motion to Alter Judgment.**

Where a motion to vacate a judgment was filed after the sentencing of the defendant, the trial judge could not consider the motion unless it was amended so as to be treated under this rule; however, since a valid sentence had been put into execution, the trial court was without jurisdiction to modify, amend, or revise it in any event. *Shipman v. State*, 261 Ark. 559, 550 S.W.2d 424 (1977).

Trial court may treat a motion to correct a judgment as a petition for post-conviction relief, regardless of style of pleading, if it alleges cognizable grounds. *Avants v. State*, 293 Ark. 24, 732 S.W.2d 149 (1987).

#### **Motion to Amend.**

Trial court did not abuse its discretion in denying appellant's motion to amend his post-conviction petition under this rule because appellant clearly sought to amend by filing an expanded petition exceeding the ten-page limit in this rule, and the trial court's findings that the ten-page limitation was reasonable under the circumstances were not clearly erroneous; although appellant asserted that he demonstrated in the motion to amend that he was unable to adequately present his claims in ten or fewer pages, he failed to present any cogent reason that the claims set out in the motion would demonstrate a need for an expanded petition. *Rodriguez v. State*, 2010 Ark. 78, — S.W.3d —, 2010 Ark. LEXIS 105 (Feb. 18, 2010).

#### **Page Count.**

Defendant is free to demonstrate that he is unable to adequately present his claims in ten or fewer pages, as required by subsection (e) of this rule, in a motion to file an overlength petition. *Hill v. Norris*, 96 F.3d 1085 (8th Cir. 1996).

Limiting petitions under this rule to 10 pages in length is an entirely reasonable restriction on petitioners for postconviction relief and does not violate their due process rights. *Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000).

Trial court abused its discretion in counting the final page of an 11 page petition for post conviction relief filed by a defendant who had been sentenced to death against the 10 page limit set forth in subsection (e) of this rule and summarily dismissing the petition on that basis where the final page of the petition contained only defendant's certificate of service; trial court could, however, properly refuse to consider defendant's 16 page "enhanced" petition. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003).

#### **Parole Eligibility.**

A question involving parole eligibility is not an attack on the validity of the sentence imposed, but rather is an attack on the execution of the sentence; such a challenge is not

a proper matter to be considered in a petition for post-conviction relief. *Carter v. State*, 283 Ark. 23, 670 S.W.2d 439 (1984).

The United States Constitution does not require the state to furnish the defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary, and erroneous legal advice on parole eligibility does not automatically render a plea involuntary. *Haywood v. State*, 288 Ark. 266, 704 S.W.2d 168 (1986); *Garmon v. State*, 290 Ark. 371, 719 S.W.2d 699 (1986).

Where defendant was told the facts about parole eligibility as they were at the time of his conviction, the change in the situation did not render his plea involuntary. Even if it were concluded that erroneous advice about parole eligibility was given, that would not make the plea involuntary. *Green v. State*, 297 Ark. 49, 759 S.W.2d 211 (1988).

### Petition.

A court will not consider matters outside the scope of a Rule 37 petition. *Morgan v. State*, 296 Ark. 370, 757 S.W.2d 530 (1988).

The court may place reasonable limitations on the form of Rule 37 petitions before it. *Maulding v. State*, 299 Ark. 570, 776 S.W.2d 339 (1989).

The page limitation on post-conviction relief petitions is a procedural rule and not an ex post facto application of substantive law, since the rules which govern the form and length of petitions for post-conviction relief do not alter the substantive offense charged or the punishment attached to the crime. *Maulding v. State*, 299 Ark. 570, 776 S.W.2d 339 (1989).

Due process does not require courts to provide an unlimited opportunity to present post-conviction claims or prevent a court from setting limits on the number of pages a petition may contain, and ten pages is a reasonable restriction to place on petitioners for post-conviction relief. *Washington v. State*, 308 Ark. 322, 823 S.W.2d 900 (1992).

Exhibits to a petition are considered a part of the petition for the purposes of determining whether the petition conforms to the ten-page limitation, and petitions will not be accepted which exceed ten pages, unless the petitioner can demonstrate that he cannot adequately present his claims to the court in only ten pages. *Washington v. State*, 308 Ark. 322, 823 S.W.2d 900 (1992).

Rule 37 petitions, whether typed or handwritten, must conform to subsection (e) of this rule with respect to the width of margins, the number of lines per page, and the number of words per line. *Burkhart v. State*, 310 Ark. 185, 834 S.W.2d 154 (1992).

A petition for post-conviction relief attacking a judgment, regardless of the label placed

on it by the petitioner, is considered pursuant to this rule. *Bailey v. State*, 312 Ark. 180, 848 S.W.2d 391 (1993).

### Petition Insufficient.

Relief cannot be granted where there is no evidence that the defendant actually filed, or even tendered, a pleading that could be identified or rationally treated as a Rule 37 petition. *Terry v. State*, 273 Ark. 544, 621 S.W.2d 476 (1981).

Post-conviction remedies under this rule require more than bare allegations and must be supported by clear substantiation of fact. *St. John v. Lockhart*, 286 Ark. 234, 691 S.W.2d 148 (1985); *Smith v. State*, 290 Ark. 90, 717 S.W.2d 193 (1986).

A petitioner is not entitled to a hearing for post-conviction relief under this rule if the petition and the records of the case conclusively show he is entitled to no relief. *Garmon v. State*, 290 Ark. 371, 719 S.W.2d 699 (1986).

Trial court did not err in dismissing with prejudice inmate's petition for postconviction relief as the petition violated subsections (d) and (e) of this rule in that it was not signed and verified by the inmate, it exceeded ten pages in length, and a compliant brief could not be filed within the time limitations of Ark. R. Crim. P. 37.2(c). *Boyle v. State*, 362 Ark. 248, 208 S.W.3d 134 (2005).

In determining a claim of ineffective assistance of counsel, the totality of the evidence before the factfinder must be considered and, in order for the Supreme Court of Arkansas to consider the totality of the evidence, as required by this standard, all the evidence presented both at trial and at any postconviction relief proceeding must be included in an appellant's abstract of the proceedings as required by Ark. Sup. Ct. & Ct. App. R. 4-2. *Johnson v. State*, 366 Ark. 286, 234 S.W.3d 858 (2006).

### Plea Withdrawal.

Where the defendant filed a motion for post-conviction relief pursuant to subsection (d) of this rule seeking to set aside two guilty pleas he had made, the petition was a back-handed attempt to withdraw the guilty pleas and not a timely presentation within ARCrP 26.1. *Jones v. State*, 267 Ark. 79, 589 S.W.2d 16 (1979).

A trial court can treat an untimely ARCrP 26 motion as a motion under this rule. *Rowe v. State*, 318 Ark. 25, 883 S.W.2d 804 (1994).

Because sentencing had already transpired and judgment entered when the defendant petitioned to withdraw his guilty plea, the trial court was correct to treat the petition as one for postconviction relief under this rule. *McCuen v. State*, 328 Ark. 46, 941 S.W.2d 397 (1997).

When a defendant pleads guilty he or she has a cognizable claim in a Rule 37 proceed-



ing if he or she alleges that the plea was not made voluntarily and intelligently; however, where the government prosecuted or threatened to prosecute a defendant's relative in good faith with regard to probable cause, the defendant's plea, entered to obtain leniency for the relative, was not involuntary. *State v. Herred*, 332 Ark. 241, 964 S.W.2d 391 (1998).

When a motion to withdraw a guilty plea is untimely, a court reviews it on appeal as a motion for postconviction relief. *Webb v. State*, 365 Ark. 22, 223 S.W.3d 796 (2006).

Trial court properly denied defendant's oral motion to withdraw his guilty plea to first-degree murder and battery because the motion was made three days after the judgment and commitment orders were entered; thus, the unsworn, oral motion did not meet the requirements for postconviction relief. *Webb v. State*, 365 Ark. 22, 223 S.W.3d 796 (2006).

### **Postconviction Proceedings.**

When Arkansas Supreme Court disposed of defendant's petition for postconviction relief filed under Ark. R. Crim. P. 37 based on an independent and adequate state procedural rule and defendant made no attempt to show cause and prejudice or actual innocence, he forfeited his right to raise his federal claim in a habeas petition. *Collier v. Norris*, 485 F.3d 415 (8th Cir. 2007).

Trial court did not err in denying appellant's petition for postconviction relief because appellant did not receive ineffective assistance of trial counsel, he did not demonstrate that an objection that the prosecution was leading would have had merit, and his claim that it was error to allow testimony concerning the rape without supporting technological evidence was a direct challenge to the sufficiency of the evidence and was not cognizable in proceedings under this rule; appellant's assertions of due process violations were likewise allegations of trial error that could have been raised at trial or on appeal and could not be raised in proceedings under this rule. *Bell v. State*, 2010 Ark. 65, 360 S.W.3d 98 (2010).

Summary denial of an inmate's postconviction relief petition under this rule was reversed because the order did not provide the requisite findings and conclusions, and the record did not clearly support affirmation; because no hearing was held, the trial court had an obligation to provide written findings that showed that the inmate was entitled to no relief. It was not conclusive from the petition or the record that relief was not warranted on the inmate's claims concerning illegal sentencing as there was no evidence that counsel agreed to allow the court to sentence on a gun enhancement charge. *Davenport v. State*, 2011 Ark. 105, — S.W.3d —, 2011 Ark. LEXIS 91 (Mar. 10, 2011).

Where the ninety-day filing period under

Ark. R. Crim. P. 37.5(e) has expired and a waiver of postconviction relief has been affirmed by the supreme court, a petitioner must file the appropriate motion to reopen postconviction proceedings before a Rule 37 petition can be brought in circuit court; the jurisdiction rule that once the appeal record is lodged with the supreme court, the circuit court loses jurisdiction to issue subsequent rulings on a postconviction proceeding under this rule applies to petitions under Rule 37.5. *Roberts v. State*, 2011 Ark. 502, — S.W.3d —, 2011 Ark. LEXIS 589 (Dec. 1, 2011).

### **Preparation.**

Even though the court denied the defendant's motion to unseal the medical records of a battery victim, the court granted the defendant access to them for purposes of preparing a petition for postconviction relief. *Ivy v. State*, 327 Ark. 683, 939 S.W.2d 843 (1997), substituted opinion 939 S.W.2d 843 (1997).

### **Presiding Judge.**

The same judge who presides over a defendant's trial may also preside over a postconviction proceeding; disqualification is discretionary and will not justify reversal absent an abuse of discretion. *Travis v. State*, 283 Ark. 478, 678 S.W.2d 341 (1984).

### **Prosecutor's Comments.**

Error in comment by prosecutor was not of such a fundamental nature as would render the judgment void. *Pitcock v. State*, 279 Ark. 174, 649 S.W.2d 393 (1983).

Mistrial was properly denied where prosecutor's remark was just a comment that had nothing to do with the trial and did not impute anything to anyone. *Holland v. State*, 288 Ark. 435, 706 S.W.2d 375 (1986).

### **Record.**

Tender of the record was timely, because the petitioner's notice of appeal was deemed filed on November 23, 2011, and the tender of the record on February 8, 2012, seventy-seven days after that date, was therefore timely; in circumstances such as were present in the instant case, where the request for a ruling on the omitted issue was still pending when the petitioner filed his notice of appeal, the notice of appeal was deemed filed on the day after the order disposing of the request for a ruling was entered. *Lewis v. State*, 2012 Ark. 355, — S.W.3d —, 2012 Ark. LEXIS 267 (May 31, 2012).

### **Relief Denied.**

Where a petitioner's pro se petition for a copy of or use of his trial transcript was not attached to or incorporated into a petition for post-conviction relief, his petition would be denied. *Pickens v. State*, 266 Ark. 486, 586 S.W.2d 1 (1979), cert. denied 451 U.S. 964, 101 S. Ct. 2036, 68 L. Ed. 2d 342 (1981).

Where the record reflected that the appellant was represented by competent counsel at his trial and that he was given every opportunity at his trial to raise any possible defense that he had to the charges, but appellant failed to do so, he was precluded from collaterally attacking his sentence on appeal. *Davis v. State*, 267 Ark. 507, 592 S.W.2d 118 (1980).

Where petitioner asserted that his sentence and judgment were void because of a stipulation to prior felonies, but did not contend that he was not convicted of the prior felonies, or that he was not represented by counsel in the earlier proceedings, or that any undue prejudice arose out of the proceedings, he did not demonstrate that his sentence and judgment were void and was not entitled to post-conviction relief. *McCroskey v. State*, 278 Ark. 156, 644 S.W.2d 271 (1983).

Where the petitioner failed to substantiate any of the conclusory statements he made in his petition for post-conviction relief, and the record indicated that all of the allegations of constitutional error presented in his post-conviction petition had been raised on direct appeal and decided adversely to the petitioner, the petitioner was not entitled to an evidentiary hearing or other post-conviction relief. *Perry v. State*, 279 Ark. 213, 650 S.W.2d 240 (1983).

A flaw in the manner of arrest is not sufficient cause to set aside a judgment of conviction. *Brents v. State*, 285 Ark. 199, 686 S.W.2d 395 (1985).

A defendant who had been convicted at one trial of theft by receiving stolen firearms and then later convicted of being a felon in possession of firearms was precluded from proceeding for a new trial under this rule of the theft by receiving conviction because he had previously appealed this conviction on other grounds and he failed to seek the prior permission of the Supreme Court to proceed. *Wilson v. State*, 285 Ark. 271, 686 S.W.2d 414 (1985).

This rule does not provide a means to attack a conviction on the ground that a juror questioned after trial is heard to give an answer which conflicts with his testimony in voir dire. *Pruett v. State*, 287 Ark. 124, 697 S.W.2d 872 (1985).

Petition properly denied. *Campbell v. State*, 288 Ark. 213, 703 S.W.2d 855 (1986); *Franklin v. State*, 293 Ark. 225, 736 S.W.2d 16 (1987); *Rhodes v. State*, 293 Ark. 211, 736 S.W.2d 284 (1987); *Pennington v. State*, 294 Ark. 185, 741 S.W.2d 266 (1987).

Where all of the petitioner's grounds for relief could have been argued at the trial and on the record on appeal and none present a question so fundamental as to render the judgment void, he is not entitled to proceed

with a petition for relief under this rule. *White v. State*, 290 Ark. 77, 716 S.W.2d 203 (1986).

Petition will be denied where it constitutes a direct attack on a judgment for which this rule is explicitly not intended. *Sanders v. State*, 291 Ark. 200, 723 S.W.2d 370 (1987).

In habeas corpus petition where the trial court correctly observed that the relief sought was more in the nature of the kind which can be granted pursuant to this rule, the court properly refused to consider Rule 37 relief when it had already been sought and denied. *Miller v. State*, 301 Ark. 59, 781 S.W.2d 475 (1989).

Denial of defendant's motion for postconviction relief was affirmed because the trial court did not direct the jury to impose the death penalty, but properly instructed the jury to go back into the jury room and correct an error made in completing the verdict form. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003), substituted opinion 105 S.W.3d 352 (2003).

Defendant was not entitled to relief under this section, due to a failure to create and provide the court with a complete record sufficient to allow meaningful review, where defendant failed to show that he was prejudiced by a lack of a record on arraignment; a ministerial notation of a continuance was not a reference to hearing requiring a record, and a reference to a continuance based on defendant's request for a mental exam did not mandate a record. *Scott v. State*, 355 Ark. 485, 139 S.W.3d 511 (2003).

Trial court properly denied defendant's motion in arrest of judgment because defendant had not timely filed a petition for post-conviction relief under this rule to challenge an illegal sentence. *Holt v. State*, 85 Ark. App. 151, 147 S.W.3d 699 (2004).

Trial court did not err in denying post-conviction relief where defendant failed to show that he was prejudiced when a pardoned sentence was introduced during the sentencing phase of his trial because, once the state offered the certified copy of the conviction, it had established a prima facie case and the burden shifted to defendant to establish the pardon; because no such evidence was introduced, the conviction was properly admitted. *Cook v. State*, 361 Ark. 91, 204 S.W.3d 532 (2005).

Trial court's written findings in the order denying defendant post-conviction relief were not deficient where the court mistakenly referred to defendant's medical records for treatment of a gunshot wound to his hand as being introduced during his testimony but where the records were, in fact, introduced at the close of testimony "for the record only"; further, although the trial court did not use the term "conclusively" in its order, its findings on the points addressed were clearly to



that effect. *Rutledge v. State*, 361 Ark. 229, 205 S.W.3d 773 (2005).

Where inmate did not raise a claim of mental retardation in either his trial or in his petition for post-conviction relief, and did not meet the rebuttable presumption in favor of mental retardation in § 5-4-618(2), the appellate court rejected inmate's request to recall the mandate of his direct appeal and reopen his case. *Coulter v. State*, 365 Ark. 262, 227 S.W.3d 904 (2006).

Where defendant was convicted of engaging children in sexually explicit conduct for use in visual or print medium, counsel was not ineffective for failing to make an argument that defendant was not producing materials for "pecuniary profit" as that was no longer a required element of the charge against defendant. *Smith v. State*, 367 Ark. 611, 242 S.W.3d 253 (2006).

Where a jury convicted appellant of possession of cocaine, simultaneous possession of drugs and firearms, and possession of a firearm by a felon, the trial court sentenced him as an habitual offender to an aggregate term of 1320 months in prison; appellant was not entitled to postconviction relief under this rule. Counsel was not ineffective for failing to move to suppress evidence, because appellant's proposed argument for suppression was without merit; and the imposition of consecutive sentences did not violate double jeopardy requirements. *White v. State*, 2009 Ark. 225, — S.W.3d —, 2009 Ark. LEXIS 135 (2009).

Under this rule, defendant's claim that trial counsel was ineffective for failure to object to the seating of a juror was a direct attack on the verdict and not a cognizable claim; as defendant did not state a meritorious basis upon which counsel could have objected to the juror's seating, his claim to ineffective assistance failed. *Anderson v. State*, 2009 Ark. 493, — S.W.3d —, 2009 Ark. LEXIS 658 (Oct. 8, 2009).

Affirmance of defendant's conviction for failure to preserve arguments for appeal did not demonstrate ineffective assistance of counsel that would entitle defendant to postconviction relief pursuant to this rule; defendant still had to show it was reasonably probable that the jury's decision would have been different absent counsel's errors. *Eastin v. State*, 2010 Ark. 275, — S.W.3d —, 2010 Ark. LEXIS 319 (June 3, 2010).

Defendant's motion under this rule for postconviction relief based on ineffective assistance of counsel was properly denied, as there was ample testimony that the offense occurred and that it was committed by appellant; even if counsel could have requested a jury instruction on corroboration, appellant had not shown that appellant was prejudiced

by the failure to do so. *Joiner v. State*, 2010 Ark. 309, — S.W.3d —, 2010 Ark. LEXIS 356 (June 24, 2010).

Due to clear evidence of guilt that included testimony of a participant in drug transactions with appellant and corroborating videotapes, appellant was not prejudiced by appellant's counsel's failure to renew a motion for directed verdict at the close of all the evidence and was not entitled to postconviction relief pursuant to this rule. *Miller v. State*, 2011 Ark. 114, — S.W.3d —, 2011 Ark. LEXIS 97 (Mar. 17, 2011).

Denial of postconviction relief under this rule was proper, because correction of the judgment to reflect the requirements of the Sex Offender Registration Act of 1997 (SORA), §§ 12-12-901 to 12-12-923, did not demonstrate error so fundamental as to render the judgment void and subject to collateral attack pursuant to this rule; since the petitioner pled guilty to false imprisonment in the first degree of a minor victim, which was a designated crime at the time he was sentenced pursuant to § 12-12-903(12)(A)(i)(r), he was subject to SORA requirements regardless of whether it was reflected on the original judgment. *Justus v. State*, 2012 Ark. 91, — S.W.3d —, 2012 Ark. LEXIS 104 (Mar. 1, 2012).

Defendant's petition for postconviction relief was properly denied because four periods of time, when excluded from the 442-day period between arrest and trial, left 287 days, which was well within the one-year period for a speedy trial. *Rueda v. State*, 2012 Ark. 144, — S.W.3d —, 2012 Ark. LEXIS 164 (Apr. 5, 2012).

Defendant's petition for postconviction relief under this rule was properly denied because defendant did not offer any basis on which a bad-faith argument could have been made at the suspended sentence revocation hearing or on appeal, did not show how defendant was prejudiced by trial and appellate counsels' alleged failures, and defendant's petition was not timely. *Jones v. State*, 2012 Ark. 215, — S.W.3d —, 2012 Ark. LEXIS 240 (May 17, 2012).

Trial court did not err in denying defendant's petition for postconviction relief, which was filed after defendant was discharged from a drug-court program and sentenced to 30 years in prison for theft of property, because defendant was accorded the benefit of an adversarial hearing regarding the drug-court strikes; the issue of whether defendant committed the second and third strikes was fully aired. *Tornavacca v. State*, 2012 Ark. 224, — S.W.3d —, 2012 Ark. LEXIS 256 (May 24, 2012).

#### **Right to Counsel.**

Denial of counsel may not be raised in a Rule 37 petition. *Oliver v. State*, 323 Ark. 743,

918 S.W.2d 690 (1996).

Fairness dictated a prospective application of Supreme Court's holding that denial of counsel under the Sixth Amendment must be raised on direct appeal or be deemed waived. *Oliver v. State*, 323 Ark. 743, 918 S.W.2d 690 (1996).

Although the trial court erred in not inquiring into defendant's financial situation, where defendant was adamant about wishing to proceed pro se and made no reference to his destitute status and where standby counsel, though appointed day of the trial, provided active representation, Supreme Court would be hard put to hold that defendant was denied his right to counsel or that the trial court's finding on this point, following a Rule 37 hearing, was clearly erroneous. *Oliver v. State*, 323 Ark. 743, 918 S.W.2d 690 (1996).

Ineffective assistance of counsel was not a basis to vacate defendant's guilty pleas, even assuming counsel was ineffective in failing to include all grounds for relief in a Rule 37 petition, because the petition to withdraw the guilty pleas was untimely and because in general a defendant has no constitutional right to counsel in state postconviction proceedings. *McCuen v. State*, 328 Ark. 46, 941 S.W.2d 397 (1997).

On review from the denial of postconviction relief under this rule, the court denied appellant's request to relieve his appointed counsel and appoint other counsel because the mere fact that counsel failed to perfect the appeal did not in itself demonstrate that appellant was entitled to other counsel. The court had already granted counsel's motion for rule on clerk. *Haynes v. State*, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 370 (June 14, 2007).

Denial of the appellant's, an inmate's, motion for counsel to represent him in his appeal from the denial of his motion for postconviction relief was appropriate because there was no constitutional right to an attorney in postconviction proceedings and because none of the inmate's claims in the motion amounted to a showing of merit. The supreme court was not persuaded by his argument that because an interpreter was provided, he should also have been provided counsel. *Viveros v. State*, 372 Ark. 463, 277 S.W.3d 223 (2008).

### Self-Incrimination.

Denial of appellant's, an inmate's, petition for postconviction relief was proper, in part, because the inmate, although in custody, did not make the statement at issue in response to any questioning by authorities. It was a spontaneous statement, which was not compelled or coerced in any significant way under the U.S. Const. Amend. V privilege against self-incrimination. *Montgomery v. State*, 2011 Ark. 462, — S.W.3d —, 2011 Ark. LEXIS 549 (Nov. 3, 2011).

### Sentence.

After defendant's valid sentence has been put into execution and an appeal taken to the Supreme Court, the trial court is without jurisdiction to modify, amend, or revise it, either during or after the term at which it was pronounced. *Smith v. State*, 262 Ark. 239, 555 S.W.2d 569 (1977); *Rogers v. State*, 265 Ark. 945, 582 S.W.2d 7 (1979).

If the penalty assessed against petitioner is too severe under the facts of the case, it is a matter that addresses itself to executive clemency, and not to the Supreme Court. *Rogers v. State*, 265 Ark. 945, 582 S.W.2d 7 (1979); *Pettit v. State*, 296 Ark. 423, 758 S.W.2d 1 (1988).

Where sentence issue was raised for the first time on appeal, the Supreme Court would not consider the issue. *Davis v. State*, 267 Ark. 507, 592 S.W.2d 118 (1980).

The state was warranted in asking for the maximum punishment in sensible language just as a defendant may argue for the minimum punishment; therefore, the prosecuting attorney's closing remarks were not improper as a matter of law and the trial court did not abuse its discretion by refusing to declare a mistrial. *Holloway v. State*, 268 Ark. 24, 594 S.W.2d 2 (1980), cert. denied, 474 U.S. 836, 106 S. Ct. 111, 88 L. Ed. 2d 90 (1985).

Defendant could not claim that he did not make a knowing and intelligent plea based upon his belief that the sentences would run concurrently so as to entitle him to postconviction relief under this rule, since he understood the difference between concurrent and consecutive sentences. *Williams v. State*, 273 Ark. 371, 620 S.W.2d 277 (1981).

Where defendant's convictions for two offenses grew out of a single act, and the proof required to prove one of the offenses necessarily included proof of the other offense, the defendant's conviction and sentence for the lesser offense had to be set aside. *Sanders v. State*, 279 Ark. 32, 648 S.W.2d 451 (1983).

This rule does not provide a procedure to go behind a conviction used to enhance a sentence and question its legality. *Thomas v. State*, 290 Ark. 76, 716 S.W.2d 765 (1986).

The issue of sentencing is the proper subject matter for a Rule 37 petition. *Hendrix v. State*, 291 Ark. 134, 722 S.W.2d 596 (1987); *Malone v. State*, 294 Ark. 127, 741 S.W.2d 246 (1987); *Pettit v. State*, 296 Ark. 423, 758 S.W.2d 1 (1988).

Although issue was not raised at trial, since it involved a question of double jeopardy which, if meritorious was sufficient to void the judgment, the court set aside two of the convictions and sentences for theft by receiving, leaving the conviction and sentence for one count of theft by receiving where the offense was a continuing one. *Watson v. State*, 295 Ark. 616, 752 S.W.2d 240 (1988).



Where defendant appeals from a sentencing procedure which was an integral part of the acceptance of the defendant's guilty plea, he must either file a motion to correct an illegal sentence pursuant to § 16-90-111(b), or seek relief under this Rule, which was still in effect when defendant was sentenced. *State v. Sherman*, 303 Ark. 284, 796 S.W.2d 339 (1990) (decision prior to 1990 reinstatement of rule).

Appellant could raise for the first time on appeal the issue that the revocation of his suspended sentence needed to be reversed because, *inter alia*, the period of suspension had expired. *Jones v. State*, 52 Ark. App. 179, 916 S.W.2d 766 (1996).

Circuit court did not have jurisdiction to entertain defendant's motion to dismiss the state's petition to revoke the suspended sentence he received for failure to comply with the reporting requirements of the Sex Offender Registration Act, § 12-12-901, because defendant failed to pursue postconviction relief under this rule within ninety days of the date of the entry of judgment; thus, he was barred from challenging his plea and conviction during a revocation proceeding. *Wicks v. State*, 2010 Ark. App. 499, — S.W.3d —, 2010 Ark. App. LEXIS 530 (June 16, 2010).

#### **Subsequent Petition.**

Where defendant's second petition for postconviction relief in a state court was dismissed because he had already filed one such petition and it was dismissed, he had exhausted his state remedies on the issue raised in second post-conviction proceeding. *Pruitt v. Hutto*, 550 F.2d 1093 (8th Cir. 1977).

Appellate court will not entertain a subsequent petition under this rule unless the original petition was specifically denied without prejudice to filing a second petition. *Ruiz v. State*, 280 Ark. 190, 655 S.W.2d 441 (1983); *Collins v. State*, 280 Ark. 312, 657 S.W.2d 546 (1983); *Grooms v. State*, 293 Ark. 358, 737 S.W.2d 648 (1987).

Where petitioner had one petition decided on its merits, he is not entitled to file a second. *Collins v. State*, 280 Ark. 312, 657 S.W.2d 546 (1983).

If the court were to permit a petitioner to withdraw a petition and submit another as soon as the state through its response pointed out deficiencies in the petition, it would be unfair to the state and open the door to an unending succession of petitions. *Parker v. State*, 308 Ark. 187, 823 S.W.2d 877 (1992).

Inmate who had been sentenced to death was incorrect in his argument that victim impact procedure was inadequate in not requiring the jury to find proof beyond a reasonable doubt as to victim statements; the circuit court thus properly refused his request to supplement his Rule 37 petition on that point. *Johnson v. State*, 356 Ark. 534, 157 S.W.3d

151 (2004), cert. denied 543 U.S. 932, 125 S. Ct. 326, 160 L. Ed. 2d 235 (2004).

#### **Timely Claims.**

Denial of appellants', inmates', pro se petition for postconviction relief under this rule was improper because the petition was timely. They filed their petition 49 days after the date that the court of appeals issued the original mandate for the appeal on October 6, 2009; although the trial court might not have had the correct information available to it upon which to make a decision at the time that it issued the order, appellants' petition was timely filed. *Romero v. State*, 2012 Ark. 133, — S.W.3d —, 2012 Ark. LEXIS 152 (Mar. 29, 2012).

#### **Transcripts.**

Counsel for petitioners seeking postconviction relief should provide the court with transcript references in support of allegations that require specific verification in the record. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

The mere fact of indigency does not entitle a petitioner to a free transcript for the purpose of searching the record in an attempt to find support for allegations in a petition under this rule. *Henderson v. State*, 287 Ark. 346, 699 S.W.2d 397 (1985); *Brooks v. State*, 303 Ark. 188, 792 S.W.2d 617 (1990).

A petitioner is not entitled to a copy of the trial record or other material at public expense unless he demonstrates some reasonably compelling need for specific documentary evidence to support a particular allegation. *Gunn v. State*, 291 Ark. 548, 726 S.W.2d 278 (1987); *Wilburn v. State*, 292 Ark. 416, 730 S.W.2d 491 (1987).

Where abstract is deficient, court will rely on record if it shows that trial court's decision should be affirmed on a particular point, but will not explore the record for prejudicial error if none is shown by the abstract. *Bowers v. State*, 292 Ark. 249, 729 S.W.2d 170 (1987).

A petitioner is not entitled to a free copy of the trial transcript on file with appellate court or any other document in possession of the clerk unless he demonstrates some reasonably compelling need for specific documentary evidence to support an allegation contained in a petition for postconviction relief. *Stone v. State*, 298 Ark. 316, 767 S.W.2d 299 (1989).

The court will not provide a copy of a trial record to facilitate a postconviction appeal without a showing that the record is necessary; the inmate must set out specific anticipated points for reversal to be contained in the inmate's brief which cannot be properly raised without access to the trial record. *Thomas v. State*, 328 Ark. 753, 945 S.W.2d 939 (1997).

#### **Untimely Claims.**

Where claims were untimely as raised in the amended petition, they were therefore

barred. *Hulsey v. Sargent*, 550 F. Supp. 179 (E.D. Ark. 1981), criticized *Woodard v. Sargent*, 753 F.2d 694 (8th Cir. 1985).

Defendant was procedurally barred from claim where he failed to raise the issue on direct appeal. *Hobbs v. Lockhart*, 791 F.2d 125 (8th Cir. 1986).

Petition was untimely. *Bailey v. State*, 312 Ark. 180, 848 S.W.2d 391 (1993).

Defendant's appeal of a trial court order denying his petition for postconviction relief was dismissed because defendant did not file his petition in the trial court within 90 days of the date defendant was convicted of driving while intoxicated pursuant to his guilty plea. *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003).

Ark. R. Crim. P. 37.2(c) provides that a petition attacking a judgment entered on a plea of guilty or nolo contendere is untimely if not filed within 90 days of the entry of judgment pursuant to the guilty plea; thus, where the 90-day period to file a petition under this rule expired in defendant's case on December 16, 2002, and defendant did not file his petition for postconviction relief until August 11, 2003, his petition was untimely and defendant was procedurally barred from proceeding under the rule. *Shabazz v. State*, 359 Ark. 525, 199 S.W.3d 77 (2004).

Trial court did not err in denying inmate's petition for postconviction relief under this rule where the petition was filed 23 months after the mandate was issued in inmate's case, which was outside the time limits of Ark. R. Crim. P. 37.2; thus, the appeal was dismissed. *Johnson v. State*, 362 Ark. 453, 208 S.W.3d 783 (2005).

Defendant's petitions for postconviction relief under this rule and § 16-90-111 were untimely filed from the 2003 mandate; if the trial court lacked jurisdiction to consider the petitions, jurisdiction to consider the portion of the appeal from the order that dismissed both petitions could not be vested in the supreme court. *Smith v. State*, 2009 Ark. 85, — S.W.3d —, 2009 Ark. LEXIS 49 (2009).

Appellate court was without jurisdiction to hear an appeal from an order denying postconviction relief under this rule because the circuit court was without subject-matter jurisdiction where there was no evidence of a timely tender of the petition for postconviction relief to the circuit court clerk and the petition bore an intact file mark for more than a year after the date of entry of the judgment. *Meraz v. State*, 2010 Ark. 121, — S.W.3d —, 2010 Ark. LEXIS 151 (Mar. 11, 2010).

Denial of postconviction relief under this rule was proper, because the petition was untimely as to the original judgment, and the amended judgment did not extend the time for the petitioner to file for postconviction

relief. *Justus v. State*, 2012 Ark. 91, — S.W.3d —, 2012 Ark. LEXIS 104 (Mar. 1, 2012).

Denial of petition and amended petition to correct a sentence was proper, because to the extent that the petitioner's claims were cognizable under this rule, his request for relief, filed more than a year after the judgment was entered, was not timely; to the extent that a claim under § 16-90-111 conflicted with the time limitations for postconviction relief on a petition under this rule, the statute had been superseded. *Turner v. State*, 2012 Ark. 99, — S.W.3d —, 2012 Ark. LEXIS 111 (Mar. 1, 2012).

### Verification of Motion.

This rule requires that motions for postconviction relief be verified and be filed with the court, a requirement of substantive importance to prevent perjury. *Carey v. State*, 268 Ark. 332, 596 S.W.2d 688 (1980).

Circuit court lacked jurisdiction to consider inmate's petitions for postconviction relief where the inmate's first and second petitions to the circuit court were invalid under subsection (d) of this rule because they lacked verification, and the inmate's third petition was not filed within the 90-day time limit of Ark. R. Crim. P. 37.2(c). *Shaw v. State*, 363 Ark. 156, 211 S.W.3d 506 (2005).

Petition for a writ of habeas corpus under 28 U.S.C.S. § 2254 was denied as untimely because inmate did not properly file his petition under this rule within the meaning of § 2244(d)(2) where the verification portion was not completed; further, inmate was not entitled to equitable tolling as a lack of diligence, not extraordinary circumstances, caused the rushed filing. *Walker v. Norris*, 436 F.3d 1026 (8th Cir. 2006).

Where a petition for post-conviction relief in a death penalty case was not verified by the petitioner, but was solely verified by his attorney, rather than dismissing the petition, the court chose to remand the matter for verification in conformance with this rule. *Howard v. State*, 366 Ark. 453, 236 S.W.3d 508 (2006).

Trial court properly denied defendant's petition for postconviction relief under this rule because while the petition for postconviction relief was notarized, it did not contain an affidavit or statement substantially in the form of the affidavit required by subsection (c) of this rule; hence, the trial court could not consider the issues in the petition. *Bunch v. State*, 370 Ark. 113, 257 S.W.3d 533 (2007).

### Waiver of Appeal.

A petitioner whose Rule 37 petition is denied may also waive his right to appeal the denial. *Barton v. State*, 278 Ark. 159, 644 S.W.2d 272 (1983); *Grain v. State*, 280 Ark. 161, 655 S.W.2d 425 (1983).

Where, after denial of Rule 37 petition, petitioner sought federal habeas corpus relief



rather than filing an appeal, he waived his right to appeal. *Barton v. State*, 278 Ark. 159, 644 S.W.2d 272 (1983).

Where the defendant did not inform counsel of his desire to appeal until the time for filing a notice of appeal had passed, the defendant waived his right to appeal. *Robbins v. State*, 288 Ark. 311, 705 S.W.2d 6 (1986); *Brooks v. State*, 303 Ark. 188, 792 S.W.2d 617 (1990).

#### **Waiver of Issues.**

Issues deemed waived. *Irons v. State*, 267 Ark. 469, 591 S.W.2d 650 (1980); *Carey v. State*, 268 Ark. 332, 596 S.W.2d 688 (1980); *Bell v. State*, 269 Ark. 85, 598 S.W.2d 738 (1980); *Watson v. State*, 282 Ark. 246, 667 S.W.2d 953 (1984).

Even questions of constitutional dimension are waived if not raised in accordance with the controlling rules of procedure. *McCroskey v. State*, 278 Ark. 156, 644 S.W.2d 271 (1983); *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983); *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648 (1983), cert. denied 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984); *Orsini v. State*, 287 Ark. 456, 701 S.W.2d 114 (1985).

Issues which were not raised on appeal in accordance with controlling rules of procedure must be considered waived. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983); *Watson v. State*, 282 Ark. 246, 667 S.W.2d 953 (1984); *Clines v. State*, 282 Ark. 541, 669 S.W.2d 883 (1984), criticized *Echols v. State*, 936 S.W.2d 509 (1996).

A post-conviction relief proceedings issue which could have been raised at trial is considered waived unless it presents a question so fundamental as to render the judgment void. *Mackey v. State*, 286 Ark. 188, 690 S.W.2d 353 (1985).

A condemned person may waive collateral challenges to his conviction and sentence provided he is mentally competent to do so. *O'Rourke v. State*, 300 Ark. 323, 778 S.W.2d 938 (1989).

Failure to preserve constitutional claims at trial is not satisfied by inclusion of each of these constitutional claims in an ARCrP 37 petition. *Whitmore v. Lockhart*, 834 F. Supp. 1105 (E.D. Ark. 1992), aff'd 8 F.3d 614 (8th Cir. Ark. 1993).

In a post-conviction appeal, the court refused to review defendant's challenge to the jury's imposition of the death sentence upon his conviction of three counts of capital murder as defendant should have preserved the issue during his trial and raised it on direct appeal. *Rankin v. State*, 365 Ark. 255, 227 S.W.3d 924 (2006).

Court refused to consider seven of eight grounds alleged by petitioner in his postconviction motion under this rule because petitioner failed to obtain a ruling from the trial court on those seven grounds. The trial court lacked jurisdiction to rule on his motion for

reconsideration filed after his notice of appeal from the denial of the motion. *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (2010).

Circuit court did not clearly err in denying appellant's petition for postconviction relief. Although appellant argued that he was denied due process because the police did not conduct a thorough investigation, appellant's challenges to the investigatory process could have been raised at trial. *Leak v. State*, 2011 Ark. 353, — S.W.3d —, 2011 Ark. LEXIS 456 (Sept. 15, 2011).

#### **Withdrawal of Counsel.**

Counsel's motion to be relieved was properly brought to the court's attention because, pursuant to Ark. R. App. P. Crim. 16, once a notice of appeal was filed, only the court had the power to relieve counsel, and Rule 16 applied to appeals from adverse orders in proceedings under this rule; the court granted counsel's motion and dismissed the appeal because it was clear that the inmate could not have prevailed on appeal. *Johnson v. State*, 362 Ark. 453, 208 S.W.3d 783 (2005).

Where appointed counsel failed to show good cause for being removed as counsel in inmate's appeal of the denial of his postconviction relief and essentially abandoned inmate's appeal, the court denied counsel's motion to withdraw under Ark. R. App. P. Crim. 16. *Trowbridge v. State*, 368 Ark. 36, 242 S.W.3d 613 (2006).

#### **Writ of Error.**

Petition for writ of error coram nobis is not available after the Supreme Court reviews a case; once a conviction has been affirmed on appeal, error coram nobis is not available to secure a new trial on the basis of newly discovered evidence or to raise issues which are properly raised in a post-conviction relief petition. *Williams v. Langston*, 285 Ark. 444, 688 S.W.2d 285 (1985); *Edgemon v. State*, 292 Ark. 465, 730 S.W.2d 898 (1987), questioned *Smith v. State*, 784 S.W.2d 595 (1990).

A petition for writ of error coram nobis cannot be used as a substitute for a postconviction petition to vacate a guilty plea. *McDonald v. State*, 285 Ark. 482, 688 S.W.2d 302 (1985).

Error coram nobis proceedings are not interchangeable with proceedings under this rule; error coram nobis is an extraordinary remedy which serves to fill a gap in the legal system and will provide relief after a plea of guilty only where a remedy was unavailable because a fact exists which was not known when the plea of guilty was entered. *Williams v. State*, 289 Ark. 385, 711 S.W.2d 479 (1986).

Where the petitioner filed an error coram nobis petition in the trial court seeking to vacate his guilty plea, the court properly treated the petition as a petition under this rule, since a court may treat a petition for

post-conviction relief as a Rule 37 petition if it raises grounds covered by this rule regardless of the label placed on the petition. *Williams v. State*, 289 Ark. 385, 711 S.W.2d 479 (1986).

Writs of error coram nobis will be permitted based on newly discovered evidence if the evidence is such that it might have resulted in a different verdict, provided the writ is filed between the trial and an appeal. *Edgemon v. State*, 292 Ark. 465, 730 S.W.2d 898 (1987), questioned *Smith v. State*, 784 S.W.2d 595 (1990).

Inmate's petition for an order reinvesting the trial court with jurisdiction so that he could file a petition for a writ of error coram nobis was denied because the inmate failed to show he had meritorious reasons for challenging his conviction. *Echols v. State*, 354 Ark. 414, 125 S.W.3d 153 (2003).

There was no abuse of discretion in denying the petition for writ of error coram nobis without a hearing, because the petitioner did not act with due diligence in bringing the petition, and there was no restriction that would prevent pursuit of relief through the writ while the petitioner pursued an application for pardon, as relief under this rule and error coram nobis proceedings were not exclusive and could be pursued simultaneously. *Deaton v. State*, 373 Ark. 605, 285 S.W.3d 611 (2008).

Petitioner sentenced to life imprisonment for rape and sexual abuse was not entitled to a writ of error coram nobis; petitioner failed to show that the prosecutor withheld material exculpatory evidence or that the trial court lacked jurisdiction over his criminal case. Petitioner's alleged constitutional claims such as double jeopardy and the ineffective assistance of counsel should have brought in a proceeding under this rule. *Mills v. State*, 2009 Ark. 463, — S.W.3d —, 2009 Ark. LEXIS 627 (Oct. 1, 2009).

Where appellant was convicted on a plea of guilty to aggravated robbery, the trial court did not err in denying his petition for a writ of error coram nobis without a hearing; he failed to prove that he was coerced into pleading guilty or that the state committed a Brady violation. Appellant's challenge to the sufficiency of the evidence and his claim of ineffective assistance of counsel was not within the purview of a coram nobis proceeding; it was too late for him to file a timely petition under this rule. *Pierce v. State*, 2009 Ark. 606, — S.W.3d —, 2009 Ark. LEXIS 798 (2009).

Because the facts forming the basis for a writ of error coram nobis were known to defendant at the completion of defendant's direct appeal, because allegations of ineffective assistance of counsel were outside the purview of a coram-nobis proceeding, and because subsection (c) of this rule did not provide for a belated petition, defendant was

not entitled to the relief sought. *Lee v. State*, 2011 Ark. 508, — S.W.3d —, 2011 Ark. LEXIS 586 (Dec. 1, 2011).

### Written Opinion.

The fact that the state court denied Rule 37 motion without issuing a written opinion setting forth findings of fact and conclusions of law did not violate the defendant's constitutional rights, since there is no requirement that the court issue a written memorandum when no hearing has been held. *Riley v. Lockhart*, 726 F.2d 421 (8th Cir. 1984).

Because defendant's postconviction claims were wholly without merit and presented no impediment to review, a trial court did not err in denying defendant's postconviction petition without making written findings or conducting an evidentiary hearing. *Greer v. State*, 2012 Ark. 158, — S.W.3d —, 2012 Ark. LEXIS 173 (Apr. 12, 2012).

**Cited:** *Young v. Arkansas*, 533 F.2d 1079 (8th Cir. 1976); *Pruitt v. Hutto*, 550 F.2d 1093 (8th Cir. 1977); *Warren v. State*, 261 Ark. 173, 547 S.W.2d 392 (1977); *Marshall v. State*, 262 Ark. 726, 561 S.W.2d 76 (1978); *Hill v. State*, 263 Ark. 478, 566 S.W.2d 127 (1978); *Houston v. State*, 263 Ark. 607, 566 S.W.2d 403 (1978); *Glick v. State*, 263 Ark. 679, 566 S.W.2d 728 (1978); *Campbell v. State*, 264 Ark. 575, 572 S.W.2d 845 (1978); *Varnedare v. State*, 264 Ark. 596, 573 S.W.2d 57 (1978), questioned by *Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992), questioned by *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986), questioned by *Pharo v. State*, 30 Ark. App. 94, 783 S.W.2d 64 (1990), questioned by *Hayes v. Lockhart*, 852 F.2d 339 (8th Cir. 1988); *Davis v. Campbell*, 608 F.2d 317 (8th Cir. 1979); *Houston v. State*, 266 Ark. 257, 582 S.W.2d 958 (1979); *Pruitt v. Housewright*, 624 F.2d 851 (8th Cir. 1980); *Philmon v. State*, 267 Ark. 1121, 593 S.W.2d 504 (Ct. App. 1980), questioned *Hall v. State*, 11 Ark. App. 53, 666 S.W.2d 408 (1984); *Hulsey v. State*, 268 Ark. 312, 595 S.W.2d 934 (1980), cert. denied 449 U.S. 938, 101 S. Ct. 337, 66 L. Ed. 2d 161 (1980); *Elliott v. State*, 268 Ark. 454, 597 S.W.2d 76 (1980); *Hammon v. State*, 270 Ark. 307, 605 S.W.2d 6 (1980); *Hoover v. State*, 270 Ark. 978, 606 S.W.2d 749 (1980); *Klimas v. State*, 271 Ark. 508, 609 S.W.2d 46 (1980); *Graham v. Mabry*, 645 F.2d 603 (8th Cir. 1981); *Yancey v. Housewright*, 664 F.2d 187 (8th Cir. 1981); *Singleton v. State*, 274 Ark. 126, 623 S.W.2d 180 (1981), cert. denied 456 U.S. 938, 102 S. Ct. 1996, 72 L. Ed. 2d 458 (1982), cert. denied 459 U.S. 882, 103 S. Ct. 184, 74 L. Ed. 2d 149 (1982); *Pickens v. Lockhart*, 542 F. Supp. 585 (E.D. Ark. 1982); *Collins v. Lockhart*, 545 F. Supp. 83 (E.D. Ark. 1982), rev'd 707 F.2d 341 (8th Cir. Ark. 1983); *Shelton v. State*, 275 Ark. 40, 627 S.W.2d 18 (1982); *Curry v. State*, 276 Ark. 312, 634 S.W.2d 139 (1982); *Reed v. State*, 276 Ark. 318, 635 S.W.2d 472 (1982); *Barnum v.*



State, 276 Ark. 477, 637 S.W.2d 534 (1982); Gipson v. Lockhart, 692 F.2d 66 (8th Cir. 1982); Pickens v. Lockhart, 714 F.2d 1455 (8th Cir. 1983); Urquhart v. Lockhart, 557 F. Supp. 1334 (E.D. Ark. 1983), aff'd 726 F.2d 1316 (8th Cir. 1984); Thomas v. Lockhart, 569 F. Supp. 454 (E.D. Ark. 1983), aff'd 738 F.2d 304 (8th Cir. 1984); Akins v. State, 278 Ark. 180, 644 S.W.2d 273 (1983); Thompson v. Housewright, 741 F.2d 213 (8th Cir. 1984); Bell v. Lockhart, 741 F.2d 1105 (8th Cir. 1984); Grooms v. State, 283 Ark. 224, 675 S.W.2d 353 (1984); Coston v. State, 284 Ark. 144, 680 S.W.2d 107 (1984); Dukes v. Lockhart, 769 F.2d 504 (8th Cir. 1985); Bumgarner v. Bloodworth, 768 F.2d 297 (8th Cir. 1985); Beavers v. Lockhart, 755 F.2d 657 (8th Cir. 1985); Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), cert. denied 474 U.S. 1013, 106 S. Ct. 546, 88 L. Ed. 2d 475 (1985), questioned Ruiz v. Norris, 71 F.3d 1404 (8th Cir. Ark. 1995), questioned Snell v. Lockhart, 14 F.3d 1289 (8th Cir. Ark. 1994), questioned Whitmore v. Lockhart, 8 F.3d 614 (8th Cir. Ark. 1993), questioned Singleton v. Lockhart, 871 F.2d 1395 (8th Cir. Ark. 1989), questioned Perry v. Lockhart, 871 F.2d 1384 (8th Cir. Ark. 1989), questioned Gardner v. Norris, 949 F. Supp. 1359 (E.D. Ark. 1996), questioned Wainwright v. Norris, 872 F. Supp. 574 (E.D. Ark. 1994), questioned Ruiz v. Norris, 868 F. Supp. 1471 (E.D. Ark. 1994), questioned Jackson v. State, 954 S.W.2d 894 (1997); Hill v. State, 13 Ark. App. 307, 683 S.W.2d 628 (1985); Dudley v. State, 285 Ark. 160, 685 S.W.2d 170 (1985); Travis v. State, 286 Ark. 26, 688 S.W.2d 935 (1985); Glick v. State, 286 Ark. 133, 689 S.W.2d 559 (1985); Fairchild v. State, 286 Ark. 191, 690 S.W.2d 355 (1985); Trustees of First Baptist Church v. Ward, 286 Ark. 238, 691 S.W.2d 151 (1985); Porter v. State, 287 Ark. 359, 698 S.W.2d 801 (1985); Atkins v. State, 287 Ark. 445, 701 S.W.2d 109 (1985), questioned McGirt v. State, 708 S.W.2d 620 (1986); Brown v. Lockhart, 781 F.2d 654 (8th Cir. 1986); Spillers v. Lockhart, 802 F.2d 1007 (8th Cir. 1986); Woodard v. Sargent, 806 F.2d 153 (8th Cir. 1986); Reynolds v. Lockhart, 635 F. Supp. 731 (E.D. Ark. 1986); Williamson v. Lockhart, 636 F. Supp. 1298 (E.D. Ark. 1986); Thomas v. State, 289 Ark. 72, 709 S.W.2d 83 (1986); Hoffman v. State, 289 Ark. 184, 711 S.W.2d 151 (1986); Mackey v. State, 289 Ark. 265, 711 S.W.2d 462 (1986); Johnson v. State, 290 Ark. 46, 716 S.W.2d 202 (1986); Diffie v. State, 290 Ark. 194, 718 S.W.2d 94 (1986); Schneider v. State, 290 Ark. 454, 720 S.W.2d 709 (1986); Brown v. State, 291 Ark. 137, 722 S.W.2d 600 (1987); Wilmoth v. State, 291 Ark. 233, 724 S.W.2d 148 (1987); Walker v. State, 291 Ark. 259, 724 S.W.2d 160 (1987); Howard v. State, 291 Ark. 633, 727 S.W.2d 830 (1987); Wood v. Lockhart, 809 F.2d 457 (8th Cir. 1987); Robinson v.

Lockhart, 823 F.2d 210 (8th Cir. 1987); Shuffield v. State, 292 Ark. 185, 729 S.W.2d 11 (1987); Hedrick v. State, 292 Ark. 411, 730 S.W.2d 488 (1987); Williams v. State, 293 Ark. 73, 732 S.W.2d 456 (1987); Davis v. State, 293 Ark. 203, 736 S.W.2d 281 (1987); Redding v. State, 22 Ark. App. 81, 733 S.W.2d 424, rev'd 738 S.W.2d 410 (1987); Hughes v. State, 295 Ark. 121, 746 S.W.2d 557 (1988); Meyer v. Sargent, 854 F.2d 1110 (8th Cir. 1988); DuBois v. Lockhart, 859 F.2d 1314 (8th Cir. 1988); Vasquez v. Lockhart, 867 F.2d 1056 (8th Cir. 1988), cert. denied 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989); Franz v. Lockhart, 700 F. Supp. 1005 (E.D. Ark. 1988); Carmichael v. State, 296 Ark. 479, 757 S.W.2d 944 (1988); Elwood v. State, 297 Ark. 101, 759 S.W.2d 557 (1988); Ashby v. State, 297 Ark. 315, 761 S.W.2d 912 (1988); Smith v. Lockhart, 868 F.2d 265 (8th Cir. 1989); Dumond v. Lockhart, 885 F.2d 419 (8th Cir. 1989); Swindler v. Lockhart, 885 F.2d 1342 (8th Cir. 1989), cert. denied 495 U.S. 911, 110 S. Ct. 1938, 109 L. Ed. 2d 301 (1990); Buckley v. Lockhart, 892 F.2d 715 (8th Cir. 1989), cert. denied 497 U.S. 1006, 110 S. Ct. 3243, 111 L. Ed. 2d 753 (1990); Fairchild v. Lockhart, 744 F. Supp. 1429 (E.D. Ark. 1989), aff'd 900 F.2d 1292 (8th Cir. Ark. 1990); Stanley v. State, 297 Ark. 586, 764 S.W.2d 426 (1989); Atchison v. State, 298 Ark. 344, 767 S.W.2d 312 (1989); Brown v. State, 298 Ark. 396, 767 S.W.2d 313 (1989); Fritts v. State, 298 Ark. 533, 768 S.W.2d 541 (1989); Brundage v. State, 298 Ark. 606, 770 S.W.2d 122 (1989); Stanton v. State, 299 Ark. 54, 770 S.W.2d 147 (1989); Sutherland v. State, 299 Ark. 86, 771 S.W.2d 264 (1989); Dokes v. State, 299 Ark. 178, 772 S.W.2d 583 (1989); Wiggins v. State, 299 Ark. 180, 771 S.W.2d 759 (1989); Lewis v. State, 299 Ark. 310, 771 S.W.2d 773 (1989); Spivey v. State, 299 Ark. 412, 773 S.W.2d 446 (1989); DeViney v. State, 299 Ark. 471, 772 S.W.2d 607 (1989); Rheuark v. State, 299 Ark. 243, 771 S.W.2d 777 (1989); Harrison v. State, 300 Ark. 439, 779 S.W.2d 536 (1989); Wilson v. Lockhart, 892 F.2d 754 (8th Cir. 1990); Orsini v. Wallace, 913 F.2d 474 (8th Cir. 1990), cert. denied 498 U.S. 1128, 111 S. Ct. 1093, 112 L. Ed. 2d 1197 (1991); Simmons v. Lockhart, 915 F.2d 372 (8th Cir. 1990), criticized Victor v. Hopkins, 90 F.3d 276 (8th Cir. Neb. 1996), questioned Farmer v. Iowa, 153 F. Supp. 2d 1034 (N.D. Iowa 2001); Cope v. Lockhart, 744 F. Supp. 906 (E.D. Ark. 1990); Abdullah v. State, 301 Ark. 235, 783 S.W.2d 58 (1990); Scott v. State, 301 Ark. 243, 782 S.W.2d 584 (1990); Sullivan v. State, 301 Ark. 352, 784 S.W.2d 155 (1990); Smith v. State, 301 Ark. 374, 784 S.W.2d 595 (1990); Russaw v. State, 301 Ark. 386, 784 S.W.2d 170 (1990); Rosenzweig v. State, 301 Ark. 475, 784 S.W.2d 776 (1990); Roberts v. State, 302 Ark. 4, 786 S.W.2d 568 (1990); Harden v. State, 302

Ark. 191, 787 S.W.2d 693 (1990); *Williams v. State*, 302 Ark. 356, 789 S.W.2d 732 (1990); *Birchett v. State*, 303 Ark. 220, 795 S.W.2d 53 (1990); *Harrison v. State*, 303 Ark. 247, 796 S.W.2d 329 (1990); *Beebe v. State*, 303 Ark. 691, 799 S.W.2d 547 (1990); *Henderson v. Sargent*, 926 F.2d 706 (8th Cir. 1991), amended 939 F.2d 586 (8th Cir. 1991); *Harris v. Lockhart*, 948 F.2d 450 (8th Cir. 1991); *Vick v. Lockhart*, 952 F.2d 999 (8th Cir. 1991); *Harris v. Lockhart*, 755 F. Supp. 850 (E.D. Ark. 1991); *Coulter v. State*, 304 Ark. 527, 804 S.W.2d 348 (1991), cert. denied 502 U.S. 829, 112 S. Ct. 102, 116 L. Ed. 2d 72 (1991); *Brown v. State*, 305 Ark. 53, 805 S.W.2d 73 (1991); *Cox v. State*, 305 Ark. 488, 807 S.W.2d 665 (1991); *Wilson v. State*, 306 Ark. 179, 810 S.W.2d 337 (1991); *Cravey v. State*, 306 Ark. 487, 815 S.W.2d 933 (1991); *Mackey v. Lockhart*, 307 Ark. 321, 819 S.W.2d 702 (1991); *Donna's Bail Bonds, Inc. v. State*, 34 Ark. App. 175, 807 S.W.2d 934 (1991); *Houston v. Lockhart*, 958 F.2d 826 (8th Cir. 1992); *Prince v. Lockhart*, 971 F.2d 118 (8th Cir. 1992), cert. denied 507 U.S. 964, 113 S. Ct. 1394, 122 L. Ed. 2d 768 (1993); *O'Rourke v. State*, 308 Ark. 454, 825 S.W.2d 262 (1992); *Burnett v. State*, 310 Ark. 202, 832 S.W.2d 848 (1992); *Foster v. Lockhart*, 811 F. Supp. 1363 (E.D. Ark. 1992), dismissed without opinion 995 F.2d 226 (8th Cir. Ark. 1992), aff'd 9 F.3d 722 (8th Cir. Ark. 1993); *Tisdale v. State*, 311 Ark. 220, 843 S.W.2d 803 (1992); *Howard v. State*, 312 Ark. 433, 847 S.W.2d 717 (1993); *Monts v. State*, 312 Ark. 547, 851 S.W.2d 432 (1993); *Devose v. Norris*, 867 F. Supp. 836 (E.D. Ark. 1994), aff'd in part and rev'd in part 53 F.3d 201 (8th Cir. Ark. 1995); *Hulsey v. Sargent*, 868 F. Supp. 1090 (E.D. Ark. 1993), appeal dismissed 15 F.3d 115 (8th Cir. Ark. 1994); *Cigainero v. State*, 321 Ark. 533, 906 S.W.2d 282 (1995); *Edwards v. State*, 321 Ark. 610, 906 S.W.2d 310 (1995); *O'Neal v. State*, 321 Ark. 626, 907 S.W.2d 116 (1995); *Barnes v. State*, 322 Ark. 814, 912 S.W.2d 405 (1995); *Bowen v. State*, 323 Ark. 233, 913 S.W.2d 304 (1996); *Nelson v. State*, 324 Ark. 404, 921 S.W.2d 593 (1996); *Whitney v. State*, 326 Ark. 206, 930 S.W.2d 343 (1996); *Pruett v. Norris*, 959 F. Supp. 1066 (E.D. Ark. 1997), rev'd 153 F.3d 579 (8th Cir. Ark. 1998); *Higgins v. State*, 326 Ark. 1030, 936 S.W.2d 740 (1996); *In re Atkinson*, 327 Ark. 193, 936 S.W.2d 747 (1997); *Ford v. Wilson*, 327 Ark. 243, 939 S.W.2d 258 (1997); *Mitchell v. State*, 327 Ark. 285, 938 S.W.2d 814 (1997); *Drymon v. State*, 327 Ark. 375, 938 S.W.2d 825 (1997); *Lawhon v. State*, 327 Ark. 674, 940 S.W.2d 475 (1997), appeal dismissed 942 S.W.2d 864 (1997); *Polletta v. State*, 327 Ark. 677, 939 S.W.2d 310 (1997); *Chavis v. State*, 328 Ark. 251, 942 S.W.2d 853 (1997); *Finch v. State*, 329 Ark. 319, 947 S.W.2d 11 (1997); *Sanders v. State*, 329 Ark. 363, 952 S.W.2d 133 (1997); *Mosley v. State*, 333 Ark. 273, 968 S.W.2d 612 (1998), cert. denied 525 U.S. 1073, 119 S. Ct. 808, 142 L. Ed. 2d 668 (1999); *Myers v. State*, 333 Ark. 706, 972 S.W.2d 227 (1998); *Propst v. State*, 335 Ark. 448, 983 S.W.2d 405 (1998); *Sasser v. State*, 338 Ark. 375, 993 S.W.2d 901 (1999); *State v. Dillard*, 338 Ark. 571, 998 S.W.2d 750 (1999); *Norman v. State*, 339 Ark. 54, 2 S.W.3d 771 (1999); *Weaver v. State*, 339 Ark. 97, 3 S.W.3d 323 (1999); *Nooner v. State*, 339 Ark. 253, 4 S.W.3d 497 (1999); *Huddleston v. State*, 339 Ark. 266, 5 S.W.3d 46 (1999); *Reed v. Norris*, 195 F.3d 1004 (8th Cir. 1999); *Gaines v. State*, 350 Ark. 535, 88 S.W.3d 858 (2002); *Watts v. Norris*, 356 F.3d 937 (8th Cir. 2004), cert. denied 543 U.S. 904, 125 S. Ct. 201, 160 L. Ed. 2d 177 (2004); *Robinson v. State*, 360 Ark. 307, 200 S.W.3d 905 (2005); *Hewitt v. State*, 362 Ark. 369, 208 S.W.3d 185 (2005); *McKenzie v. State*, 362 Ark. 257, 208 S.W.3d 173 (2005); *Weatherford v. State*, 363 Ark. 579, 215 S.W.3d 642 (2005); *Washington v. State*, 364 Ark. 130, 216 S.W.3d 592 (2005); *Daniels v. State*, 2009 Ark. 607, — S.W.3d —, 2009 Ark. LEXIS 802 (2009); *Lee v. State*, 2010 Ark. 261, — S.W.3d —, 2010 Ark. LEXIS 300 (May 27, 2010); *Moss v. State*, 2010 Ark. 284, — S.W.3d —, 2010 Ark. LEXIS 328 (June 3, 2010); *Wooten v. State*, 2010 Ark. 467, — S.W.3d —, 2010 Ark. LEXIS 580 (Dec. 2, 2010); *Strain v. State*, 2012 Ark. 42, — S.W.3d —, 2012 Ark. LEXIS 58 (Feb. 2, 2012).

### **Rule 37.2. Commencement of proceedings; pleadings [Reinstated and Revised — See Publisher's Notes].**

(a) If the conviction in the original case was appealed to the Supreme Court or Court of Appeals, then no proceedings under this rule shall be entertained by the circuit court while the appeal is pending.

(b) All grounds for relief available to a petitioner under this rule must be raised in his or her original petition unless the petition was denied without prejudice. Any ground not so raised or any ground finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence, or in any other proceedings that the petitioner may have taken to secure relief from his or her conviction or sentence, may



not be the basis for a subsequent petition. All grounds for post-conviction relief from a sentence imposed by a circuit court, including claims that a sentence is illegal or was illegally imposed, must be raised in a petition under this rule.

(c)(i) If a conviction was obtained on a plea of guilty, or the petitioner was found guilty at trial and did not appeal the judgment of conviction, a petition claiming relief under this rule must be filed in the appropriate circuit court within ninety (90) days of the date of entry of judgment. If a petition is filed before the entry of judgment, the petition shall be treated as filed on the day after the entry of judgment.

(ii) If an appeal was taken of the judgment of conviction, a petition claiming relief under this rule must be filed in the circuit court within sixty (60) days of the date the mandate is issued by the appellate court. If a petition is filed after a conviction is affirmed by the appellate court but before the mandate is issued, the petition shall be treated as filed on the day after the mandate is issued.

(iii) In the event an appeal was dismissed, the petition must be filed in the appropriate circuit court within sixty (60) days of the date the appeal was dismissed.

(iv) If the appellate court affirms the conviction but reverses the sentence, the petition must be filed as provided in subsection (ii) within sixty (60) days of a mandate following an appeal taken after resentencing. If no appeal is taken after resentencing, then the petition must be filed as provided in subsection (i) with the appropriate circuit court within ninety (90) days of the entry of the judgment.

(d) The decision of the court in any proceeding under this rule shall be final when the judgment is rendered. No petition for rehearing shall be considered.

(e) Before the court acts upon a petition filed under this rule, the petition may be amended with leave of the court.

(f) Within twenty (20) days after service of a petition under this rule, the state may file a response thereto with evidence of service on opposing counsel or on the petitioner if he or she is acting *pro se*. (Amended December 18, 1978; amended July 6, 1981; amended February 22, 1982; amended September 17, 1984; amended January 25, 1988, effective March 1, 1988; amended February 5, 1990, effective March 1, 1990; abolished May 30, 1990, effective July 1, 1990; reinstated and revised October 29, 1990, effective January 1, 1991; subsection (c) amended January 29, 1996; amended February 9, 2011, effective April 1, 2011.)

**Reporter's Notes, 1988 Amendment:**

The problems encountered with use of the word "commitment" in Rule 37.2(c) are the same as those set out above [in Reporter's Note, ARCrP 36.9]. Most petitions under Rule 37 are *pro se*, therefore, the need to clarify this rule equals or exceeds the need with respect to Rule 36.9. The *pro se* petitioner is understandably more likely to assume that the date he entered prison is the date of commitment. Under such an interpretation, those who have been free on appeal bond would have longer to file a petition than a defendant who goes directly to prison on conviction. Using entry of judgment as the piv-

otal date is preferable because even the untrained petitioner can grasp the significance of a filemarked date on the judgment which gives him/her a definite date from which to calculate the three years. In the case of a delay of more than ten days in filing the judgment, the petitioner can simply use the date of sentence.

**Addition to Reporter's Notes, 1990 Amendment:** This proposal gives the state twenty days rather than ten to answer Rule 37 petitions.

**Addition to Reporter's Notes, 2011 Amendment:** In addition to minor, nonsubstantive editorial revisions, the 2011 amend-

ments made two major changes to the period within which a Rule 37 petition must be filed. First, the amendments struck confusing language in subsection (c)(i) pursuant to which the 90-day period for filing a petition commenced from the date sentence was “pronounced” when judgment was not entered within 10 days of the date sentence was pronounced. Second, the amendments adopted the “deemed filed” rule that Arkansas Rule of Appellate Procedure—Criminal 2(b)(1) applies to a premature notice of appeal. Thus, the amendment changes the result announced in *Tapp v. State*, 324 Ark. 176, 920 S.W.2d 482 (1996) (“[Rule 37] does not allow for holding allegations in abeyance for future consideration when the [circuit] court obtains jurisdiction.”)

Note that the “deemed filed” rule only applies to appealed cases if the petition is filed with the circuit court after the conviction is affirmed, but before the mandate is issued. If the Rule 37 petition is filed before the appellate court has issued its decision on the appeal, then the circuit court is limited to dismissing the petition as untimely.

**Publisher’s Notes.** As to abolition and subsequent reinstatement and revision of Rule 37, and continued applicability to certain persons, see Publisher’s Notes, ARCrP 37.1.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey — Criminal Procedure, 11 U. Ark. Little Rock L.J. 187.

## CASE NOTES

### ANALYSIS

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### Constitutionality.

There is no constitutional right to a post-conviction proceeding; but when a state undertakes to provide collateral relief, due process requires that the proceeding be

fundamentally fair. The requirement that a petition meet certain threshold requirements to gain permission to proceed in circuit court is fundamentally fair. *Robinson v. State*, 295 Ark. 693, 751 S.W.2d 335 (1988).

### In General.

In 1996, the supreme court amended subsection (c) of this rule to provide appropriate limitations for seeking post-conviction relief after action by the circuit court upon remand. *Bowen v. State*, 323 Ark. 233, 913 S.W.2d 304, cert. denied, 517 U.S. 1226, 116 S. Ct. 1861, 134 L. Ed. 2d 960 (1996).

The 1996 amendment of subsection (c) of this rule provides that, in cases where the appellate court affirms the conviction but reverses the sentence, a petition for postconviction relief must be filed within sixty days of a mandate following an appeal taken after resentencing, or, if no appeal is taken, the petition must be filed within ninety days of the circuit court’s judgment; in cases involving multiple counts where a conviction and sentence is affirmed as to one count in a case, but the sentences are reversed for resentencing on the remaining counts, the appellate court will recall the portion of the mandate affirming the conviction and death sentence and stay it until such time as a final disposition of the remaining counts is complete. As such, any petition under subsection (c) of this rule must be filed within sixty days of a mandate following an appeal taken after resentencing on the remaining counts, and if no appeal is taken after resentencing on these



counts, the petition must be filed with the appropriate circuit court within ninety days of the entry of judgment. *Kemp v. State*, 326 Ark. 910, 934 S.W.2d 526 (1996).

Petitioner's state court remedies with respect to postconviction relief from his convictions for rape and capital murder and his death sentence had been exhausted where petitioner and his post-conviction attorney agreed that there were no issues appropriate for relief, petitioner and his attorney deliberately decided not to pursue postconviction relief, and the time for filing a petition was long past. *Engram v. State*, 360 Ark. 140, 200 S.W.3d 367 (2004), cert. denied 125 S. Ct. 2965, 162 L. Ed. 2d 893, 545 U.S. 1192 (2005).

### Construction.

When ARCrP 37 was reinstated, the provision which had permitted relief in those instances where a ground was sufficient to void the conviction regardless of the timeliness of the petition was removed from the rule; therefore, claims of such a fundamental nature as to render the judgment void will no longer be heard unless filed within the time limit set forth in this rule. *Prince v. State*, 315 Ark. 492, 868 S.W.2d 77, cert. denied 511 U.S. 1093, 114 S. Ct. 1857, 128 L. Ed. 2d 480 (1994).

Section 16-90-111, which permits the trial court to correct a sentence imposed in an illegal manner within 120 days after receipt of the affirming mandate of the appellate court, and which permits an illegal sentence to be corrected at any time, is in conflict with subsection (c) of this rule, which provides that a petition under the rule is untimely if not filed within 60 days of issuance of the appellate court's mandate affirming the judgment of conviction; since the time limitations imposed in ARCrP 37 are jurisdictional in nature, the circuit court may not grant relief on a untimely petition. *Reed v. State*, 317 Ark. 286, 878 S.W.2d 376 (1994).

Because the time limits set forth in Rule 37 are jurisdictional in nature, a trial court cannot extend the time to file a Rule 37 petition even if a motion for extension of time is filed before the sixty-day period allowed by subsection (c) of this rule elapses. *Hill v. State*, 340 Ark. 248, 13 S.W.3d 142 (2000).

### Purpose.

A Rule 37 petition will be denied where a defendant does not seek any further hearing in the trial court, but merely presents constitutional arguments based upon the record on the original appeal, since it is not the purpose of this rule to provide a substitute for appeal, an alternative method of reviewing mere errors in the conduct of the trial, or an opportunity for a belated petition for rehearing. *Miller v. State*, 273 Ark. 508, 621 S.W.2d 482 (1981).

### Applicability.

The 90-day period for filing petitions in subsection (c) of this rule also applies to pleas of *nolo contendere*, since the plea of *nolo contendere* to a charge in a criminal case is an admission of guilt. *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996).

### Amendment to Petition.

An amendment to a petition is untimely where filed after the court has already ruled on the original petition. *Ford v. State*, 278 Ark. 106, 644 S.W.2d 252 (1982).

The trial court did not abuse its discretion when it denied a last-minute effort to insert a due-process claim (based on an outrageous conduct theory) into the petition because the state was unprepared and unable to respond to the new theory without obtaining a continuance. *Weaver v. State*, 339 Ark. 97, 3 S.W.3d 323 (1999).

The trial court did not err in denying appellant's motion to file an enlarged petition where appellant failed to set forth any legitimate ground or justification for filing the enlarged petition; appellant spent the majority of his motion attacking the page restrictions of ARCrP 37.1(e), rather than establishing a need to exceed that limitation. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003).

Trial court abused its discretion in denying counsel's motion for leave to amend defendant's Ark. R. Crim. P. 37.1 petition; defendant acted with persistence in trying to move the case forward and defendant's counsel did not seek to file an enlarged petition, which was not required by subsection (e) of this rule. *Butler v. State*, 367 Ark. 318, 239 S.W.3d 514 (2006).

Trial court did not abuse its discretion when it denied the inmate's motion to amend the petition for relief because the leave to amend was tied to defendant's request for production of counsel's files and the trial court could not conclude that it was error to refuse production of the attorney's files. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006).

### Appeal.

Where the defendant's convictions were affirmed by the Court of Appeals, his subsequent petition for post-conviction relief was subject to automatic dismissal where he did not get permission from the Supreme Court prior to filing the petition. *Coston v. State*, 283 Ark. 155, 671 S.W.2d 738 (1984).

Once a case is appealed, the trial court's jurisdiction is lost and cannot be regained without the Supreme Court's permission. Subsection (a) of this rule clearly limits the jurisdiction of the trial court in post-conviction proceedings; the petition to proceed is absolutely required. *Coston v. State*, 283 Ark. 155, 671 S.W.2d 738 (1984); *Jones v. State*,

283 Ark. 363, 676 S.W.2d 738 (1984), cert. denied 469 U.S. 1219, 105 S. Ct. 1204, 84 L. Ed. 2d 347 (1985).

This rule does not specify whether “appealed” as used in subsection (a) of this rule denotes simply filing a notice of appeal or denotes only those cases affirmed on appeal, but the Supreme Court interprets it to mean that a case must be affirmed before it becomes necessary to have that court’s permission to proceed in circuit court; if an appeal is dismissed before final disposition, jurisdiction returns to the trial court to consider petitions for post-conviction relief. *Walker v. State*, 283 Ark. 534, 678 S.W.2d 360 (1984).

The mere allegation that a petitioner mailed a notice of appeal without some substantiation is not good cause to grant a belated appeal. *Elkins v. State*, 300 Ark. 320, 778 S.W.2d 609 (1989).

An appellant can not simultaneously pursue a direct appeal and Rule 37 relief. *Haynes v. State*, 311 Ark. 651, 846 S.W.2d 179 (1993).

An appeal of the denial of post-conviction relief will be dismissed where it is clear that the appeal is wholly without merit. *Reed v. State*, 317 Ark. 286, 878 S.W.2d 376 (1994).

Where the circuit court never ruled on the issue raised by the defendant with regard to remarks made by the trial judge, a request that the circuit court modify its order to include the omitted issue could not be a request for a rehearing that is prohibited by the rule. *Matthews v. State*, 333 Ark. 701, 975 S.W.2d 836 (1998).

Where defendant failed to ask the trial court to modify its order to include a ruling on the omitted conflict-of-interest issue, the court was precluded from addressing that issue on appeal. *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000).

Although defendant’s appeal from the denial of his motion for modification was technically timely, this rule did not allow the filing of a motion for reconsideration following the denial of a Ark. R. Crim. P. Rule 37.1 petition; as the appeal from the denial of the actual petition was not timely, defendant’s appeal was dismissed. *Morgan v. State*, 360 Ark. 264, 200 S.W.3d 890 (2005).

### **Appointment of Counsel.**

Court will not appoint counsel to pursue the appeal of an untimely Rule 37 petition unless the petition states a ground sufficient to void the judgment. *Williams v. State*, 293 Ark. 73, 732 S.W.2d 456 (1987).

### **Bond.**

Where the trial court was not authorized to admit defendant to bail during release for hearing on a Rule 37 petition, the bail bond taken was void and the surety was not liable. *Donna’s Bail Bonds, Inc. v. State*, 34 Ark. App. 175, 807 S.W.2d 934 (1991).

### **Burden of Proof.**

Burden is on appellant, as petitioner, to demonstrate that judgment entered was a nullity, and presumption that a criminal judgment is final is at its strongest in collateral attacks on judgment. *Hedrick v. State*, 292 Ark. 411, 730 S.W.2d 488 (1987).

### **Competency to Stand Trial.**

Where the petitioner had an extensive role at trial and he failed to provide any even slightly convincing evidence that he was incompetent, his allegation that the trial court should have ordered a hearing on his competence did not warrant an evidentiary hearing. *Henry v. State*, 288 Ark. 592, 708 S.W.2d 88 (1986).

If convicted defendant did not raise the issue of his competence at trial, he may nevertheless assert his incompetence to stand trial in a petition for post-conviction relief, since a person who is incompetent cannot knowingly and intelligently waive the right to have the court determine his capacity to stand trial. *Henry v. State*, 288 Ark. 592, 708 S.W.2d 88 (1986).

### **Cruel and Unusual Punishment.**

The constitutional prohibition of cruel and unusual punishment is directed toward the kind of punishment, not its duration, and the fact that punishment is severe does not make it cruel and unusual. *Rogers v. State*, 265 Ark. 945, 582 S.W.2d 7 (1979).

### **Exclusion of Juror.**

Where the trial judge had justifiably excused a juror who said that she would vote against the imposition of the death penalty without regard to any evidence that might develop at the trial, the defendant could not claim in a petition for post-conviction relief that his capital felony murder conviction should be overturned because a juror had been improperly excluded. *Hulsey v. State*, 268 Ark. 312, 595 S.W.2d 934, cert. denied 449 U.S. 938, 101 S. Ct. 337, 66 L. Ed. 2d 161 (1980).

### **Federal Habeas Corpus.**

The rule that certain state-court procedural defaults will bar a petition for federal habeas corpus extends to procedural defaults occurring in the course of state post-conviction proceedings, as well as to procedural defaults occurring at trial or on direct appeal in the state courts. *Williams v. Lockhart*, 873 F.2d 1129 (8th Cir.), cert. denied 493 U.S. 942, 110 S. Ct. 344, 107 L. Ed. 2d 333 (1989).

Where defendant filed a petition under ARCrP 37 seeking post-petition relief, and state courts dismissed the petition because it was filed more than three years after date of defendant’s commitment, and the state Supreme Court had consistently interpreted and applied this three year limitation, and it was



consistently applied in defendant's case, defendant was barred from federal habeas corpus relief. *Williams v. Lockhart*, 873 F.2d 1129 (8th Cir.), cert. denied 493 U.S. 942, 110 S. Ct. 344, 107 L. Ed. 2d 333 (1989).

For purposes of federal habeas corpus relief, defendant established sufficient cause for not bringing guilt phase claim of ineffective assistance of counsel before the state court due to the ineffectiveness of counsel in defendant's subsequent state collateral challenge under this rule. *Henderson v. Sargent*, 926 F.2d 706 (8th Cir.), amended 939 F.2d 586 (8th Cir. 1991).

Where defendant did not raise his guilt phase claim of ineffective assistance of counsel before the state court, and could not bring another petition under this rule due to the three-year time limitation, no non-future state remedy was available to him, thus satisfying the exhaustion of remedies requirement for federal habeas corpus relief. *Henderson v. Sargent*, 926 F.2d 706 (8th Cir.), amended 939 F.2d 586 (8th Cir. 1991).

The fact that defendant failed to raise the claims of ineffective assistance of counsel or defective guilty plea in either of his petitions and he has not shown cause for this default and has not demonstrated that failure to consider the omitted claims will result in a fundamental miscarriage of justice, federal habeas review of the omitted claims was barred. *Johnson v. Lockhart*, 944 F.2d 388 (8th Cir. 1991).

Defendant's claim of ineffective assistance of counsel, first raised in a federal petition for writ of habeas corpus, should first have been raised in his petition for post-conviction relief under this rule; the failure to raise his claim in state court can be excused only on a showing of cause for the default and prejudice from the alleged violation of federal law. *Ford v. Lockhart*, 861 F. Supp. 1447 (E.D. Ark. 1994), sub nom. 38 F.3d 1046 (8th Cir. 1994), aff'd sub nom. 67 F.3d 162 (8th Cir. 1995).

Equitable tolling was not warranted where inmate's failure to file a habeas corpus petition within the one-year limitations period under 28 U.S.C.S. § 2244(d)(1)(A) was due to a misunderstanding of the proper procedures for filing a petition for post-conviction relief under this rule. *Shoemate v. Norris*, 390 F.3d 595 (8th Cir. 2004).

### **Filing of Formal Petition.**

A formal verified petition for post-conviction relief must be filed in Supreme Court, following its affirmance of a conviction for permission to proceed in the trial court. *Knappenberger v. State*, 278 Ark. 382, 647 S.W.2d 417 (1983).

Rule compared with § 16-90-111 concerning correction of illegal sentence. *Williams v. State*, 291 Ark. 255, 724 S.W.2d 158 (1987).

Delivering an item to a circuit judge is not

the equivalent of filing the item with the clerk for the purposes of determining whether an item is timely filed under this rule. *Benton v. State*, 325 Ark. 246, 925 S.W.2d 401 (1996).

Where appellant "sent" a petition to reduce sentence to the circuit judge, who ruled on it, but the petition was never filed-of-record, the appellant did not satisfy the requirement of this rule that a petition for postconviction relief be filed with the circuit clerk. *Benton v. State*, 325 Ark. 246, 925 S.W.2d 401 (1996).

Postconviction relief petition was timely filed under this rule when it was filed on the day that an appellate court issued its mandate affirming petitioner's conviction. *Carter v. State*, 2010 Ark. 231, 364 S.W.3d 46 (2010).

### **Fundamental Errors.**

While even constitutional issues must be raised in the trial court and on direct appeal rather than in Rule 37 proceedings, the Supreme Court has made an exception for errors that are so fundamental as to render the judgment of conviction void and subject to collateral attack, provided the petition is timely filed. *Collins v. State*, 324 Ark. 322, 920 S.W.2d 846 (1996).

### **Grounds for Relief.**

Where the defendant's petition under this rule alleged only that he was not guilty, the defendant was not entitled to post-conviction relief since he did not allege grounds which would void his conviction. *Craft v. State*, 289 Ark. 466, 712 S.W.2d 303 (1986).

Issues which could have been raised on appeal or in the original petition for post-conviction relief, but were not, must be considered waived. *Blair v. State*, 290 Ark. 22, 716 S.W.2d 197 (1986).

The failure of counsel to move to dismiss a charge on speedy trial grounds is not a defect sufficient to void a judgment. *Locklear v. State*, 290 Ark. 70, 716 S.W.2d 766 (1986).

A ground sufficient to void a conviction must be one so basic that the judgment is a complete nullity. *York v. State*, 295 Ark. 163, 747 S.W.2d 102 (1988).

A trial court's failure to establish a factual basis for a guilty plea is not so basic as to render a judgment of conviction a complete nullity. *Jeffers v. State*, 301 Ark. 590, 786 S.W.2d 114 (1990).

This rule does not provide a means to challenge the constitutionality of a judgment where the issue could have been raised in the trial court. *Bailey v. State*, 312 Ark. 180, 848 S.W.2d 391 (1993).

To the extent the trial court based its denial of petition upon conflicting testimonies presented by witness who was not excluded pursuant to ARE 615, appellant demonstrated prejudice as a result of the trial court's error. Request for a new hearing granted. *King v. State*, 322 Ark. 51, 907 S.W.2d 127 (1995).

**Guilty Pleas.**

ARCrP 24, 25, and 26, which govern pleas of guilty and nolo contendere, make no distinction between the pleas for the purposes of the rule. A judgment founded on a plea of nolo contendere may be challenged in a proceeding under this rule. *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996).

**Illegal Sentence.**

In criminal cases, an aggrieved party may seek relief to correct a sentence illegal on its face at any time, but must petition within 120 days to seek relief from a sentence imposed in an illegal manner; the corollary to this rule is that the trial court is without jurisdiction to modify a sentence once it has been put into execution. *Pannell v. State*, 320 Ark. 250, 897 S.W.2d 552 (1995).

Because modification of sentence was the only issue raised on appeal, and Rule 37 requires that the merits of the modification of the sentence be determined by the Circuit Court, the Supreme Court dismissed the appeal rather than modify the judgment. However, under subsection (c) of this rule appellant had 60 days from this dismissal to seek correction of his sentence which was imposed in an illegal manner. *Cooley v. State*, 322 Ark. 348, 909 S.W.2d 312 (1995).

**Ineffective Assistance of Counsel.**

Sufficient allegation of ineffective assistance of counsel. *Lewis v. State*, 265 Ark. 132, 577 S.W.2d 415 (1979); *Poe v. State*, 287 Ark. 292, 698 S.W.2d 297 (1985).

Petitioner was not barred from raising the issue of the ineffective assistance of counsel for the first time in federal court in a petition for a writ of habeas corpus. *Knott v. Mabry*, 671 F.2d 1208 (8th Cir. 1982), cert. denied 459 U.S. 851, 103 S. Ct. 115, 74 L. Ed. 2d 101 (1982).

While advice of law student, who was part of law school defender project, regarding the calculation of time limitations under this rule may have been erroneous, it did not amount to ineffective assistance of counsel since the student was not a licensed attorney and there was no evidence that petitioner retained the defender project as his counsel or that the defender project was appointed by a court to represent him. *Holloway v. State*, 276 Ark. 120, 632 S.W.2d 428 (1982).

To prevail on an allegation of ineffective assistance of counsel with regard to jury selection, a petitioner first has the heavy burden of overcoming the presumption that the jurors were unbiased. The petition must demonstrate actual bias, and the actual bias must have been sufficient to prejudice the petitioner to the degree that he was denied a fair trial. *Tackett v. State*, 284 Ark. 211, 680 S.W.2d 696 (1984).

Petition held based on ineffective assis-

tance of counsel deficient. *Morrison v. State*, 288 Ark. 636, 707 S.W.2d 323 (1986).

Inexperience of counsel held not a sufficient ground to void conviction. *York v. State*, 295 Ark. 163, 747 S.W.2d 102 (1988).

Petitioner was not barred from raising the issue of the ineffective assistance of counsel during the guilt phase of his trial for the first time in a petition for a writ of habeas corpus, where exhaustion of state remedies and cause for not raising the issue in the state proceedings was established. *Henderson v. Sargent*, 926 F.2d 706 (8th Cir.), amended 939 F.2d 586 (8th Cir. 1991).

The unavailability of trial records destroyed by fire did not prevent defendant from presenting his ineffective assistance claim in an amended ARCrP 37 petition. Accordingly, the district court erred in finding that the absence of records generally, or the absence of a transcript, more specifically, constituted sufficient cause to excuse his procedural default in failing to raise this claim in a timely manner. *Bell v. Lockhart*, 2 F.3d 293 (8th Cir. 1993), cert. denied 510 U.S. 1182, 114 S. Ct. 1229, 127 L. Ed. 2d 574 (1994).

Any prolonged incarceration was due to defendant's failure to follow the rules, not the appellate court's refusal to address ineffective assistance claims on direct appeal where the claims were not considered by the trial court; defendant failed to demonstrate that the appellate court's requirement, that an ineffective assistance claim must first be considered by the trial court, unduly prolonged his time in prison for a conviction that was defective and, as such, no exception to the rule was warranted on that basis. *Ratchford v. State*, 357 Ark. 27, 159 S.W.3d 304 (2004).

Because the state was not required to prove that an alleged theft had actually been accomplished, trial counsel was not ineffective for failing to investigate the security system at a store, for failing to talk to a store representative regarding the theft, and for failing to interview alleged unnamed witnesses regarding the theft; postconviction relief was properly denied. *Carter v. State*, 2010 Ark. 231, 364 S.W.3d 46 (2010).

**Jurisdiction of Trial Court.**

Subsection (a) of this rule clearly limits the trial court in post-conviction proceedings to that authorized by the Supreme Court. *Fink v. State*, 280 Ark. 281, 658 S.W.2d 359 (1983).

Under subsection (c) of this rule, lack of jurisdiction is a ground sufficient to void a conviction. *Ellis v. State*, 291 Ark. 72, 722 S.W.2d 575 (1987).

The petition must be filed after the mandate is issued because, when a case is directly appealed, the circuit court does not regain jurisdiction over the case until that event occurs, and a court must have jurisdiction before it can do more with respect to a Rule 37



petition than examine it to see if it is timely. *Doyle v. State*, 319 Ark. 175, 890 S.W.2d 256 (1994); *Tapp v. State*, 324 Ark. 176, 920 S.W.2d 482 (1996).

The filing deadlines imposed by this rule are jurisdictional in nature; if they are not met, a circuit court lacks jurisdiction to consider a Rule 37 petition or a petition to correct an illegal sentence on its merits. *Petree v. State*, 323 Ark. 570, 920 S.W.2d 819 (1996).

Because defendant was in custody when the trial court ultimately disposed of his motion to withdraw under ARCrP 26.1 and because his motion was otherwise timely under ARCrP 26.1 and this rule, the trial court had jurisdiction to consider the merits of his Rule 37 motion. *State v. Herred*, 332 Ark. 241, 964 S.W.2d 391 (1998).

Circuit court lacked jurisdiction to consider an appellant's petitions for postconviction relief from his theft by receiving, possession of a firearm by a felon, robbery, fleeing, and aggravated assault convictions where his first and second petitions were invalid under Ark. R. Crim. P. 37.1(d) and (e) for lack of verification and his third petition was not filed within the 90-day time limit of subsection (c) of this rule. *Shaw v. State*, 363 Ark. 156, 211 S.W.3d 506 (2005).

Circuit court erred in dismissing defendant's postconviction relief petition for lack of jurisdiction because once jurisdiction was established by defendant's timely filing of a verified petition pursuant to subdivision (c)(ii) of this rule, the circuit court had discretion to allow defendant to file an amended petition under subsection (e). *Barrow v. State*, 2012 Ark. 197, — S.W.3d —, 2012 Ark. LEXIS 221 (May 10, 2012).

Dismissal of appellant's, an inmate's, appeal from the denial of his petition for postconviction relief was appropriate pursuant to Ark. R. Crim. P. 37.1 and this rule because, without an original timely petition in compliance with the rules, the trial court had no jurisdiction to consider his later-filed amended petitions. The appeal was dismissed because the trial court was, and therefore, the supreme court was, without jurisdiction to consider the claims. *Williamson v. State*, 2012 Ark. 170, — S.W.3d —, 2012 Ark. LEXIS 191 (Apr. 19, 2012).

### Petition.

Any grounds for relief finally adjudicated in the original proceedings or in any other postconviction proceedings may not be the basis for a subsequent petition. *Ghent v. State*, 265 Ark. 347, 578 S.W.2d 218 (1979).

Where the petitioner filed a second petition for post-conviction relief, the petition was denied because the petitioner failed to show why his attorney could not have raised the allegations in his first post-conviction petition and failed to demonstrate that manifest injus-

tice had resulted from his several previous opportunities for redress. *Scott v. State*, 267 Ark. 536, 592 S.W.2d 122 (1980).

The Supreme Court will no longer consider any petitions subsequent to an original Rule 37 petition, unless the original petition was specifically denied without prejudice. *Williams v. State*, 273 Ark. 315, 619 S.W.2d 628 (1981); *Grooms v. State*, 293 Ark. 358, 737 S.W.2d 648 (1987).

Where a petitioner filed one motion for Rule 37 post-conviction relief, which was denied because it only presented conclusory allegations, and a second Rule 37 petition, properly submitted, was also denied, a petition seeking a transcript at public expense, subsequently filed, constituted a third Rule 37 petition and was properly denied pursuant to subsection (b) of this rule. *Williams v. State*, 273 Ark. 315, 619 S.W.2d 628 (1981).

Since post-conviction petitions which raise grounds for relief cognizable under this rule are considered petitions to proceed under this rule, regardless of the label given them by the petitioner, trial court could simply have dismissed an ARCrP 26.1 petition to withdraw guilty pleas as being a subsequent Rule 37 petition. *Walker v. State*, 283 Ark. 339, 676 S.W.2d 460 (1984).

Where the defendant's petition under ARCrP 26.1 seeking to vacate his guilty plea was denied without written findings of fact, and the petitioner then filed a Rule 37 petition raising allegations similar to those raised in the earlier Rule 26.1 petition, the trial court did not err in refusing to hold an evidentiary hearing on the petition, since the trial court had already considered and denied one petition for post-conviction relief filed by the petitioner before he filed the petition in question. *Porter v. State*, 289 Ark. 475, 712 S.W.2d 304 (1986).

Where, in his second petition under this rule, the defendant did not allege that he did not voluntarily and intelligently choose to dismiss the first petition with prejudice, and the trial judge had questioned the defendant at considerable length about his desire to dismiss the first petition and the consequences of that decision, the trial court correctly denied the second petition on the ground that the defendant had already exhausted his remedy under subsection (b) of this rule. *James v. State*, 289 Ark. 560, 712 S.W.2d 919 (1986).

All grounds for relief pursuant to this rule must be asserted in the original or amended petition as prescribed by subsections (b) and (e) of this rule. *Madewell v. State*, 290 Ark. 580, 720 S.W.2d 913 (1986); *Gunn v. State*, 296 Ark. 105, 752 S.W.2d 262 (1988).

Fact that petitioner chose to label his second petition a petition for writ of error coram nobis did not change the fact that the grounds

raised were encompassed by his original Rule 37 petition; and a petitioner may not reassert issues or raise new ones which are properly addressed under this rule by simply giving the petition a new name and filing it again. *Mock v. State*, 292 Ark. 148, 728 S.W.2d 513 (1987).

Although the principles that attorneys are required to file a brief setting out all issues which might support an appeal and explain why those issues have no merit prior to being relieved as counsel, it was held in *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987) not to extend to collateral post-conviction petitions in federal proceedings, "Finley" does not affect the Arkansas rules. The Supreme Court of Arkansas will continue to review the denial of Rule 37 petitions, and appointed counsel must file an appeal brief; if he determines the appeal is without merit, he must state the reasons therefor. *Mills v. State*, 293 Ark. 312, 737 S.W.2d 460 (1987).

Subsection (c) of this rule requires that petitions for post-conviction relief must be filed in those cases where the petitioner was convicted, after January 1, 1991, within sixty days of the date the mandate was issued upon affirmance. *Bailey v. State*, 312 Ark. 180, 848 S.W.2d 391 (1993).

Circuit court was without jurisdiction to entertain defendant's Ark. R. Crim. P. 37.5 petition for postconviction relief, and the supreme was likewise without jurisdiction to hear an appeal from any decision of the circuit court because defendant's initial waiver of postconviction relief was equivalent to filing a first petition for postconviction relief; subsection (b) of this rule makes it clear that all grounds for postconviction relief must be raised in the first petition, and subsection (b) contemplates not only the direct-appeal proceeding but also any postconviction proceedings. *Roberts v. State*, 2011 Ark. 502, — S.W.3d —, 2011 Ark. LEXIS 589 (Dec. 1, 2011).

#### **Prior Consent.**

Where petitioner for post-conviction relief had death sentence affirmed on previous direct appeal, he could not bring relief petition without the prior consent of the Supreme Court since, under this rule, prior consent must be obtained in such circumstances, and even questions of constitutional dimension are not preserved beyond the direct appeal of the conviction unless they are shown to be of such a fundamental nature that the judgment is rendered void. *Swindler v. State*, 272 Ark. 340, 617 S.W.2d 1, cert. denied 454 U.S. 933, 102 S. Ct. 431, 70 L. Ed. 2d 240 (1981).

Defendant was precluded from proceeding for a new trial under this rule where he had previously appealed his conviction on other grounds and he failed to seek the prior per-

mission of the Supreme Court to proceed. *Wilson v. State*, 285 Ark. 271, 686 S.W.2d 414 (1985).

#### **Record.**

Tender of the record was timely, because the petitioner's notice of appeal was deemed filed on November 23, 2011, and the tender of the record on February 8, 2012, seventy-seven days after that date, was therefore timely; in circumstances such as were present in the instant case, where the request for a ruling on the omitted issue was still pending when the petitioner filed his notice of appeal, the notice of appeal was deemed filed on the day after the order disposing of the request for a ruling was entered. *Lewis v. State*, 2012 Ark. 355, — S.W.3d —, 2012 Ark. LEXIS 267 (May 31, 2012).

#### **Relief Denied.**

Where the petitioner waited until he filed his amended petition for reconsideration of the Supreme Court's denial of his earlier petition for post-conviction relief before raising his claims, the claims were untimely as raised in the amended petition, and were therefore barred. *Hulsey v. Sargent*, 550 F. Supp. 179 (E.D. Ark. 1981), criticized *Woodard v. Sargent*, 753 F.2d 694 (8th Cir. 1985).

Where the petitioner's claimed grounds for post-conviction relief are not raised in a timely fashion, this rule is an adequate and independent ground barring review of the claims on their merits by the state court. This procedural default also bars federal habeas corpus review of the issues where the petitioner has not demonstrated legally sufficient cause for his failure to raise the issues. *Hulsey v. Sargent*, 550 F. Supp. 179 (E.D. Ark. 1981), criticized *Woodard v. Sargent*, 753 F.2d 694 (8th Cir. 1985).

Allegations of petitioner not sufficient to render judgment of conviction void under this rule. *Holloway v. State*, 276 Ark. 120, 632 S.W.2d 428 (1982).

Denial of relief held proper. *Cotton v. State*, 293 Ark. 338, 738 S.W.2d 90 (1987); *Grooms v. State*, 293 Ark. 358, 737 S.W.2d 648 (1987); *Abdullah v. State*, 294 Ark. 547, 744 S.W.2d 727, cert. denied 486 U.S. 1025, 108 S. Ct. 2001, 100 L. Ed. 2d 232 (1988); *McCuen v. State*, 328 Ark. 46, 941 S.W.2d 397 (1997).

As petitioner did not file his petition for post-conviction relief within the ninety-day period set by this rule to raise such claims, the petition was untimely; therefore, petitioner could not have prevailed on appeal even if he had perfected an appeal. *Smith v. State*, 321 Ark. 195, 900 S.W.2d 939 (1995).

Petition not filed until nearly a year after the judgment was untimely. *Cothrine v. State*, 322 Ark. 112, 907 S.W.2d 134 (1995).

Denial of postconviction relief under Ark. R. Crim. P. 37.1 was proper, because the petition



was untimely as to the original judgment, and the amended judgment did not extend the time for the petitioner to file for postconviction relief. *Justus v. State*, 2012 Ark. 91, — S.W.3d —, 2012 Ark. LEXIS 104 (Mar. 1, 2012).

Denial of petition and amended petition to correct a sentence was proper, because to the extent that the petitioner's claims were cognizable under Ark. R. Crim. P. 37.1, his request for relief, filed more than a year after the judgment was entered, was not timely; to the extent that a claim under § 16-90-111 conflicted with the time limitations for postconviction relief on a petition under Ark. R. Crim. P. 37.1, the statute had been superseded. *Turner v. State*, 2012 Ark. 99, — S.W.3d —, 2012 Ark. LEXIS 111 (Mar. 1, 2012).

### Supersession of Statutes.

Section 16-90-111, which permits the trial court to correct a sentence imposed in an illegal manner within 120 days after receipt of the affirming mandate of the appellate court and which permits an illegal sentence to be corrected at any time, is in conflict with subsection (c) of this rule, which provides that a petition under this rule is untimely if not filed within 60 days of issuance of the appellate court's mandate affirming the judgment of conviction; the rule supersedes the statute. *Harris v. State*, 318 Ark. 599, 887 S.W.2d 514 (1994).

Although the provisions of § 16-90-111(a) permit a circuit court to correct an illegal sentence at any time, this provision is invalid to the extent that it conflicts with subsection (b) of this rule. *Petree v. State*, 323 Ark. 570, 920 S.W.2d 819 (1996).

### Timeliness.

Petition denied as untimely. *Scott v. State*, 267 Ark. 536, 592 S.W.2d 122 (1980); *Washington v. State*, 270 Ark. 840, 606 S.W.2d 365 (1980); *Collins v. State*, 271 Ark. 825, 611 S.W.2d 182, cert. denied 452 U.S. 973, 101 S. Ct. 3127 (1981); *Poe v. State*, 273 Ark. 194, 617 S.W.2d 361 (1981); *Chisum v. State*, 274 Ark. 332, 625 S.W.2d 448 (1981); *Pogue v. Cooper*, 284 Ark. 105, 679 S.W.2d 207 (1984); *Bell v. State*, 287 Ark. 430, 700 S.W.2d 788 (1985); *Abdullah v. State*, 290 Ark. 537, 720 S.W.2d 902 (1986); *Leggins v. Lockhart*, 822 F.2d 764 (8th Cir. 1987), cert. denied 485 U.S. 907, 108 S. Ct. 1080, 99 L. Ed. 2d 239 (1988); *Williams v. State*, 293 Ark. 73, 732 S.W.2d 456 (1987); *Bailey v. State*, 312 Ark. 180, 848 S.W.2d 391 (1993).

The trial, the direct appeal of the judgment, and the safeguards afforded by this rule give the defendant ample opportunity to be heard; the three year limitation for raising claims under this rule protects the rights of the accused, while respecting the legitimate in-

terest of society in the finality of criminal judgments. *Travis v. State*, 286 Ark. 26, 688 S.W.2d 935 (1985).

Although the three-year limitation was not in effect when a defendant was sentenced, his action must be timely filed three years from the date this rule was so amended in 1978. *Abdullah v. State*, 290 Ark. 537, 720 S.W.2d 902 (1986).

Where defendant raises no issue which, if found in his favor, would make his conviction absolutely void, the exception to the three year requirement of former subsection (c) of this rule does not apply. *Locklear v. State*, 290 Ark. 609, 721 S.W.2d 668 (1986) (decision under prior law).

The language of subsection (c) of this rule and the policy reasons behind it are sufficient to hold that the time limits of the rule are jurisdictional in nature. *Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989).

The standard for allowing a late petition is not the "reasonableness" of the delay, but whether the alleged grounds are sufficient to render the conviction absolutely void. *Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989).

Where claims are not sufficient to render conviction absolutely void, petition coming well beyond the three-year limit of former subsection (c) of this rule is untimely filed. *Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989) (decision under prior law).

The three year limitations period runs from the date of entry of judgment, and not from the date the Court of Appeals affirms the conviction. *Gass v. State*, 298 Ark. 548, 769 S.W.2d 24 (1989).

In 1990, this rule was amended to require filing within 90 days in cases where the defendant pleaded guilty or did not elect to appeal and 60 days where an appeal was taken; that time limit is strictly imposed. *Wainwright v. Norris*, 836 F. Supp. 619 (E.D. Ark. 1993).

Because this rule takes precedence over conflicting § 16-90-111, where appellant did not file his petition for post-conviction relief within the 60-day period set by rule, the petition was untimely. *Hamilton v. State*, 323 Ark. 614, 918 S.W.2d 113 (1996).

The time limitations imposed in Rule 37 are jurisdictional in nature, and the circuit court may not grant relief on a petition for postconviction relief not filed within the 90-day period set by this rule. *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996).

Even though appellant filed petition for reduction of sentence under § 16-90-111 when it should have been filed under this rule, the time for filing appellant's brief was extended where the petition met the timeliness requirement of this rule. *Taylor v. State*, 324 Ark. 532, 922 S.W.2d 710 (1996).

The time limitations imposed in ARCrP 37 are jurisdictional in nature, and the circuit court may not grant relief on a petition for postconviction relief that is not properly filed. *Benton v. State*, 325 Ark. 246, 925 S.W.2d 401 (1996).

Where the defendant provided no citation of authority supporting his allegation that the sixty-day deadline of this rule was fundamentally unfair, his petition for relief was dismissed as untimely. *Larimore v. State*, 327 Ark. 271, 938 S.W.2d 818 (1997).

A petition was untimely where it was not filed within 90 days of judgment, notwithstanding the pro se petitioner's argument that the court should adopt a mailbox rule, whereby the petition would be deemed filed when placed in the hands of prison officials for mailing. *Hamel v. State*, 338 Ark. 769, 1 S.W.3d 434 (1999).

Good cause was established for the petitioner's failure to file his petition in a timely manner and, therefore, would be allowed to proceed with his petition where the case involved the death penalty, the enactment of Rule 37.5 effectively cured the instant situation from recurring, and there were ambiguous circumstances surrounding the petitioner's legal representation at the time the petition was filed. *Porter v. State*, 339 Ark. 15, 2 S.W.3d 73 (1999), limited *O'Brien v. State*, 339 Ark. 138, 3 S.W.3d 332 (1999).

A pro se petition was untimely where it was not filed within 60 days of the mandate of the Court of Appeals which affirmed his conviction, notwithstanding the petitioner's assertion that his trial counsel failed to inform him of the mandate. *O'Brien v. State*, 339 Ark. 138, 3 S.W.3d 332 (1999).

An appeal was not properly taken within 90 days of judgment, notwithstanding that the defendant's wife prepared and filed a notice of appeal on his behalf within 90 days, since she was not a licensed attorney and, therefore, her actions were of no consequence. *Shoemate v. State*, 339 Ark. 403, 5 S.W.3d 446 (1999).

The appellant timely filed his petition for postconviction relief with regard to claims associated with the revocation of his suspended sentences where he filed his petition less than 60 days after the court of appeals affirmed that revocation. *Johnson v. State*, 339 Ark. 487, 5 S.W.3d 477 (1999).

When a conviction results from a guilty plea, the party claiming relief under subsection (c) of this rule must file a petition in the appropriate trial court within 90 days of the date of judgment; thus, defendant's failure to file his petition until more than one year later meant the petition was untimely filed. *Hamm v. State*, 75 Ark. App. 358, 57 S.W.3d 252 (2001).

Trial court erred in dismissing defendant's postconviction relief petition of his death sen-

tence as untimely under subsection (c) of this rule, a rule that applied only to non-death cases; defendant's petition was timely filed within 90 days after the appointment of counsel under ARCrP 37.5(e), which did apply to death penalty cases. *Simpson v. State*, 347 Ark. 564, 65 S.W.3d 878 (2002).

Subsection (c) of this rule provides that a petition attacking a judgment entered on a plea of guilty or nolo contendere is untimely if not filed within 90 days of the entry of judgment pursuant to the guilty plea; thus, where the 90-day period to file a petition under Ark. R. Crim. P. 37.1 expired in defendant's case on December 16, 2002, and defendant did not file his petition for postconviction relief until August 11, 2003, his petition was untimely and defendant was procedural barred from proceeding under the rule. *Shabazz v. State*, 359 Ark. 525, 199 S.W.3d 77 (2004).

Motion to dismiss defendant's appeal was granted where defendant's postconviction petition was not filed within the jurisdictional time limitations of subsection (c) of this rule because it was filed 99 days after the judgment. *Mims v. State*, 360 Ark. 96, 199 S.W.3d 681 (2004).

In postconviction proceedings, the appellant's motion to remand the case to the trial court to settle the record was granted as the file-stamp date on the petition for postconviction relief was incorrect and the Court could not determine whether the petition was timely filed under subsection (c) of this rule. *Smith v. State*, 362 Ark. 173, 207 S.W.3d 555 (2005).

Trial court did not err in dismissing with prejudice inmate's petition for postconviction relief as the petition violated Ark. R. Crim. P. 37.1(d) and (e) in that it was not signed and verified by the inmate, it exceeded ten pages in length, and a compliant brief could not be filed within the time limitations of subsection (c) of this rule. *Boyle v. State*, 362 Ark. 248, 208 S.W.3d 134 (2005).

Trial court did not err in denying inmate's petition for postconviction relief under Ark. R. Crim. P. 37.1 where the petition was filed 23 months after the mandate was issued in inmate's case, which was outside the time limits of this rule; thus, the appeal was dismissed. *Johnson v. State*, 362 Ark. 453, 208 S.W.3d 783 (2005).

Circuit court lacked jurisdiction to consider inmate's petitions for postconviction relief where the inmate's first and second petitions to the circuit court were invalid under Ark. R. Crim. P. 37.1(d) because they lacked verification, and the inmate's third petition was not filed within the 90-day time limit of subsection (c) of this rule. *Shaw v. State*, 363 Ark. 156, 211 S.W.3d 506 (2005).

Defendant's petitions for postconviction relief under this rule and § 16-90-111 were



untimely filed from the 2003 mandate; if the trial court lacked jurisdiction to consider the petitions, jurisdiction to consider the portion of the appeal from the order that dismissed both petitions could not be vested in the supreme court. *Smith v. State*, 2009 Ark. 85, — S.W.3d —, 2009 Ark. LEXIS 49 (2009).

Construing an inmate's petition as one under this rule, the petition was untimely under subsection (c) of this rule because it was not filed within ninety days from the date of judgment, but was filed over a year after the judgment was entered. *McLeod v. State*, 2010 Ark. 95, — S.W.3d —, 2010 Ark. LEXIS 116 (Feb. 25, 2010).

Because the facts forming the basis for a writ of error coram nobis were known to defendant at the completion of defendant's direct appeal, because allegations of ineffective assistance of counsel were outside the purview of a coram-nobis proceeding, and because subsection (c) of this rule did not provide for a belated petition, defendant was not entitled to the relief sought. *Lee v. State*, 2011 Ark. 508, — S.W.3d —, 2011 Ark. LEXIS 586 (Dec. 1, 2011).

Denial of appellants', inmates', pro se petition for postconviction relief under Ark. R. Crim. P. 37.1 was improper because the petition was timely. They filed their petition 49 days after the date that the court of appeals issued the original mandate for the appeal on October 6, 2009; although the trial court might not have had the correct information available to it upon which to make a decision at the time that it issued the order, appellants' petition was timely filed. *Romero v. State*, 2012 Ark. 133, — S.W.3d —, 2012 Ark. LEXIS 152 (Mar. 29, 2012).

Prisoner's habeas corpus petition was properly dismissed as untimely under 28 U.S.C.S. § 2244(d) because the prisoner was not entitled to statutory tolling since the prisoner's initial petition for post-conviction relief was not properly filed under this rule since it was filed before the state appellate court's mandate was issued, and the prisoner was not entitled to equitable tolling since the prisoner could not show that an extraordinary circumstance, external to the prisoner and not attributable to the prisoner's actions, prevented the prisoner from timely filing an application for a writ of habeas corpus. *Johnson v. Hobbs*, 678 F.3d 607 (8th Cir. 2012).

#### Waiver of Issues.

A ground sufficient to void a conviction under subsection (c) of this rule must be one so basic that the judgment is a complete nullity, such as a judgment obtained in a court without jurisdiction to try the accused or a judgment obtained in violation of the provisions against double jeopardy. Issues not sufficient to void the conviction are waived even though they are of constitutional dimension,

and the burden is on the petitioner to demonstrate that the judgment entered was a nullity. *Travis v. State*, 286 Ark. 26, 688 S.W.2d 935 (1985); *Smittie v. Lockhart*, 843 F.2d 295 (8th Cir. 1988).

Issue waived where not raised in petition for post-conviction relief. *Snelgrove v. State*, 292 Ark. 116, 728 S.W.2d 497 (1987).

Where defendant did not authorize the filing of an ARCrP 37 petition by his attorney, who filed it without defendant's knowledge or participation, defendant should not be bound by the petition or his attorney's failure to raise the ineffective assistance of counsel claim. *Ford v. Lockhart*, 861 F. Supp. 1447 (E.D. Ark. 1994), sub nom. 38 F.3d 1046 (8th Cir. 1994), aff'd sub nom. 67 F.3d 162 (8th Cir. 1995).

The defendant waived any claim under this rule stemming from the denial of his motions to strike four jurors because those claims should have been raised on appeal. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001).

Circuit court did not have jurisdiction to entertain defendant's motion to dismiss the state's petition to revoke the suspended sentence he received for failure to comply with the reporting requirements of the Sex Offender Registration Act, § 12-12-901, because defendant failed to pursue postconviction relief under Ark. R. Crim. P. 37.1 within ninety days of the date of the entry of judgment; thus, he was barred from challenging his plea and conviction during a revocation proceeding. *Wicks v. State*, 2010 Ark. App. 499, — S.W.3d —, 2010 Ark. App. LEXIS 530 (June 16, 2010).

Postconviction petitioner's failure to obtain a ruling on an argument in a trial court precluded the Arkansas Supreme Court's review of that argument on appeal; petitioner could have sought a writ of mandamus to compel the trial court to act on the petition, which was filed under subsection (d) of this rule. *Strain v. State*, 2012 Ark. 184, — S.W.3d —, 2012 Ark. LEXIS 197 (Apr. 26, 2012).

#### When Relief Sought.

Since, under Arkansas law, state prisoners are precluded from filing a second post-conviction petition, whether or not they are alleging new grounds of error, where a habeas corpus petitioner did not raise claims of error before the state court, the United States Court of Appeals was not compelled to dismiss federal jurisdiction and defer to the Arkansas courts by giving them the initial opportunity to rule upon petitioner's claims. *Witham v. Mabry*, 596 F.2d 293 (8th Cir. 1979).

In a federal habeas corpus proceeding to review a conviction, the court will decline to rule on petitioner's claim until his state remedies for reduction of sentence have been clearly exhausted; he should present to the Supreme Court of Arkansas a petition for

leave to seek post-conviction relief. *Rogers v. Britton*, 466 F. Supp. 397 (E.D. Ark. 1979).

**Cited:** *Austin v. State*, 264 Ark. 318, 571 S.W.2d 584 (1978); *Davis v. Campbell*, 608 F.2d 317 (8th Cir. 1979); *Smothers v. State*, 273 Ark. 518, 621 S.W.2d 475 (1981); *Urquhart v. Lockhart*, 557 F. Supp. 1334 (E.D. Ark. 1983), *aff'd* 726 F.2d 1316 (8th Cir. 1984); *Shelton v. Lockhart*, 725 F.2d 82 (8th Cir. 1984); *Urquhart v. Lockhart*, 726 F.2d 1316 (8th Cir. 1984); *Virgin v. State*, 283 Ark. 382, 677 S.W.2d 840 (1984); *Edgemon v. Lockhart*, 768 F.2d 252 (8th Cir. 1985), *cert. denied* 475 U.S. 1085, 106 S. Ct. 1468, 89 L. Ed. 2d 724 (1986); *Lomax v. State*, 285 Ark. 440, 688 S.W.2d 283 (1985); *Trustees of First Baptist Church v. Ward*, 286 Ark. 238, 691 S.W.2d 151 (1985); *Pennington v. State*, 286 Ark. 503, 697 S.W.2d 85 (1985); *Pruett v. State*, 287 Ark. 124, 697 S.W.2d 872 (1985); *Nation v. State*, 287 Ark. 291, 697 S.W.2d 918 (1985); *Williamson v. Lockhart*, 636 F. Supp. 1298 (E.D. Ark. 1986); *Boyet v. State*, 290 Ark. 43, 716 S.W.2d 749 (1986); *Sanders v. State*, 291 Ark. 200, 723 S.W.2d 370 (1987); *Mock v. State*, 292 Ark. 148, 728 S.W.2d 513 (1987); *McClendon v. State*, 293 Ark. 173, 735 S.W.2d 701 (1987); *Stephens v. State*, 293 Ark. 231, 737 S.W.2d 147 (1987); *Walker v. Lockhart*, 852 F.2d 379 (8th Cir. 1988), *cert. denied* 489 U.S. 1088, 109 S. Ct. 1551, 103 L. Ed. 2d 854 (1989); *Buckley v. Lockhart*, 892 F.2d 715 (8th Cir. 1989), *cert. denied* 497 U.S. 1006, 110 S. Ct. 3243, 111 L. Ed. 2d 753 (1990); *Grisso v. State*, 297 Ark. 546, 763 S.W.2d 661 (1989); *Lewis v.*

*State*, 299 Ark. 310, 771 S.W.2d 773 (1989); *Dokes v. State*, 300 Ark. 424, 779 S.W.2d 182 (1989); *Tippitt v. Lockhart*, 903 F.2d 552 (8th Cir. 1990), *cert. denied* 498 U.S. 922, 111 S. Ct. 301, 112 L. Ed. 2d 254 (1990); *Wright v. Lockhart*, 914 F.2d 1093 (8th Cir. 1990), *cert. denied* 498 U.S. 1126, 111 S. Ct. 1089, 112 L. Ed. 2d 1193 (1991); *Chambers v. State*, 304 Ark. 663, 803 S.W.2d 932 (1991); *City of Fayetteville v. Stanberry*, 305 Ark. 210, 807 S.W.2d 26 (1991); *Hickson v. State*, 316 Ark. 783, 875 S.W.2d 492 (1994); *Bunn v. State*, 320 Ark. 516, 898 S.W.2d 450 (1995); *Pearson v. Norris*, 94 F.3d 406 (8th Cir. 1996); *Johninson v. State*, 330 Ark. 381, 953 S.W.2d 883 (1997), *questioned* *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003); *Johnson v. State*, 332 Ark. 182, 964 S.W.2d 199 (1998); *O'Brien v. State*, 334 Ark. 381, 974 S.W.2d 473 (1998); *Swopes v. State*, 338 Ark. 217, 992 S.W.2d 109 (1999); *Watts v. Norris*, 356 F.3d 937 (8th Cir. 2004), *cert. denied* 543 U.S. 904, 125 S. Ct. 201, 160 L. Ed. 2d 177 (2004); *Taylor v. State*, 94 Ark. App. 21, 223 S.W.3d 80 (2006); *Pierce v. State*, 2009 Ark. 606, — S.W.3d —, 2009 Ark. LEXIS 798 (2009); *Jamett v. State*, 2010 Ark. 28, 358 S.W.3d 874 (2010); *Smith v. State*, 2010 Ark. 137, 361 S.W.3d 840 (2010); *Lee v. State*, 2010 Ark. 261, — S.W.3d —, 2010 Ark. LEXIS 300 (May 27, 2010); *Moss v. State*, 2010 Ark. 284, — S.W.3d —, 2010 Ark. LEXIS 328 (June 3, 2010); *Robertson v. State*, 2010 Ark. 300, — S.W.3d —, 2010 Ark. LEXIS 342 (June 17, 2010).

**Rule 37.3. Nature of proceedings; summary disposition; appointment of counsel; evidentiary hearings; presence of petitioner [Reinstated and Revised — See Publisher's Notes].**

(a) If the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief, the trial court shall make written findings to that effect, specifying any parts of the files, or records that are relied upon to sustain the court's findings.

(b) If the original petition, or a motion for appointment of counsel should allege that the petitioner is unable to pay the cost of the proceedings and to employ counsel, and if the court is satisfied that the allegation is true, the court may at its discretion appoint counsel for the petitioner for any hearing held in the circuit court. If a petition on which the petitioner was represented by counsel is denied, counsel shall continue to represent the petitioner for an appeal to the Supreme Court, unless relieved as counsel by the circuit court or the Supreme Court. If no hearing was held or the petitioner proceeded *pro se* at the hearing, the circuit court may at its discretion appoint counsel for an appeal upon proper motion by the petitioner.

(c) When a petition is filed in the circuit court and the court does not dispose of the petition under subsection (a) hereof, the court shall cause notice of the filing thereof to be served on the prosecuting attorney and the petitioner's counsel of record at the trial court level; and on the petition the



court shall grant prompt hearing with proceedings reported. At any hearing ordered by the court the petitioner shall be present, unless the petitioner waives the right to appear or the trial court determines that the issues to be addressed at the hearing can be fairly resolved without the presence of the petitioner or the trial court directs that the testimony of petitioner be taken by deposition. The rules of evidence shall apply at any hearing. The court shall determine the issues and make written findings of fact and conclusions of law with respect thereto.

(d) When an order is rendered on a petition filed under this rule, the circuit court shall promptly mail a copy of the order to the petitioner. (Amended February 21, 1984; amended January 25, 1988, effective March 1, 1988; abolished May 30, 1990, effective July 1, 1990; reinstated and revised October 29, 1990, effective January 1, 1991; subsection (b) amended November 14, 1994.)

**Reporter's Notes, 1988 Amendment:** It is the committee's feeling that Rule 37.337.4(c) relating to notice should also include notice to the prisoner's trial counsel of record in order to eliminate any potential situations where a hearing is to be held concerning matters relating to trial counsel's

performance, or other matters of interest to trial counsel, without timely notice to counsel.

**Publisher's Notes.** As to abolition and subsequent reinstatement and revision of Rule 37, and continued applicability to certain persons, see Publisher's Notes, ARCrP 37.1.

## RESEARCH REFERENCES

**ALR.** Claims of Ineffective Assistance of Counsel in Death Penalty Proceedings - United States Supreme Court Cases. 31 ALR Fed. 2d 1.

Adequacy of Defense Counsel's Representation of Criminal Client Regarding Entrapment Defense - Federal Cases. 42 ALR Fed. 2d 145.

## CASE NOTES

### ANALYSIS

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### In General.

This rule is essentially former Rule 1 and is designed to attack unconstitutionality, lack of jurisdiction, excess of authorized sentences, and sentences otherwise subject to collateral

attack. *Rawls v. State*, 264 Ark. 954, 581 S.W.2d 311 (1979).

Supreme Court of Arkansas refused to reconsider its holding in *Tarry v. State*, 346 Ark. 267, 57 S.W.3d 163 (2001), that defendant would be allowed to proceed with a late appeal of his conviction only if his counsel admitted fault in failing to file the record in a timely fashion; regulation of the practice of law in state courts was a matter within the authority of the Supreme Court of Arkansas and the Court was not required to suspend its rules and procedures because a federal tribunal challenged the Court's authority *sua sponte*. *Tarry v. State*, 353 Ark. 158, 114 S.W.3d 161 (2003).

### Appeal.

When a pro se Rule 37 petition is denied, the petitioner is entitled to appeal, but with the right goes the responsibility to file a timely notice of appeal; the bare allegation that the notice was lost in the mail is not good cause to grant a belated appeal. *Alexander v. State*, 282 Ark. 216, 667 S.W.2d 366 (1984); *Moore v. State*, 285 Ark. 321, 686 S.W.2d 790 (1985).

To reverse a trial judge's denial of post-

conviction relief under this rule, the appellate court would have to find the court's decision was clearly erroneous and against the preponderance of the evidence. *Hall v. State*, 285 Ark. 38, 684 S.W.2d 261 (1985); *Stephens v. State*, 293 Ark. 231, 737 S.W.2d 147 (1987); *Flaherty v. State*, 297 Ark. 198, 761 S.W.2d 167 (1988).

Where an inmate alleged in his Rule 37 petition that he was unable to file a timely notice of appeal because he had not received notice from the circuit court, the fact that mail was delivered to the prison mailroom and not directly into the hands of the inmate was not in itself enough to overcome the presumption that a letter mailed was received by the person to whom it was addressed. *Moore v. State*, 285 Ark. 322, 688 S.W.2d 733 (1985).

Appellate court will grant a motion for belated appeal of the denial of a petition for post-conviction relief where the petitioner is not promptly provided a copy of the court's order. *Davis v. State*, 293 Ark. 203, 736 S.W.2d 281 (1987).

While subsection (b) of this rule affords a right to appointment of counsel for an appeal by an indigent, there is no requirement under the rule that the circuit clerk perfect the appeal for the petitioner. *Bragg v. State*, 297 Ark. 348, 760 S.W.2d 878 (1988).

Credibility is peculiarly within the province of the trier of fact. The decision of the trier of fact is binding on appeal in the absence of proof of abuse of discretion by the trial court. *Chandler v. State*, 297 Ark. 432, 762 S.W.2d 796 (1989).

Failure by clerk promptly to provide petition with court's order denying post-conviction relief as required by this rule was good cause to grant belated order of appeal. *Chiasson v. State*, 304 Ark. 110, 798 S.W.2d 927 (1990).

Trial court did not err in dismissing with prejudice inmate's petition for postconviction relief as the petition violated Ark. R. Crim. P. 37.1(d) and (e) in that it was not signed and verified by the inmate, it exceeded ten pages in length, and a compliant brief could not be filed within the time limitations of Ark. R. Crim. P. 37.2(c). *Boyle v. State*, 362 Ark. 248, 208 S.W.3d 134 (2005).

Trial court did not abuse its discretion when it denied defendant's request for a hearing because the trial court could conclude on the record submitted that defendant had not stated a cognizable claim for relief. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006).

### **Conclusive Record.**

Where record in the case was conclusive, petitioner was not entitled to a hearing on his petition for post-conviction relief. *Moore v. State*, 273 Ark. 231, 617 S.W.2d 855 (1981),

criticized *Woods v. State*, 278 Ark. 271, 644 S.W.2d 937 (1983).

Absent some compelling reason, appellate court will not grant a motion to supplement the record unless the proposed supplement was considered by the trial court. *Brown v. State*, 291 Ark. 143, 722 S.W.2d 845 (1987).

Where trial court failed to make written findings and conclusions of law pursuant to subsection (a) of this rule, but, after appellant's brief was filed, the record was remanded to the trial court on the joint petition of the parties and written findings and conclusions were entered by the trial court, the issue was moot. *Brown v. State*, 291 Ark. 393, 725 S.W.2d 544 (1987).

Where only writing entered by the trial court was an order denying relief case was reversed and remanded for entry of fact findings in accordance with subsection (c) of this rule. *Smith v. State*, 300 Ark. 291, 778 S.W.2d 924 (1989).

Where a jury convicted appellant of possession of cocaine, simultaneous possession of drugs and firearms, and possession of a firearm by a felon, the trial court sentenced him as an habitual offender to an aggregate term of 1320 months in prison; trial court denied his petition for post-conviction relief. While the trial court failed to comply with subsection (a) of this rule in that its order did not sufficiently identify the portions of the record relief upon, the Supreme Court of Arkansas did address each of appellant's points and held that the petition for post-conviction relief was without merit. *White v. State*, 2009 Ark. 225, — S.W.3d —, 2009 Ark. LEXIS 135 (2009).

Where it was conclusive on the face of defendant's petition under this rule that no relief was warranted, the trial court did not err in failing to hold an evidentiary hearing. *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918 (2010).

### **Evidentiary Hearing.**

Although a trial court has discretion pursuant to subsection (a) of this rule to decide whether the files and records relating to a motion for postconviction relief are sufficient to sustain the court's findings on the motion without conducting an evidentiary hearing, an evidentiary hearing should be held unless the files and record of a case conclusively show that the petitioner is entitled to no relief. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003).

### **—In General.**

Petitioner for post-conviction relief held entitled to evidentiary hearing. *Cusick v. State*, 259 Ark. 720, 536 S.W.2d 119 (1976); *Boyett v. State*, 290 Ark. 43, 716 S.W.2d 749 (1986).

If the motion can be decided on the record, no hearing is required, but if the record does



not show conclusively that the motion should be denied, a hearing must be held. *Morrison v. State*, 288 Ark. 636, 707 S.W.2d 323 (1986); *Stewart v. State*, 295 Ark. 48, 746 S.W.2d 58 (1988).

Where the defendant files a post-conviction petition to set aside his conviction without stating any facts, and the prior record is undisputed, the defendant does not show that an evidentiary hearing is required. *Franks v. State*, 289 Ark. 122, 709 S.W.2d 406 (1986); *Smith v. State*, 290 Ark. 90, 717 S.W.2d 193 (1986).

Where trial court makes no findings other than finding that petition is without merit, an evidentiary hearing is unnecessary. *Long v. State*, 294 Ark. 362, 742 S.W.2d 942 (1988).

The defendant may not employ an evidentiary hearing to develop other grounds for relief to those originally pled in his Rule 37 petition. *Gunn v. State*, 296 Ark. 105, 752 S.W.2d 262 (1988).

If it can be shown on the record, or on the face of the petition itself, that the allegations have no merit, the circuit court need not hold an evidentiary hearing. Moreover, where the record clearly establishes that the petition is without merit, the court will affirm, notwithstanding the trial court's failure to make specific reference to the parts of the record relied on to deny the petition, which this rule also requires. *Kain v. State*, 296 Ark. 123, 752 S.W.2d 265 (1988).

Where the defendant was not present for the hearing on his pretrial motion for a continuance and for his commitment to the Arkansas State Hospital for a mental examination, defendant's absence was not prejudicial, since defendant's trial counsel testified at the Rule 37 hearing that nothing during the trial surprised him and that he did not know of anything else he could have done in preparation for the trial even if the continuance had been granted. *Bell v. State*, 296 Ark. 458, 757 S.W.2d 937 (1988).

A hearing is not required on a petition containing conclusory allegations. *Garrett v. State*, 296 Ark. 550, 759 S.W.2d 23 (1988).

A factual basis for the guilty pleas can be supplied at a Rule 37 hearing. *Flaherty v. State*, 297 Ark. 198, 761 S.W.2d 167 (1988).

Subsection (a) of this rule provides that an evidentiary hearing is not required where the trial court can conclude from the files and records of the case that the petitioner is entitled to no relief. *Luna-Holbird v. State*, 315 Ark. 735, 871 S.W.2d 328 (1994).

Petitioner for post-conviction relief held not entitled to evidentiary hearing. *Nance v. State*, 339 Ark. 192, 4 S.W.3d 501 (1999).

Trial court properly denied relief without holding an evidentiary hearing in a death penalty case; conclusory allegations that are unsupported by the facts do not provide a

basis for either an evidentiary hearing or postconviction relief. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004).

Trial court's decision to render its decision denying appellant's petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1 without a hearing was not clearly erroneous because the trial court examined the record, found that appellant's ineffective assistance of counsel claims were without merit, entered written findings to that effect, and denied the petition without a hearing. *Richardson v. State*, 2011 Ark. 478, — S.W.3d —, 2011 Ark. LEXIS 556 (Nov. 10, 2011).

Trial court properly denied defendant's petition for postconviction relief after defendant was convicted of aggravated robbery and felony theft of property because the record did not show deficient investigation on the part of counsel; counsel argued that defendant did not have the intent to commit aggravated robbery and moved for a directed verdict on that very basis. *Sartin v. State*, 2012 Ark. 155, — S.W.3d —, 2012 Ark. LEXIS 178 (Apr. 12, 2012).

Granting of petitioner's, an inmate's, petition for writ of mandamus was appropriate because the circuit court failed to provide the required rulings on each of the issues raised in his Ark. R. Crim. P. 37.1 petition, and because the inmate properly filed a motion for modification to obtain the missing rulings. *Garcia v. Arnold*, 2012 Ark. 253, — S.W.3d —, 2012 Ark. LEXIS 269 (May 31, 2012).

#### —Burden of Proof.

A Rule 37 hearing is not a trial. The petitioners have the burden of proof, not the state. *Flaherty v. State*, 297 Ark. 198, 761 S.W.2d 167 (1988).

Without some showing of prejudice as required by Strickland, it was conclusive on the face of defendant's postconviction petition that no relief was warranted, and a trial court did not err under subsection (a) of this rule in failing to hold an evidentiary hearing. *Scott v. State*, 2012 Ark. 159, — S.W.3d —, 2012 Ark. LEXIS 177 (Apr. 12, 2012).

#### —Credibility of Witnesses.

At a Rule 37 hearing, the credibility of witnesses is for the trial judge to determine. *Pettit v. State*, 296 Ark. 423, 758 S.W.2d 1 (1988).

#### —Exclusion of Evidence.

Disguised evidentiary argument that testimony should have been admitted under § 5-4-602(4), which states that the rules of evidence, such as hearsay, do not apply to mitigating evidence in capital cases, was not entertained in Rule 37 petition. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995).

**Failure to Understand Nature of Guilty Plea.**

Where the defendant advised the judge that he fully understood his rights and the nature of the charges against him at the time his guilty plea was entered, he would not be later heard, on a motion pursuant to this rule, to complain that he did not. *Renfro v. State*, 264 Ark. 601, 573 S.W.2d 53 (1978).

**Findings.**

Where the trial court rules on a defendant's motion for post-conviction relief without specifying any findings, or parts of the record relied upon in doing so, reversible error is committed. *Robinson v. State*, 264 Ark. 186, 569 S.W.2d 662 (1978); *State v. Manees*, 264 Ark. 190, 569 S.W.2d 665 (1978).

Where the entire record had been furnished to the Supreme Court, the court was able to determine from the record that it conclusively demonstrated that the motion to withdraw a plea was without merit, even though the trial court failed to make written findings of fact specifying the parts of the files or records that were relied upon to sustain the court's findings. *Rawls v. State*, 264 Ark. 954, 581 S.W.2d 311 (1979).

Where the trial court, after a Rule 37 hearing, approved and signed an order, drafted by the prosecuting attorney at the request of the court, that denied a petition for post-conviction relief, the court adopted such order as its own and the order was in compliance with subsection (c) of this rule which required the court to make written findings of fact and conclusions of law. *Scott v. State*, 267 Ark. 628, 593 S.W.2d 27 (1980).

The failure of the trial judge to make specific reference to the parts of the record he relied on to deny the petition as required by this rule is reversible error; however, if the entire record conclusively shows that the petition was without merit, the Supreme Court will affirm, even though the trial court failed to make written findings of fact specifying the parts of the record that were relied upon to sustain the denial. *Morrison v. State*, 288 Ark. 636, 707 S.W.2d 323 (1986).

Where a petition for Rule 37 relief is filed, the court must either: (1) grant a hearing on the petition, or (2) make a determination from the files and records if they conclusively show that the petitioner is entitled to no relief. If the petition is summarily denied without an evidentiary hearing, the court must make written findings specifying the parts of the files and records relied upon in denying the petition. *Brown v. State*, 291 Ark. 143, 722 S.W.2d 845 (1987).

Where trial court failed to make a factual determination as required by ARCrP 24.6 at a Rule 37 hearing, such facts may be proven to have existed at the time of the guilty plea, and where the factual basis is established at his

Rule 37 hearing, the appellant has not been prejudiced. *Grover v. State*, 291 Ark. 508, 726 S.W.2d 268 (1987).

The circuit court's findings were conclusory because they did not reflect how the court applied the standard for ineffective assistance of counsel claims to the allegations that were raised in the appellant's petition and that were addressed during the postconviction hearing; therefore, the order would be reversed and remanded for appropriate findings. *Coleman v. State*, 338 Ark. 545, 998 S.W.2d 748 (1999).

The circuit court's findings were conclusory as they did not address the numerous allegations listed in the appellant's petition or those reiterated on appeal; therefore, the order would be reversed and remanded for fact-findings. *Dulaney v. State*, 338 Ark. 548, 999 S.W.2d 181 (1999).

It is the defendant's obligation to obtain a ruling on any issues omitted from the written findings of the trial court in order to preserve those issues for appeal. *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000).

Trial court's written findings in the order denying defendant post-conviction relief were not deficient where the court mistakenly referred to defendant's medical records for treatment of a gunshot wound to his hand as being introduced during his testimony but where the records were, in fact, introduced at the close of testimony "for the record only"; further, although the trial court did not use the term "conclusively" in its order, its findings on the points addressed were clearly to that effect. *Rutledge v. State*, 361 Ark. 229, 205 S.W.3d 773 (2005).

Under subsection (a) of this rule, a trial court did not err in not holding a hearing on defendant's petition for postconviction relief because it made specific written findings regarding defendant's claims and noted the evidence from the record upon which it relied. *Clarks v. State*, 2011 Ark. 296, — S.W.3d —, 2011 Ark. LEXIS 291 (July 27, 2011).

Summary denial of an inmate's Ark. R. Crim. P. 37.1 postconviction relief petition was reversed because the order did not provide the requisite findings and conclusions, and the record did not clearly support affirmation; because no hearing was held, the trial court had an obligation to provide written findings that showed that the inmate was entitled to no relief. It was not conclusive from the petition or the record that relief was not warranted on the inmate's claims concerning illegal sentencing as there was no evidence that counsel agreed to allow the court to sentence on a gun enhancement charge. *Davenport v. State*, 2011 Ark. 105, — S.W.3d —, 2011 Ark. LEXIS 91 (Mar. 10, 2011).

Denial of the inmate's petition for postcon-



viction relief under this rule was improper as to the competency issue because the supreme court was unable to determine whether there were any results of the mental evaluation of which the parties or the court might have been made aware, whether those results were contested, or whether there was any other resolution settling the issue of the inmate's competency to proceed and enter his plea. *Sandoval-Vega v. State*, 2011 Ark. 393, — S.W.3d —, 2011 Ark. LEXIS 494 (Sept. 29, 2011).

In a postconviction proceeding, the trial court's lack of written findings of fact and conclusions of law, as required by subsection (a) of this rule, amounted to reversible error because based on the transcript of the plea hearing and the alleged positive misrepresentations of trial counsel regarding defendant's parole eligibility, it could not be said that the files and record conclusively showed that defendant was entitled to no relief. *Olivarez v. State*, 2012 Ark. 24, — S.W.3d —, 2012 Ark. LEXIS 40 (Jan. 26, 2012).

Denial of appellant's, an inmate's, petition for postconviction relief pursuant to Ark. R. Crim. P. 37 was appropriate because the circuit court's written findings complied with this rule. In part, the inmate himself submitted a portion of the record with his petition and the circuit court, in its order, stated that it reviewed the pleadings and transcripts in denying the inmate's petition for postconviction relief; in doing so, the circuit court outlined the inmate's claims and the reasons for its denial of those claims. *Henington v. State*, 2012 Ark. 181, — S.W.3d —, 2012 Ark. LEXIS 205 (Apr. 26, 2012).

#### —Written Findings Mandatory.

The provisions of this rule requiring written findings are mandatory, for on review the court determines whether the findings are supported by a preponderance of the evidence and, unless they are clearly erroneous, they will be affirmed, and thus the court must have specific findings regarding the facts in the case and the conclusion of law so that there can be a meaningful review of these findings. *Williams v. State*, 272 Ark. 98, 612 S.W.2d 115 (1981).

When an evidentiary hearing is held on a Rule 37 petition, subsection (a) of this rule is mandatory and requires written findings. *Bumgarner v. State*, 288 Ark. 315, 705 S.W.2d 10 (1986).

If the record conclusively shows that a petitioner is not entitled to a hearing on any issue raised in the motion, the appellate court will not reverse for a failure to make written findings of fact and conclusions of law explaining why the motion was denied. However, once a hearing is held and an issue is actually considered by the court, its resolution must be supported by written findings so

that there can be a meaningful review of the proceedings. *Bumgarner v. State*, 288 Ark. 315, 705 S.W.2d 10 (1986).

The trial court was not in compliance with this rule where it did not make written findings that the defendant was not entitled to relief, and where the record before the appellate court did not conclusively show that the defendant's petition was without merit. *Bohanan v. State*, 327 Ark. 507, 939 S.W.2d 832 (1997).

Subsection (c) of this rule requires without exception that the order denying a motion for postconviction relief contain written findings of fact and conclusions of law. *Beshears v. State*, 329 Ark. 469, 947 S.W.2d 789 (1997).

When the trial court fails to enter written findings as required by subsection (c) of this rule, the supreme court will reverse and remand the case to the trial court for written findings of fact and conclusions of law on a defendant's claim for postconviction relief. *Beshears v. State*, 329 Ark. 469, 947 S.W.2d 789 (1997).

While the supreme court has affirmed the denial of Rule 37 petitions notwithstanding the trial court's failure to make written findings as required by subsection (a) of this rule, it has done so only where it can be determined from the record that the petition is wholly without merit or where the allegations in the petition are such that it is conclusive on the face of the petition that no relief is warranted. *Wooten v. State*, 338 Ark. 691, 1 S.W.3d 8 (1999).

Where the trial judge did not make any written findings in his order and did not specify what parts of the files or record were relied upon in denying a petition for postconviction relief, the court was unable to affirm because the record, which primarily consisted of the petition, the state's response, and the trial court's order, did not conclusively show that the petition was without merit, it was not clear from the face of the petition that no relief was warranted, and the record on appeal did not show whether the trial court had an opportunity to review the trial record. *Wooten v. State*, 338 Ark. 691, 1 S.W.3d 8 (1999).

Merits of the case could not be decided because the circuit court order was merely conclusory; it did not enter written findings of fact and conclusions of law, which is mandatory under this rule. *Taylor v. State*, 340 Ark. 308, 9 S.W.3d 515 (2000).

Where a trial court concludes, without a hearing, that a petitioner is not not entitled to postconviction relief from a criminal conviction, subsection (a) of this rule requires the trial court to make written findings specifying the parts of the record the form the basis of the trial court's decision; if the trial court fails to make such findings, it is reversible error

unless the record on appeal conclusively shows that the petition is without merit. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003).

Where appellant was convicted of possession of methamphetamine, manufacturing methamphetamine, and possession of paraphernalia with the intent to manufacture methamphetamine, he filed a petition for postconviction relief alleging: (1) that he was subjected to double jeopardy; (2) that his trial counsel was ineffective for failing to make an accomplice-corroboration argument; and (3) that his trial counsel was ineffective for failing to object to the affidavit supporting the search warrant for his residence. The circuit judge erred by denying appellant's petition without a hearing and without making findings of fact on the allegations raised in the petition, as required by this rule. *Reed v. State*, 375 Ark. 277, 289 S.W.3d 921 (2008).

Trial court did not fail to provide adequate written findings to support its decision denying appellant's petition under Ark. R. Crim. P. 37.1 as required by this rule because the petition was wholly without merit; appellant failed to set forth facts sufficient to sustain a finding that any alleged ineffective assistance of trial counsel resulted in prejudice. *Rodriguez v. State*, 2010 Ark. 78, — S.W.3d —, 2010 Ark. LEXIS 105 (Feb. 18, 2010).

Case was remanded with instructions for the circuit court to enter written findings of fact and conclusions of law because the circuit court's order denying defendant's petition for postconviction relief was conclusory in nature and failed to comply with this rule. *Barrow v. State*, 2012 Ark. 197, — S.W.3d —, 2012 Ark. LEXIS 221 (May 10, 2012).

#### **Ineffective Assistance of Counsel.**

Where the case records do not show conclusively that a defendant has been effectively represented by counsel, the circuit court errs when it denies a defendant's pro se petition for post-conviction relief without an evidentiary hearing as to the adequacy of the defense counsel. *Blackmon v. State*, 268 Ark. 316, 595 S.W.2d 689 (1980).

An inmate is at a disadvantage in properly framing a petition alleging ineffective assistance of counsel and in an even more difficult position in proving the allegations; thus it is incumbent on the trial court to look at the entire record and files before making a determination to deny a petition without a hearing. *Brown v. State*, 291 Ark. 143, 722 S.W.2d 845 (1987).

When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that the counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings

would have been different. In order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial; a defendant whose conviction is based upon a plea of guilty will have difficulty proving any prejudice since his plea rests upon his admission in open court that he did the act with which he is charged. *Proctor v. State*, 291 Ark. 459, 725 S.W.2d 827 (1987).

Where ineffective assistance of counsel argument was not accompanied by a statement that defendant would not have pled guilty but for counsel's error, his argument would not be considered. *Garrett v. State*, 296 Ark. 550, 759 S.W.2d 23 (1988).

The circuit court erred when it failed to hold an evidentiary hearing on the defendant's claim that his attorney was ineffective for failing to file a motion to suppress his custodial statement since the record did not conclusively show that the claim was without merit where (1) the evidence that was introduced during the trial did not conclusively show that the alleged failure to file the motion did not prejudice the defendant, and (2) there was no means of determining whether counsel performed deficiently when he did not file a motion to suppress. *Carter v. State*, 342 Ark. 535, 29 S.W.3d 716 (2000).

Circuit court clearly erred in denying defendant's motion for postconviction relief, because the petition provided specific facts to establish actual prejudice due to counsel's conduct at trial and the allegations were not conclusory, when counsel's performance was deficient by failing to suppress defendant's custodial statement as a violation of the Sixth Amendment right to counsel, and the deficient performance prejudiced the defense since the inclusion of defendant's statement as the state's evidence at trial and used in affirming the conviction was sufficient to find that there was a reasonable probability that the decision reached would have been different absent counsel's failure to suppress the statement; the conviction resulted from a breakdown in the adversary process that rendered the result unreliable. *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008).

In an Ark. R. Crim. P. 37.1 case in which an inmate had been convicted of one count of delivery of a controlled substance and received an enhanced sentence pursuant to § 5-64-411(a)(7) (now § 5-64-411(a)(8)), he unsuccessfully argued that his trial counsel was ineffective because he failed to adequately investigate the facts underlying the application of the enhancement prior to trial or to flesh them out appropriately during cross-examination. As to the failure to investigate, the inmate made only a conclusory statement,



wholly lacking in allegations of prejudice; as to the cross-examination claim, his argument provided him no relief as he was procedurally barred from raising it on appeal. *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (2010).

Although petitioner asserted that counsel was ineffective for failure to renew his motion for a directed verdict and for failure to offer instructions on lesser-included offenses, petitioner failed to offer facts to support his conclusion that the failure to move for a directed verdict and offer instructions on lesser-included offenses prejudiced him or his defense. *Mitchell v. State*, 2012 Ark. 242, — S.W.3d —, 2012 Ark. LEXIS 271 (May 31, 2012).

Circuit court did not err in denying postconviction relief without a hearing under subsection (a) of this rule, because appellant failed to demonstrate he was prejudiced by trial counsel's alleged impairment or how her failure to call additional witnesses to testify that appellant's confession was coerced would have changed the outcome of trial. *Charland v. State*, 2012 Ark. 246, — S.W.3d —, 2012 Ark. LEXIS 259 (May 31, 2012).

#### **Mandamus.**

A petitioner was entitled to mandamus directing a judge to enter a order on a petition under this rule within seven days where he failed to act within a reasonable time on the petition even after several telephone calls from a supreme court staff attorney. *Ladwig v. Davis*, 340 Ark. 415, 10 S.W.3d 461 (2000).

#### **Notice to Petitioner.**

In order to provide for prompt, consistent notice to petitioners when a ruling is made on a petition for post-conviction relief, the supreme court amended this rule on February 21, 1984, to require that a copy of the court's order be promptly mailed to the petitioner. *Scott v. State*, 281 Ark. 436, 664 S.W.2d 475 (1984).

The supreme court will grant a belated appeal under former ARCrP 36.9 if the clerk neglects to comply with subsection (d) of this rule. *Porter v. State*, 287 Ark. 359, 698 S.W.2d 801 (1985).

When the record is silent on whether the clerk complied with the rule by mailing notice to the petitioner of the court's order, and the attorney general in his response to a motion for belated appeal is unable to provide the clerk's affidavit or some other proof that the order was mailed, it will be assumed that the petitioner was not notified of the denial of his petition. *Porter v. State*, 287 Ark. 359, 698 S.W.2d 801 (1985); *Kelly v. State*, 301 Ark. 294, 783 S.W.2d 369 (1990).

Mailing to defendant's counsel rather than to defendant a copy of the order denying petition for postconviction relief fulfilled

court's obligations to notify defendant under this rule. *Davis v. State*, 293 Ark. 203, 736 S.W.2d 281 (1987).

#### **Right to Counsel.**

There is no right to appointment of counsel in the preparation of a petition under this rule. *Watson v. State*, 282 Ark. 246, 667 S.W.2d 953 (1984).

Since postconviction proceedings are civil in nature, there is no constitutional right to appointment of counsel to prepare a petition under this rule. This rule provides for the appointment of counsel by the circuit court where a hearing is granted and where the petitioner is unable to afford counsel. *Robinson v. State*, 295 Ark. 693, 751 S.W.2d 335 (1988).

Arkansas does provide for discretionary appointment of counsel for ARCrP 37 petitions; if a hearing is granted, counsel is required. *Wainwright v. Norris*, 836 F. Supp. 619 (E.D. Ark. 1993).

Since the repeal of § 16-92-108(b)(2) in 1993, there is no statutory authority for the granting of counsel, although the state courts continue to pay discretionary amounts to lawyers if they choose to appoint them. *Wainwright v. Norris*, 836 F. Supp. 619 (E.D. Ark. 1993).

The fact that defendant was not satisfied with the appointed counsel's efforts did not entitle the defendant to appointment of a different attorney; even on direct appeal of a judgment, a defendant does not enjoy the absolute right to counsel of his choosing. *Franklin v. State*, 327 Ark. 537, 939 S.W.2d 836 (1997).

Even though petitioner filed an pro se amended Rule 37 petition and a pro se notice of appeal, his attorney had not been relieved and was thus obligated to continue representing him, which included lodging the Rule 37 record on appeal. *Sanders v. State*, 329 Ark. 363, 952 S.W.2d 133 (1997).

Rule 16 of the Rules of Appellate Procedure — Criminal, requiring counsel to continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court, applies to appeals of orders denying postconviction relief. *Sanders v. State*, 329 Ark. 363, 952 S.W.2d 133 (1997).

Denial of the appellant's, an inmate's, motion for counsel to represent him in his appeal from the denial of his motion for postconviction relief was appropriate because there was no constitutional right to an attorney in postconviction proceedings and because none of the inmate's claims in the motion amounted to a showing of merit. The supreme court was not persuaded by his argument that because an interpreter was provided, he should also have been provided counsel. *Viveros v. State*, 372 Ark. 463, 277 S.W.3d 223 (2008).

**Right to Relief.**

The circuit court may deny a petition for post-conviction relief without a hearing if the petition and files and records of the case conclusively show that the prisoner is entitled to no relief. *Scott v. State*, 281 Ark. 436, 664 S.W.2d 475 (1984); *Smith v. State*, 291 Ark. 496, 725 S.W.2d 849 (1987).

**Sentencing.**

Where trial judge, prior to accepting defendant's guilty plea, told defendant he did not know how the concurrent sentences he was imposing would affect the sentence from which defendant was currently on parole, there was no deception such as to warrant post-conviction relief. *Stevens v. State*, 262 Ark. 216, 555 S.W.2d 229 (1977).

**Withdrawal of Guilty Plea.**

A motion to withdraw a guilty plea must necessarily be made under this rule if it is filed after the sentence has been carried into execution. *Simmons v. State*, 265 Ark. 48, 578 S.W.2d 12 (1979).

**Writ of Mandamus.**

A writ of mandamus can be granted to compel the circuit court to act on a petition filed under this rule. *Costillo v. Goodson*, 288 Ark. 639, 707 S.W.2d 776 (1986).

**Written Opinion.**

The fact that the state court denied Rule 37 motion without issuing a written opinion setting forth findings of fact and conclusions of law did not violate the defendant's constitutional rights, since there is no requirement that the court issue a written memorandum when no hearing has been held. *Riley v. Lockhart*, 726 F.2d 421 (8th Cir. 1984).

Because defendant's postconviction claims

were wholly without merit and presented no impediment to review, a trial court did not err in denying defendant's postconviction petition without making written findings or conducting an evidentiary hearing under subdivision (c) of this rule. *Greer v. State*, 2012 Ark. 158, — S.W.3d —, 2012 Ark. LEXIS 173 (Apr. 12, 2012).

**Cited:** *Moore v. State*, 262 Ark. 27, 553 S.W.2d 29 (1977); *Smith v. State*, 264 Ark. 329, 571 S.W.2d 591 (1978); *Stocker v. State*, 280 Ark. 450, 658 S.W.2d 879 (1983); *Edgemon v. Lockhart*, 768 F.2d 252 (8th Cir. 1985), cert. denied 475 U.S. 1085, 106 S. Ct. 1468, 89 L. Ed. 2d 724 (1986); *Moore v. State*, 285 Ark. 321, 686 S.W.2d 790 (1985); *Pennington v. State*, 286 Ark. 503, 697 S.W.2d 85 (1985); *Jones v. State*, 288 Ark. 375, 705 S.W.2d 874 (1986); *Craft v. State*, 289 Ark. 466, 712 S.W.2d 303 (1986); *Schneider v. State*, 290 Ark. 454, 720 S.W.2d 709 (1986); *Birchett v. State*, 291 Ark. 379, 724 S.W.2d 492 (1987); *Costillo v. State*, 292 Ark. 43, 728 S.W.2d 153 (1987), overruled *Oliver v. State*, 323 Ark. 743, 918 S.W.2d 690 (1996); *Stewart v. State*, 293 Ark. 262, 737 S.W.2d 161 (1987); *Malone v. State*, 294 Ark. 127, 741 S.W.2d 246 (1987); *Richie v. State*, 298 Ark. 358, 767 S.W.2d 522 (1989); *Kelly v. State*, 298 Ark. 465, 768 S.W.2d 533 (1989); *Mullins v. State*, 303 Ark. 695, 799 S.W.2d 550 (1990); *Bilyeu v. State*, 337 Ark. 304, 987 S.W.2d 277 (1999); *Tarry v. State*, 346 Ark. 267, Ark. 57 S.W.3d 163 (2001); *Fudge v. State*, 354 Ark. 148, 120 S.W.3d 600 (2003); *Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004), cert. denied 543 U.S. 932, 125 S. Ct. 326, 160 L. Ed. 2d 235 (2004); *Rankin v. State*, 365 Ark. 255, 227 S.W.3d 924 (2006); *Shaw v. State*, 2010 Ark. 112, — S.W.3d —, 2010 Ark. LEXIS 129 (Mar. 4, 2010).

**Rule 37.4. Relief [Reinstated and Revised — See Publisher's Notes].**

If the circuit court finds that for any reason the petitioner is entitled to relief, then the circuit court may set aside the original judgment, discharge the petitioner, resentence him or her, grant a new trial, or otherwise correct the sentence, as may appear appropriate in the proceedings. (Abolished May 30, 1990, effective July 1, 1990; reinstated and revised October 29, 1990, effective January 1, 1991.)

**Publisher's Notes.** As to abolition and subsequent reinstatement and revision of Rule 37, and continued applicability to cer-

tain persons, see Publisher's Notes, ARCrP 37.1.

**RESEARCH REFERENCES**

**ALR.** Justification and Correction of Remarks or Acts of State Trial Judge Criticizing, Rebuking, or Punishing Defense Counsel in

Criminal Case as Otherwise Requiring New Trial or Reversal. 54 ALR 6th 429.



## CASE NOTES

## ANALYSIS

Construction.  
Competency of defendant.  
Federal courts.  
New trial.  
Relief denied.  
Waiver.

**Construction.**

Section 16-90-111, permitting a court to correct an illegal sentence, is in conflict with this rule. *Ashe v. State*, 57 Ark. App. 99, 942 S.W.2d 267 (1997).

**Competency of Defendant.**

Where evidence showed that defendant was delusional while on trial, the trial judge should have halted the trial and made a new determination of competency; while the failure to hold a further competency hearing violated due process, the proper remedy was not to grant the writ of habeas corpus, but to conduct a post-conviction competency hearing. *Reynolds v. Norris*, 86 F.3d 796 (8th Cir. 1996).

**Federal Courts.**

The United States District Court has no authority to order or direct the trial court or the Arkansas Supreme Court to take any action relative to granting a defendant relief; the appropriate avenue for federal relief is to grant a petition for habeas corpus, not to order or direct the state courts to take some action. *Nail v. State*, 315 Ark. 675, 869 S.W.2d 705 (1994).

**New Trial.**

Jury misconduct under ARCP 59(a)(2) may apparently be used in a criminal proceeding as a basis for granting a new trial. *Trimble v. State*, 316 Ark. 161, 871 S.W.2d 562 (1994).

Defense counsel's dual representation of

two brothers, one of whom entered into a plea agreement and then testified against the other brother, created an actual conflict of interest; because defense counsel could not effectively cross-examine the first brother, the second brother was adversely affected and entitled to a new trial. *Sheridan v. State*, 331 Ark. 1, 959 S.W.2d 29 (1998).

**Relief Denied.**

Appellant was not entitled to relief where it was reasonably clear from the record that all of the parties involved in the plea agreement, with the possible exception of the appellant, fully understood that a person serving a life sentence is not eligible for parole, and that, under normal circumstances, at some point in time, a life sentence may be commuted to a term of years by the executive branch of the government, at which point the prisoner could become eligible for parole. *Vagi v. State*, 296 Ark. 377, 757 S.W.2d 533 (1988).

Where there was ample evidence from which the trial court could have concluded that there was no off-the-record motion for mistrial, counsel on appeal could not have been ineffective in failing to move to supplement the record to show a timely motion for mistrial, and accordingly, the petitioner did not show that he was entitled to any relief pursuant to this rule. *Dumond v. State*, 297 Ark. 21, 759 S.W.2d 36 (1988).

**Waiver.**

A guilty plea waives nonjurisdictional defects and errors. *Garrett v. State*, 296 Ark. 550, 759 S.W.2d 23 (1988).

**Cited:** *McDaniel v. State*, 288 Ark. 629, 708 S.W.2d 613 (1986), questioned *Bolt v. State*, 314 Ark. 387, 862 S.W.2d 841 (1993); *Hicks v. State*, 289 Ark. 83, 709 S.W.2d 87 (1986); *Van Harris v. State*, 297 Ark. 573, 764 S.W.2d 606 (1989).

**Rule 37.5. Special rule for persons under sentence of death.**

(a) *Purpose and scope.* This rule shall apply only to persons under a sentence of death. Except as otherwise provided in this rule, the provisions of Rules 37.1, 37.2, 37.3 and 37.4 shall apply to a petition for post-conviction relief filed by a person under sentence of death. The intent of this rule is to comply with the provisions of 28 United States Code § 2261 et seq.

(b) *Requirement of hearing on appointment of attorney.*

(1)(A) Upon affirmance of a sentence of death by the Supreme Court of Arkansas, the clerk of the court shall forward a copy of the mandate to the circuit court that imposed the sentence of death and to the Attorney General. The circuit court shall conduct a hearing to consider the appointment of an attorney to represent the person in post-conviction proceedings

under this rule. If the Supreme Court affirms a sentence of death, the hearing shall be held not later than twenty-one (21) days after the mandate is issued by the Supreme Court.

(B) If the mandate is recalled within the twenty-one (21) day period, the requirement of a hearing shall be suspended until the mandate is reissued. The hearing shall be held within twenty-one (21) days after the mandate is reissued. If the hearing has already been held when the mandate is recalled, any findings and order entered pursuant to this subsection shall be deemed null and void and a new hearing shall be required within twenty-one (21) days after the mandate is reissued.

(2) The person under sentence of death shall be present at the hearing. At the hearing the circuit court shall inform the person of the existence of possible relief under this rule and shall determine whether the person desires the appointment of an attorney to represent him in proceedings under this rule. If the person rejects the appointment of an attorney, the waiver shall be made in open court on the record. If the circuit court determines that the person is indigent and that he either accepts the appointment of an attorney or is unable to make a competent decision whether to accept or reject an attorney, the circuit court shall issue written findings to that effect and enter a written order appointing an attorney to represent the person in proceedings under this rule. If the circuit court determines that the person rejects the appointment of an attorney and understands the legal consequences of his decision, or that the person is not indigent, the circuit court shall issue written findings to that effect and enter a written order declining to appoint an attorney to represent the person in proceedings under this rule. In determining whether the person is indigent, the circuit court shall consider the extraordinary cost of post-conviction proceedings in a capital case. The written findings and order required by this subsection shall be issued within seven (7) days after the hearing required by this subsection. The circuit clerk shall forward a copy of the order to the Attorney General.

(3) The appointment of an attorney under this rule shall remain effective through an appeal to the Supreme Court from a proceeding under this rule.

(c) *Qualifications of appointed attorney.*

(1) Except as provided in subsection (c)(4) of this rule, an attorney appointed to represent a person under this rule shall meet each of the following standards:

(A) Within ten (10) years immediately preceding the appointment, the attorney shall have:

(i) represented a petitioner under sentence of death in a state or federal post-conviction proceeding; or

(ii) actively participated as defense counsel in at least five (5) felony jury trials tried to completion, including one trial in which the death penalty was sought; and

(B) Within ten (10) years immediately preceding the appointment, the attorney shall have:

(i) represented a petitioner in at least three state or federal post-conviction proceedings, one of which proceeded to an evidentiary hearing and all of which involved a conviction of a violent felony, including one conviction of murder; or

(ii) represented a defendant in at least three (3) appeals involving a conviction of a violent felony, including one conviction of murder, and



represented a petitioner in at least one evidentiary hearing in a state or federal post-conviction proceeding; and

(C) The attorney shall have been actively engaged in the practice of law for at least three (3) years; and

(D) Within two (2) years immediately preceding the appointment, the attorney shall have completed at least six (6) hours of continuing legal education or other professional training in the representation of persons in capital trial, capital appellate, or capital post-conviction proceedings.

(2) The circuit court may appoint *pro hac vice* an attorney who is not licensed to practice in Arkansas but who meets the standards of (c)(1) provided the court also appoints as co-counsel an attorney who is licensed to practice in Arkansas. In such case, the attorney who is licensed to practice in Arkansas is not required to meet the standards of (c)(1).

(3) The court shall make findings, either on the record or in the written order required by subsection (b) of this rule, specifying the qualifications of counsel which satisfy the standards for appointment under this rule.

(4) The circuit court may appoint an attorney who does not meet the standards of (c)(1)(A) and (c)(1)(B), but who does meet the standards of (c)(1)(C) and either (c)(1)(A), (B), or (D) if the circuit court determines that the attorney is clearly qualified because of his unique training, experience, and background to represent a person under sentence of death in a post-conviction proceeding. The order appointing such an attorney shall contain written findings specifying the unique training, experience, and background that qualify the attorney for appointment.

(5) The circuit court shall not appoint an attorney under this rule if the attorney represented the person under a sentence of death at trial or on direct appeal to the Supreme Court of Arkansas unless the person and the attorney request continued representation on the record. If the circuit court does appoint an attorney who represented the person at trial or on direct appeal, the circuit court shall appoint a second attorney, who did not represent the person at trial or on direct appeal, to assist in the representation of the person. At least one of the attorneys shall meet the standards of (c)(1) or (c)(4).

(6) In accordance with the terms of this rule, the circuit court may appoint the Capital, Conflicts, and Appellate Office of the Arkansas Public Defender Commission, unless otherwise disqualified.

(d) *Access to records.* If a person is under sentence of death, any attorney who represented such person at trial or on appeal in connection with the conviction that resulted in the sentence of death shall make available the complete files in connection with such conviction to the attorney who represents such person in post-conviction proceedings under this rule. The attorney who represents such person in post-conviction proceedings may inspect and photocopy such files, but the attorneys who represented such person at trial or on appeal shall maintain custody of their respective files, except for material which was admitted into evidence in any trial proceeding, for at least five (5) years following completion of their representation of such person.

(e) *Time for filing post-conviction petition.* A petition for relief under this rule shall be filed in the circuit court that imposed the sentence of death within ninety (90) days after the entry of the order required in subsection (b)(2) of this rule.

(f) *Notification of filing of petition.* Upon the filing of a petition under this rule, the petitioner shall immediately forward a copy of the petition to the circuit judge who entered the order required in subsection (b)(2) of this rule, the prosecuting attorney for the district, the Attorney General, the petitioner's counsel of record at the trial resulting in the sentence of death, and the Executive Director of the Arkansas Public Defender Commission.

(g) *Effect on sentence of death.* When the circuit court enters an order under subsection (b) of this rule, the court shall also enter an order staying any sentence of death. The stay of execution shall remain in effect until dissolved by a court with com-petent jurisdiction. The circuit court shall enter an order dissolving the stay of execution if:

(1) A timely petition is not filed under this rule; or

(2) A timely petition is filed under this rule but relief is denied by the circuit court under subsection (i) of this rule, and either the denial of relief is affirmed on appeal or the time for filing an appeal from the denial of relief has expired without the filing of a notice of appeal.

(h) *Hearing on petition.* If the circuit court determines that a hearing is necessary, the hearing shall be held within one hundred eighty (180) days from the date of the filing of the petition, unless continued for good cause shown.

(i) *Decision.* If a hearing on the petition is held, the circuit court shall, within sixty (60) days of the conclusion of the hearing, make specific written findings of fact with respect to each factual issue raised by the petition and specific written conclusions of law with respect to each legal issue raised by the petition. If no hearing on the petition is held, the circuit court shall, within one hundred twenty (120) days after the filing of the petition, make specific written findings of fact with respect to each factual issue raised by the petition and specific written conclusions of law with respect to each legal issue raised by the petition. The time within which the circuit court shall make specific written findings of fact and conclusions of law shall be extended by thirty (30) days if the circuit court requests or permits post-hearing briefs.

(j) *Compensation of appointed attorney.* Compensation to be paid to attorneys appointed under this rule, as well as the fees and expenses to be paid for investigative, expert, and other reasonably necessary services, shall be fixed by the circuit and appellate courts in their respective proceedings at such rates or amounts as the courts determine to be reasonable. All compensation and reasonable expenses authorized by the courts shall be paid pursuant to Ark. Code Ann. § 16-91-202(f), or as otherwise provided by law.

(k) *Effective date.* The effective date of this rule is August 1, 1997. This rule shall apply to all persons under sentence of death who became eligible to file a petition under Rule 37.2(c) on or after March 31, 1997. For persons who were eligible to file a petition between March 31, 1997 and August 1, 1997, the hearing required by subsection (b)(1) of this rule shall be conducted no later than twenty-one (21) days after the effective date of this rule. In all other cases, the hearing shall be conducted within the time set forth in subsection (b)(1) of this rule. In all cases, the time for filing the petition shall be governed by subsection (e) of this rule. (Adopted June 23, 1997, effective August 1, 1997; subsection (b) amended July 16, 1998; subsection (g) amended January 13, 2000; subsection (b)(1)(A) amended November 29, 2001.)



**Publisher's Notes.** The adoption of Rule 10 of the Arkansas Rules of Appellate Procedure — Criminal (Automatic Review in Death Cases) rendered certain language in subdivision (b)(1)(A) obsolete. The subdivision was accordingly amended effective November 29, 2001.

**Reporter's Notes, 1998 Amendments.** Subsection (b)(1)(B) was added to address the situation where the mandate is recalled.

Subsection (b)(1)(A) was amended to require that a copy of the mandate be forwarded to the Attorney General, and subsection (b)(2) was amended to require that a copy of the

order with respect to the appointment of counsel be forwarded to the Attorney General.

**Addition to Reporter's Notes, 2000 Amendment:** Subsection (g)(2) was amended to clarify the dissolution of the stay of execution when post-conviction relief has been denied and a notice of appeal has not been timely filed. (See Ark. R. App. P. — Crim. 10 for dissolution of stays of execution when the denial of post-conviction relief is affirmed on appeal.)

**Cross References.** Post-conviction proceedings in capital cases, § 16-91-202.

## RESEARCH REFERENCES

**Ark. L. Rev.** Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

## CASE NOTES

### ANALYSIS

In general.

Appointment of counsel.

Competency hearing necessary.

Competency of counsel.

Decision.

Denial of investigator.

Petition denied.

Stay of execution.

Time to file petition.

Verification of motion.

Waiver of appeals.

Written findings.

### In General.

Trial court did not improperly cross into the jury's province when it directed them to deliberate further to fix an incorrectly completed verdict form on which the jury marked that it had found no mitigating evidence when mitigating evidence had, in fact, been offered; hence, petitioner was not improperly denied postconviction relief from his death penalty sentence. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003).

This rule provides specific procedures on how postconviction relief is to be pursued and includes deadlines that must be met; thus, where the death penalty was imposed, unique attention to procedural safeguards had to be met and the circuit court had to appoint counsel who met these requirements and all issues had to be set out in petition. *Collins v. State*, 365 Ark. 411, 231 S.W.3d 717 (2006).

Inmate's claims regarding a juror's alleged untruthfulness during voir dire as to his feelings about the death penalty were not cognizable in inmate's postconviction proceeding; his remedy for alleged juror misconduct was to directly attack a verdict by requesting a

new trial under § 16-89-130(c)(7). *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006).

### Appointment of Counsel.

The Supreme Court of Arkansas granted a motion for rehearing filed by a murder defendant under a death sentence and held that defendant might, in fact, be entitled to appointment of counsel to represent him at an evidentiary hearing ordered by the Court on defendant's motion for postconviction relief where the Court's earlier ruling that counsel need not be appointed was the result of the Court's mistaken belief that defendant was represented by retained counsel when, in fact, counsel appeared at trial on a pro bono basis without compensation; trial court was ordered to conduct a hearing to determine if counsel should be appointed under this rule despite the fact that defendant's eligibility for postconviction relief predated the effective date of this rule. *Sanders v. State*, 352 Ark. 520, 102 S.W.3d 480 (2003).

In the context of habeas corpus actions, State of Arkansas proceedings are not procedural mechanisms employed within the context of a federal action to insure the protection of a person's rights in that action, and allowing the payment of fees under 21 U.S.C.S. § 848(q)(8) will have the practical effect of supplanting state-court systems for appointment of counsel for unexhausted matters; 21 U.S.C.S. § 848(q) does not authorize an expanded appointment for a Federal Public Defender (FPD) to represent indigent capital defendants in state post-conviction proceedings, and 21 U.S.C.S. § 848(q)(8) or the reference to "ancillary matters" in 18 U.S.C.S. § 3006A(c) cannot be read so broadly as to encompass state post-conviction relief. *Hill v.*

State (In re Fed. Pub. Def. Representation of Defendants Sentenced to Death), 363 Ark. 480, 215 S.W.3d 589 (2005).

Counsel appointed to represent indigent capital defendants in connection with unexhausted state remedies after the mandate has issued have to comply with the criteria for appointment set out in this rule, including whether the defendant accepts appointment of counsel and, further, counsel must be appointed by the Arkansas Supreme Court. *Hill v. State* (In re Fed. Pub. Def. Representation of Defendants Sentenced to Death), 363 Ark. 480, 215 S.W.3d 589 (2005).

Court's earlier mandate denying inmate's postconviction appeal under Ark. R. Crim. P. 37 was granted because there was evidence that inmate's counsel, appointed pursuant to this rule, had been impaired during the hearing and inmate, who had been sentenced to death, was entitled to a new hearing with competent counsel. *Lee v. State*, 367 Ark. 84, 238 S.W.3d 52 (2006).

Requirement under this rule that an attorney be appointed to represent a capital defendant in post-conviction proceedings did not allow an inmate who had been sentenced to death to assert in federal habeas proceedings that ineffective assistance of the inmate's post-conviction counsel constituted a denial of due process. The state's decision to grant a right to counsel did not give rise to a constitutional right. *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007), rehearing denied 499 F.3d 874 (8th Cir. 2007), cert. denied 552 U.S. 1224, 128 S. Ct. 1226, 170 L. Ed. 2d 140 (2008).

#### **Competency Hearing Necessary.**

Although defendant was previously found competent to stand trial, that evaluation was so remote in time from the waiver hearing, which occurred over one year later, that a second evaluation was warranted; the trial court was instructed to order a state hospital to conduct an evaluation of defendant for the purpose of determining whether he was currently competent to proceed with the hearing mandated by this rule. *State v. Newman*, 355 Ark. 265, 132 S.W.3d 759 (2003).

After defendant, who was convicted of capital murder and sentenced to death, was informed of his rights pursuant to subsection (b) of this rule and was found competent, his decision to waive his right to postconviction counsel and to any postconviction relief was found to have been made knowingly, intelligently, and voluntarily and, accordingly, the trial court's petition to lodge the record and affirm the findings was granted; after an initial hearing, it was found that defendant was under the influence of Thorazine and a further examination of defendant and a hearing was necessitated to assure that he was

competent to waive his rights. *State v. Newman*, 357 Ark. 39, 159 S.W.3d 309 (2004).

#### **Competency of Counsel.**

Denial of appellant's, an inmate's, petition for postconviction relief was appropriate because he alleged only bare conclusions and had not overcome the presumption of trial counsel's competence by identifying specific acts and omissions that could not have been the result of reasonable professional judgment. Counsel's testimony established that, because the inmate's IQ fell at the pivotal point of 65, that was a strategic decision not to pursue further the issue of the inmate's IQ and mental retardation. *Anderson v. State*, 2011 Ark. 488, — S.W.3d —, 2011 Ark. LEXIS 576 (Nov. 17, 2011).

Trial court did not err in denying defendant's petition for postconviction relief after defendant was convicted of capital murder and sentenced to death; while defense counsel was ineffective in not calling one of defendant's sons to testify as a mitigation witness, it could not be said that prejudice resulted therefrom such that there was a reasonable probability that the jury would have imposed a different sentence. *Springs v. State*, 2012 Ark. 87, — S.W.3d —, 2012 Ark. LEXIS 110 (Mar. 1, 2012).

#### **Decision.**

Under this rule, a defendant is allowed to raise as many issues as he chooses that may demonstrate that his conviction and death sentence were illegally and unconstitutionally obtained; once the issues are raised, the trial court then must make a determination whether a hearing is necessary by making specific written findings of fact and conclusions of law on each issue raised in the petition. *Echols v. State*, 344 Ark. 513, 42 S.W.3d 467 (2001).

Although petitioner's death penalty case had been reviewed five times, the Supreme Court of Arkansas found the circumstances of the case were unique and recalled the mandate and reopened the case solely because of: (1) the alleged comparable verdict form deficiency in the *Willett v. State* case; (2) the federal district court's dismissal of the federal habeas corpus petition in order to give state courts the opportunity to explore the issue; and (3) the enhanced scrutiny required in death penalty cases. *Robbins v. State*, 353 Ark. 556, 114 S.W.3d 217 (2003).

The undeniable fact is the Supreme Court of Arkansas will recall a mandate and reopen a case in extraordinary circumstances. *Robbins v. State*, 353 Ark. 556, 114 S.W.3d 217 (2003).

#### **Denial of Investigator.**

Circuit court did not abuse its discretion in denying the inmate authorization to retain an investigator to probe into issues of jury bias



and misconduct because the inmate failed to demonstrate the need for an investigator, as nothing required the inmate's counsel to rely exclusively on an investigator to investigate whether one of the jurors had failed to disclose information accurately during voir dire and the inmate admitted that he did not know if any misrepresentation occurred. *Williams v. State*, 369 Ark. 104, 251 S.W.3d 290 (2007).

#### **Petition Denied.**

Inmate's petition for postconviction relief after a capital murder conviction was properly denied because the inmate failed to show that trial counsel's decision to forego conducting a fingerprint analysis on a cash register and several gas pumps amounted to ineffective assistance of counsel; the inmate failed to show what the test might have shown, and the decision to forego testing was a matter within counsel's professional judgment. *Simpson v. State*, 355 Ark. 294, 138 S.W.3d 671 (2003).

Supreme Court of Arkansas declined to recall its mandate denying petitioner's request for post-conviction relief and writ of error coram nobis as petitioner's claims of juror misconduct did not fall within any of the categories of errors for which error coram nobis could provide relief. *Echols v. State*, 360 Ark. 332, 201 S.W.3d 890 (2005).

In a post-conviction proceeding under this rule, appellant convicted of three counts of capital murder was not entitled to relief from his death sentence as counsel did not render a deficient performance at the penalty phase by failing to call appellant's mother to testify, and appellant's challenge to his death sentence was not preserved for review because he failed to raise the issue on direct appeal. *Rankin v. State*, 365 Ark. 255, 227 S.W.3d 924 (2006).

Inmate's postconviction claim that his trial counsel was ineffective for failing to submit the statutory mitigating circumstances set out in § 5-4-605 was properly rejected as counsel made a conscious choice not to do so because they were inconsistent with the defense of innocence and because the evidence showed that the inmate had a past of criminal activity, including drug dealing. *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006).

Inmate's postconviction claim that his trial counsel was ineffective for failing to ask for a hearing or move for a mistrial once she learned about a juror's discussion with the court regarding an officer whom she overheard saying that the jury would hang the inmate was properly rejected as counsel's decision to keep the juror was a matter of carefully considered trial strategy. *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006).

Inmate's postconviction claims that the state knowingly introduced false testimony in order to bolster its theory of the case and that

the information charging him with capital murder was defective on the ground that it failed to enumerate any of the four aggravating circumstances upon which the state relied to obtain the death penalty were rejected as the claims could have been raised on direct appeal but were not, and could not be raised for the first time in a Rule 37 petition. *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006).

Petitioner's request for postconviction relief under this rule was properly denied as petitioner failed to prove that but for trial counsel's unprofessional errors, the result of petitioner's trial would have been different; petitioner alleged that counsel was ineffective for failing to call witnesses who would testify that another individual had bloodied and bandaged hands after the crimes were committed, but the only blood at the scene was the victim's blood. *Isom v. State*, 2010 Ark. 495, — S.W.3d —, 2010 Ark. LEXIS 600 (Dec. 16, 2010).

#### **Stay of Execution.**

Defendant's motion to lift the stay of execution was moot because there was no stay of execution in effect at the time; the circuit court was obligated to vacate the stay of execution it issued when defendant's Rule 37 petition was affirmed on appeal. *Nooner v. State*, 352 Ark. 481, 101 S.W.3d 834 (2003).

#### **Time to File Petition.**

The circuit court wrongly dismissed the defendant's petition for post-conviction relief as untimely, notwithstanding that the petition was not filed within 90 days of the court's order appointing counsel for the defendant, where the attorney appointed by the circuit court moved to be relieved on the basis of a conflict of interest and was relieved on that basis and, therefore, the defendant was not provided with counsel prior to the expiration of the filing period. *Jackson v. State*, 343 Ark. 613, 37 S.W.3d 595 (2001).

Trial court erred in dismissing defendant's postconviction relief petition of his death sentence as untimely under ARCrP 37.2(c), a rule that applied only to non-death cases; defendant's petition was timely filed within 90 days after the appointment of counsel under subsection (e) of this rule, which did apply to death penalty cases. *Simpson v. State*, 347 Ark. 564, 65 S.W.3d 878 (2002).

Where defendant: (1) timely filed his ARCrP 37 petition and the mandate of the state Supreme Court was returned to the trial court on April 29, 1999; (2) on May 18, 1999, appeared before the trial court, at which time the trial court appointed counsel for defendant who met the qualifications set forth in subdivision (b)(2) of this rule; and (3) on August 11, 1999, filed his ARCrP 37 petition, defendant's ARCrP 37 petition was not un-

timely with regard to his murder sentence. *Kemp v. State*, 348 Ark. 750, 74 S.W.3d 224 (2002).

#### **Verification of Motion.**

Where a petition for post-conviction relief in a death penalty case was not verified by the petitioner, but was solely verified by his attorney, rather than dismissing the petition, the court chose to remand the matter for verification in conformance with Ark. R. Crim. P. 37.1. *Howard v. State*, 366 Ark. 453, 236 S.W.3d 508 (2006).

#### **Waiver of Appeals.**

The defendant was competent to waive his appeals, including his postconviction remedies under this rule, where (1) not only did the defendant file a pro se motion for withdrawal of the appeal timely filed on his behalf by counsel, but affirmed during a hearing that he had a long-standing desire to waive his right to appeal and that he was doing so against the advice of his attorneys, who had told him that at least two reversible errors in the case could result in resentencing or retrial, and (2) an expert evaluated the defendant and testified that he understood the difference between life and death, the consequences of the death sentence, and the consequences of execution by lethal injection, that he understood his right to appeal and the posttrial relief available to him, and that he had the capacity to knowingly and intelligently waive any and all appeals and postconviction relief. *Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001).

Given that: (1) the psychological evidence indicated that defendant knew right from wrong; (2) defendant indicated an understanding that he was waiving appeal rights; and (3) the trial court asked defendant appropriate questions concerning the waiver, the trial court properly found that defendant made a knowing and intelligent waiver of appeal rights, including the right to appeal to the court and the right of postconviction challenge under this rule. *Roberts v. State*, 352 Ark. 489, 102 S.W.3d 482 (2003).

Record supported a trial court's findings that defendant had knowingly and intelligently waived his right to have appointed counsel, to pursue postconviction relief, and to pursue federal habeas corpus relief from a conviction and death sentence; the trial court had reviewed testimony of psychologists and defendant's former employer pertinent to defendant's competency, and defendant had repeatedly indicated that he understood he was choosing death over life. *State v. Roberts*, 354 Ark. 399, 123 S.W.3d 881 (2003), dismissed 415 F.3d 816 (8th Cir. 2005).

Inmate waived any error that may have arisen from sheriff's acting as a witness in his case and as bailiff because inmate failed to raise the issue on direct appeal and because

the state and defense counsel agreed for the sheriff to remain in the courtroom in exchange for the defense team to be able to keep its investigators in the courtroom as well. *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006).

Circuit court was without jurisdiction to entertain defendant's petition for postconviction relief under this rule, and the supreme court was likewise without jurisdiction to hear an appeal from any decision of the circuit court because defendant's initial waiver of postconviction relief was equivalent to filing a first petition for postconviction relief; because jurisdiction remained with the supreme court following its affirmance of the circuit court's decision that defendant waived his rights to postconviction relief, the circuit court never acquired jurisdiction to hear the Rule 37.5 petition. *Roberts v. State*, 2011 Ark. 502, — S.W.3d —, 2011 Ark. LEXIS 589 (Dec. 1, 2011).

Where the ninety-day filing period under subsection (e) of this rule has expired and a waiver of postconviction relief has been affirmed by the supreme court, a petitioner must file the appropriate motion to reopen postconviction proceedings before a Rule 37 petition can be brought in circuit court; the jurisdiction rule that once the appeal record is lodged with the supreme court, the circuit court loses jurisdiction to issue subsequent rulings on a postconviction proceeding under Ark. R. Crim. P. 37.1 applies to petitions under this rule. *Roberts v. State*, 2011 Ark. 502, — S.W.3d —, 2011 Ark. LEXIS 589 (Dec. 1, 2011).

#### **Written Findings.**

Written findings on a petition for postconviction relief in a capital murder prosecution were insufficient where the trial court generally denied 19 claims, specifically denied 12 claims, and completely omitted rulings on 15 claims. *Echols v. State*, 344 Ark. 513, 42 S.W.3d 467 (2001).

Where the trial court failed to make specific written findings of fact and conclusions of law as required under this rule, the appellate court reversed and remanded for entry of a written order in compliance with subsection (i) of this rule. *McGehee v. State*, 344 Ark. 602, 43 S.W.3d 125 (2001).

This rule reinforces the responsibility of the trial court to make specific written findings of fact and conclusions of law on each issue raised in a petition. *Kemp v. State*, 347 Ark. 52, 60 S.W.3d 404 (2001).

Trial court erred in denying inmate's petition for post-conviction relief without making specific written findings of fact and conclusions of law with respect to each issue raised by the petition. *Fudge v. State*, 354 Ark. 148, 120 S.W.3d 600 (2003).

Where an appeal of the denial of a defen-



nant's petition for postconviction relief was remanded for the trial court to make specific written findings of fact and conclusions of law as required by subsection (i) of this rule, the trial court's adoption verbatim of the proposed findings of fact and conclusions of law submitted by the prosecution was sufficient to satisfy the mandate; the trial court allowed the parties to submit proposed findings, but

the trial court was not required to conduct any further hearing or even seek input from the parties. Echols v. State, 354 Ark. 530, 127 S.W.3d 486 (2003).

**Cited:** Wallace v. Broyles, 332 Ark. 189, 961 S.W.2d 712 (1998); State v. Robbins, 335 Ark. 380, 985 S.W.2d 293 (1998); Lee v. Norris, 354 F.3d 846 (8th Cir. 2004); State v. Newman, 359 Ark. 6, 193 S.W.3d 737 (2004).

[ARTICLE XI. NEWS MEDIA COVERAGE  
OF CRIMINAL CASES]

RULE 38. MEDIA ACCESS

Rule 38.1. [Broadcasting or publishing by news media.]

No rule of court or judicial order shall be promulgated that prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case. (Adopted February 5, 1990, effective March 1, 1990.)

**Publisher's Notes.** The title of this article and this rule were inserted by the Publisher.

**Reporter's Notes:** This proposal was recommended by the Arkansas Bar Association Committee on Minimum Standards for the Administration of Criminal Justice.

**Cross References.** As to cameras in the courtroom, see Supreme Court Administrative Order No. 6.

CASE NOTES

**Voir Dire.**

A member of the news media, though not a party to the litigation, has standing to ques-

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# DISTRICT COURT RULES

(Formerly Inferior Court Rules, revised and renamed effective January 1, 2005.)

- |                                                            |                                                                                         |
|------------------------------------------------------------|-----------------------------------------------------------------------------------------|
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| 1. Scope of rules.                                         | 7. Jurisdiction — Effect of counterclaim, cross-claim, or third-party claim — Transfer. |
| 2. Jurisdiction and venue unaffected; Right to jury trial. | 8. Judgments — How entered.                                                             |
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| 4. Complaint.                                              | 10. Procedure in small claims division.                                                 |
| 5. Service of complaint.                                   | 11. Uniform paper size.                                                                 |
| 6. Contents of answer; time for filing.                    |                                                                                         |

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**Cross References.** Administration of District Courts, Ark. Sup. Ct. Admin. Order No. 18.

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## Rule 1. Scope of rules.

(a) Except as provided in subdivision (b), these rules shall govern the procedure in all civil actions in the district courts and county courts (hereinafter collectively called the “district courts”) of this state. They shall apply in the small claims division of district courts except as may be modified by Rule 10 of these rules.

(b) These rules shall not apply to an appeal of a tax assessment from an equalization board to the county court. Rule 9 of these rules, however, shall apply to a tax-assessment appeal from county court to circuit court.

(c) Where applicable and unless otherwise specifically modified herein, the Arkansas Rules of Civil Procedure and the Arkansas Rules of Evidence shall apply to and govern matters of procedure and evidence in the district courts of this State. Actions in the small claims division of district court shall be tried informally before the court with relaxed rules of evidence, see Rule 10(d)(2) of these rules.

(d) Rules specific to criminal proceedings in district court shall so indicate, and in such cases, such rules shall apply to actions pending in city courts.

(e) Other matters affecting district courts may be found in Administrative Order Number 18. (Amended November 18, 1996, effective March 1, 1997; amended May 24, 2001, effective July 1, 2001; revised December 9, 2004, effective January 1, 2005; amended October 9, 2008, effective January 1, 2009.)

**Publisher’s Notes.** The Per Curiam orders of the Supreme Court entered on December 18, 1978, adopting the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Rules for Inferior Courts, read: “PER CURIAM. The Court, pursuant to Act 38 of

1973 and to its constitutional and inherent power to regulate procedure in the courts, hereby adopts the Rules of Civil Procedure submitted by the Civil Procedure Revision Committee, with modifications made by the Court. These Rules will be effective July 1,

1979. The Court expresses its great appreciation for the untiring work done by the members of the Committee and for the various suggestions made by attorneys in response to the Court's invitation.

"Without limiting the effect of the supersession rule adopted by this court as part of the Arkansas Rules of Civil Procedure, Rules of Appellate Procedure and Rules for Inferior Courts, pursuant to Act 38 of the General Assembly of 1973, we deem the following statutes (designated by section numbers in Ark. Stat., 1947, Annotated) to be specifically superseded by those rules:

§ 27-1801; § 28-353 (1).

"The following rules are deemed to be superseded:

Rule 13, Rules Governing Procedures in Circuit and Chancery Courts.

Rule 26A, Rules of Supreme Court.

"The question of supersession of all other rules and statutes will be determined by the supersession rule and Act 38 of 1973."

The Per Curiam order of the Supreme Court entered on December 9, 2004, read: "As a consequence of Amendment 80 to the Arkansas Constitution, a number of statutory provisions governing district courts are repealed as of December 31, 2004. The Amendment 80 Implementation Committee has recommended to the Supreme Court the adoption of Administrative Order Number 18 — Administration of District Courts — and the revision of the Inferior Court Rules, including their renaming to the 'District Court Rules.' The purpose of these proposals is to put in place the framework to govern the administration of the district courts beginning January 1, 2005. The initial work on these proposals was done by the Supreme Court Civil Practice Committee, and the Committee's work was then reviewed by the District Court Judges of the state. We thank all of these entities for their work on this project.

"Administrative Order Number 18 creates four subject matter divisions: civil, criminal, traffic, and small claims. See In re Amended Supreme Court Statement on Limited Jurisdiction Courts under Amendment 80, 351 Ark. App. (2002). Amendment 80, Section 7 places responsibility for setting the civil jurisdiction of the district courts in the Supreme Court. The civil jurisdiction of the district courts was previously codified at Ark. Code Ann. § 16-17-704, which is repealed as of January 1, 2005.

"Several organizations, including the Arkansas Bar Association and the Arkansas District Judges Council, have recommended that we make no changes in the civil subject matter jurisdiction of the district courts at this time. While we adopt that recommendation, we are mindful of the significant opportunity provided to the justice system by the passage of Amendment 80 and the ability to

reconsider the nature and operation of the district court. We are aware that the General Assembly is given the primary authority for adopting changes in the structure and funding of the court and, to some extent, our ability to change or expand the courts's jurisdiction is dependent upon the resolution of the structural issues. We will continue to work with all parties toward a final resolution of these issues, and we will continue to carry out our specific responsibility to review and establish jurisdictional monetary limits and the types of cases heard for possible changes in the future.

"The conversion of the Inferior Court Rules to the District Court Rules is further explained in the Reporter's Notes, which accompany several of the rules. Rule 10 addresses procedure in the small claims division and takes most of its provisions from Ark. Code Ann. §§ 16-17-601 et seq. While some changes in the rules have been made, the primary intention at this time is to maintain the status quo and ensure that the procedural rules are in place when the statutes are repealed. We ask the Civil Practice Committee to review the District Court Rules and report any recommendations for their improvement to the court.

"In order to insure the continued operations of the district courts, the Supreme Court promulgates Administrative Order Number 18, effective January 1, 2005 and amends and republishes the District Court Rules, formerly known as the Inferior Court Rules, effective January 1, 2005. Administrative Order Number 18 and the District Court Rules are set out below.

"At the end of Administrative Order Number 18, a 'Note' is appended which may be helpful in understanding the provisions. Pre-2004 Reporter's Notes to the Inferior Court Rules and Additions to those Notes remain part of the District Court Rules."

**Reporter's Notes to Rule 1:** 1. These inferior court rules are designed for use in all civil actions in the inferior courts of Arkansas. Since many parties to such actions do not have benefit of counsel, these rules are drafted so as to permit a person to represent himself with a minimum of procedural assistance. A complex set of rules would be self-defeating of this goal; accordingly, these rules are kept to a minimum and the text made as simple and concise as possible. County courts are excepted from the rules, because their proceedings are in the nature of special proceedings.

**Addition to Reporter's Notes, 1997 Amendment:** The first sentence has been amended by deleting the exception for county courts. Previously, actions brought in county court were considered to be "in the nature of special proceedings," but statutory proce-



dures are virtually nonexistent. To fill the gap, these rules have been made applicable. The second sentence has been added to make clear proceedings in the small claims division of a municipal court are governed by Small Claims Procedure Act. These rules are applicable in such cases to the extent that they do not conflict with the act.

**Addition to Reporter's Notes, 2001 Amendment:** Act 1693 of 2001 changed the name of municipal courts to district courts, and the second sentence of this rule has been amended accordingly. Courts of common pleas, which were previously subject to these rules, were abolished by Act 915 of 2001.

**Addition to Reporter's Notes, 2004 Amendment:** As a consequence of Amendment 80 to the Arkansas Constitution, the Inferior Court Rules have been revised and renamed the "District Court Rules." Effective January 1, 2005, the implementing legislation for Amendment 80 repeals several statutes governing the procedures in the district courts. The substantive revisions of these rules fill the gaps created by that repeal.

Former Inferior Court Rule 1 used the term "inferior courts," which included both district courts and county courts. *See Pike Ave. Dev. Co. v. Pulaski County*, 343 Ark. 338, 37 S.W.

3d 177 (2001) and the Reporter's Notes to Inferior Court Rule 1. District Court Rule 1 dispenses with the term "inferior courts." All the rules have been revised to reflect this name change.

The provisions in subsection (b) were previously found in Inferior Court Rule 10. The procedural rules for the Small Claims Division of district court are now contained in Rule 10 of the District Court Rules. *See Addition to Reporter's Notes, 2004 Amendment*, to Rule 10.

Administrative Order Number 18 should be consulted for other matters affecting practice in the district courts.

**Addition to Reporter's Notes, 2008 Amendment:** Subdivision (b) is new. It recognizes that our statutes prescribe specific procedures for appealing a tax assessment from an equalization board to the county court. Ark. Code Ann. §§ 26-27-311, 318. Those statutory procedures, not the District Court Rules, govern such cases in the county court with one exception. The exception is that Rule 9 governs appeals in tax-assessment cases from county court to circuit court. Former subdivisions (b)-(d) have been redesignated as (c)-(e).

## CASE NOTES

### Applicability.

Pro se litigants must follow and conform to these rules of procedure, including the timely perfecting of an appeal under AICR 9 [now ADCR 9]. *Ottens v. State*, 316 Ark. 1, 871 S.W.2d 329 (1994).

The Inferior Court Rules [now District Court Rules] govern the procedure in all civil actions in the inferior courts (including county courts) of the state; the appeal procedure in a county court action has court administration as its basis, as do those civil actions

in and appeals from other inferior courts. *Pike Ave. Dev. Co. v. Pulaski County*, 343 Ark. 338, 37 S.W.3d 177 (2001).

**Cited:** *State Child Support Enforcement Unit v. Markham*, 292 Ark. 449, 730 S.W.2d 497 (1987); *In re Implementation of Amendment 80: Amendments to Rules of Civ. Procedure & Inferior Court Rules*, — Ark. —, — S.W.3d —, 2001 Ark. LEXIS 707 (May 24, 2001); *Barnett v. Howard*, 363 Ark. 140, 211 S.W.3d 494 (2005).

## Rule 2. Jurisdiction and venue unaffected; Right to jury trial.

(a) These rules shall not be construed to extend or affect the jurisdiction of the district courts of this State or the venue of actions therein.

(b) There shall be no jury trials in district court. In order that the right of trial by jury remains inviolate, all appeals from judgment in district court shall be de novo to circuit court. (Revised December 9, 2004, effective January 1, 2005.)

**Reporter's Notes to Rule 2: 1.** It is not the function of these inferior court rules to extend or affect the jurisdiction of the inferior courts of Arkansas. Any attempt to increase the monetary jurisdiction of such courts would violate the Arkansas Constitution.

*United Loan & Inv. Co. v. Chilton*, 225 Ark. 1037, 287 S.W.2d 458 (1956). Likewise, these rules do not attempt to define or affect the venue of civil actions in inferior courts.

**Addition to Reporter's Notes, 2004 Amendment:** The second paragraph was

added to this rule and designated subsection (b). It is derived from Ark. Code Ann. § 16-17-703.

### CASE NOTES

#### Appeal.

When the time for filing an appeal is fixed by a rule or statute, the provision which limits

the time is jurisdictional in nature. *Ottens v. State*, 316 Ark. 1, 871 S.W.2d 329 (1994).

### Rule 3. Commencement of action.

A civil action is commenced by filing a complaint with the clerk of the proper court who shall note thereon the date and precise time of filing. However, an action shall not be deemed commenced as to any defendant not served with the complaint, in accordance with these rules, within 120 days of the date on which the complaint is filed, unless within that time and for good cause shown the court, by written order or docket entry, extends the time for service. (Amended November 18, 1996, effective March 1, 1997; revised December 9, 2004, effective January 1, 2005.)

**Reporter's Notes to Rule 3:** 1. Rule 3 follows ARCP 3 concerning the commencement of an action in an inferior court. Whether such action has been timely commenced under this rule depends upon the same standards applicable to actions in the circuit and chancery courts. As under ARCP 3, the inferior court is given considerable discretion to extend the time for service upon a showing of good cause. Such extension must, however, be by written order of the court or by docket entry of the court. This requirement is

designed to prevent any later misunderstandings as to whether such extension was granted.

**Addition to Reporter's Notes, 1997 Amendment:** The first sentence of the rule has been rewritten so that it is identical to Rule 3 of the Rules of Civil Procedure. The second sentence, which established a 60-day time limit for service, has been revised to make it consistent with Rule 4(i) of the Rules of Civil Procedure.

### Rule 4. Complaint.

A complaint shall be in writing and signed by the plaintiff or his or her attorney, if any. It shall also: (a) state the names of the parties, the nature and basis of the claim, and the nature and amount of the relief sought; (b) warn the defendant to file a written answer with the clerk of the court, and to serve a copy to the plaintiff or his or her attorney, within 30 days after service of the complaint upon him; (c) warn the defendant that failure to file an answer may result in a default judgment being entered against him; (d) recite the address of the plaintiff or his or her attorney, if any; and (e) contain a proof of service form which shall be completed by the person serving the defendant. No separate summons is required.

### COMPLAINT — FORM

\_\_\_\_\_ Court of \_\_\_\_\_, Arkansas

\_\_\_\_\_, Plaintiff

vs. No. \_\_\_\_\_

\_\_\_\_\_, Defendant

Plaintiff's Address: \_\_\_\_\_



Defendant's Address: \_\_\_\_\_  
Nature of Claim: \_\_\_\_\_  
Nature and Amount of Relief Claimed: \_\_\_\_\_  
\_\_\_\_\_  
Date Claim Arose: \_\_\_\_\_  
Factual Basis of Claim: \_\_\_\_\_  
Plaintiff's Attorney, if any, and Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

[Signature of Attorney, if any, or of Plaintiff]

SUMMONS AND NOTICE TO DEFENDANT

You are hereby warned to file a written answer with the clerk of the court within 30 days after the date that you receive this complaint and to send a copy to the plaintiff or to his or her attorney. If you do not file an answer within 30 days, or if you fail to file an answer, a default judgment may be entered against you.

\_\_\_\_\_  
[Signature of Clerk or Judge]

PROOF OF SERVICE

STATE OF ARKANSAS  
CITY OF \_\_\_\_\_

I, \_\_\_\_\_, hereby certify that I served the within complaint on the defendant, \_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_ m. on \_\_\_\_\_, 2\_\_\_\_, by [state method of service].

\_\_\_\_\_  
[Signature and Office, if any]

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_ 2\_\_\_\_,  
[To be completed if service is by someone other than sheriff or constable.]

\_\_\_\_\_  
Notary Public or Court Clerk

My Commission Expires: \_\_\_\_\_  
(Amended November 18, 1996, effective March 1, 1997; revised December 9, 2004, effective January 1, 2005; amended June 2, 2011, effective July 1, 2011.)

**Reporter's Notes to Rule 4:** 1. This rule simply requires a claimant to set forth in a brief writing the nature of his claim and the nature and amount of relief sought. It follows the intent of superseded *Ark. Stat. Ann.* § 26-402 (Repl. 1962), which required only that the plaintiff file a short written statement of the facts upon which the action was founded. It is not the intent of this rule that complex pleadings be filed, but rather simple writings which

are sufficient to inform a defendant of the nature and basis of the claim and the relief sought. The information required under this rule can be inserted on a printed form such as Exhibit 4-A attached to this rule.  
2. The claim form must notify a defendant to file an answer or otherwise appear on a day and time certain or else a default judgment may be entered against him. The day and time to appear shall not be less than twenty

days from the date of service. The court or the clerk thereof should exercise responsibility for fixing the day and time for answer or appearance and it should be far enough in advance to allow for service upon the defendant.

**Addition to Reporter's Notes, 1997**

**Amendment:** The rule has been amended to require that the complaint warn the defendant that he must file a written answer within 20 days of service, with a copy to the plaintiff or his or her attorney. This change is necessary in light of the revision in Rule 6, which now requires that the answer be in writing. Previously, a defendant was permitted to appear personally in court, without filing a written answer, on the day stated in the complaint. In addition, the rule now refers to "proof of service" rather than to the "return," a change in terminology consistent with a 1997 amendment to Rule 4(g) of the Rules of Civil Procedure. Rule 4 has also been rewritten for purposes of clarity, and the accompanying form has been revised to take into account the changes made in the rule.

**Addition to Reporter's Notes, 2004**

**Amendment:** The sentence "No separate summons is required" was added to the first paragraph and "Summons and" was added to the "Notice to Defendant" section of the form. These additions clarify that a separate summons is not required in district court. To improve administration, a space for the defendant's address was also added to the form.

The Rule and form were also amended to give defendants who are non-residents of Arkansas thirty days to answer. This change harmonizes the procedure in the civil division of District Court with the procedure in the small claims division. Part of the now-repealed Small Claims Procedure Act, Ark. Code Ann. §§ 16-17-610, prescribed the longer time period for nonresident defendants to answer in the small claims division. That provision survives in District Court Rule 10(b). To establish uniform procedures between the civil and small claims divisions, Rule 4 was amended. This amendment reinstates the pre-1997 procedure for answers in the civil division. See Addition to Reporter's Note, 1997 Amendment to Inferior Court Rule 6.

## Rule 5. Service of complaint.

(a) *By Whom Served.* A copy of the complaint shall be served upon each defendant by a sheriff or constable or any other person permitted to make service under Rule 4(c) of the Arkansas Rules of Civil Procedure.

(b) *Proof of Service.* The person serving the complaint shall promptly make proof of service thereof to the clerk of the court. Proof of service shall reflect that which has been done to show compliance with these rules. Service by one other than the sheriff or constable shall state by affidavit the time, place, and manner of service. (Amended November 18, 1996, effective March 1, 1997; revised December 9, 2004, effective January 1, 2005.)

**Reporter's Notes to Rule 5:** 1. The claim form may be served by a sheriff, a sheriff's deputy, a constable or any other person permitted by ARCP 4 (c) to make service. Reference to the latter must be made for a determination as to the identity of those persons authorized to make service. Proof of service must be made by the effecting service on the return filed with the court clerk.

2. Superseded Ark. Stat. Ann. § 26-501 (Repl. 1962) provided for service of process by the constable although any other person authorized by law could also make service. Superseded Ark. Stat. Ann. § 26-507 (Repl. 1962) provided that service and return of process followed the procedure used in circuit court. Thus, no real changes are affected by this rule.

3. Section (b) requires any person other than a constable or sheriff who serves process to make affidavit or swear to the return. This requirement was also found in superseded Ark. Stat. Ann. § 26-507 (Repl. 1962).

**Addition to Reporter's Notes, 1997**

**Amendment:** The rule has been amended to replace the term "claim form" with the word "complaint." In addition, subdivision (b) now refers to "proof of service" rather than to "return," a change in terminology consistent with a 1997 amendment to Rule 4(g) of the Rules of Civil Procedure. The word "summons" in subdivision (b) has been replaced with "complaint."

## Rule 6. Contents of answer; time for filing.

(a) *Contents of Answer.* An answer shall be in writing and signed by the



defendant or his or her attorney, if any. It shall also state: (1) the reasons for denial of the relief sought by the plaintiff, including any affirmative defenses and the factual bases therefor; (2) any affirmative relief sought by the defendant, whether by way of counterclaim, set-off, cross-claim, or third-party claim, the factual bases for such relief, and the names and addresses of other persons needed for determination of the claim for affirmative relief; and (3) the address of the defendant or his or her attorney, if any.

(b) *Time for Filing Answer or Reply.* A defendant shall file an answer with the clerk of the court within thirty (30) days after the service of the complaint upon the defendant. An answer to a cross-claim and a reply to a counterclaim shall be filed with the clerk of the court within 30 days of the date that the pleading asserting the claim is served. A copy of an answer or reply shall also be served on the opposing party or parties in accordance with Rule 5(b) of the Rules of Civil Procedure.

**ANSWER AND AFFIRMATIVE RELIEF — FORM**

\_\_\_\_\_ Court Of \_\_\_\_\_, Arkansas

\_\_\_\_\_, Plaintiff

vs. \_\_\_\_\_ No. \_\_\_\_\_

\_\_\_\_\_, Defendant

Defendant's Address: \_\_\_\_\_

Reasons for Denial of Plaintiff's Claim: \_\_\_\_\_

Affirmative Defenses: \_\_\_\_\_

\_\_\_\_\_

Nature and Amount of Affirmative Relief Sought: \_\_\_\_\_

\_\_\_\_\_

Date Affirmative Claim Arose: \_\_\_\_\_

Factual Basis of Affirmative Claim: \_\_\_\_\_

\_\_\_\_\_

Names and Addresses of Other Persons Needed for Determination of Affirmative Claim: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Defendant's Attorney, if any, and Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

[Signature of Attorney, if any, or of Defendant]

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing answer was served on [plaintiff or attorney for plaintiff, as appropriate] on the \_\_\_\_\_ date of \_\_\_\_\_, 2 \_\_\_\_, by [state method of service used, e.g., hand delivery, mail, commercial delivery service].

[Signature of Defendant or Defendant's Attorney]

(Amended November 18, 1996, effective March 1, 1997; revised December 9, 2004, effective January 1, 2005; amended June 2, 2011, effective July 1, 2011; amended May 24, 2012, effective July 1, 2012.)

**Reporter's Notes to Rule 6:** 1. Under prior practice in most inferior courts of this State, a defendant simply appeared on the trial date and proceeded to trial without filing any formal answer or response. This rule recognizes and continues this practice. Where a defendant makes a timely personal appearance in court, he is deemed to have entered his appearance and generally denied plaintiff's claim. Section (a) is designed for this purpose.

2. Where, however, a defendant intends to raise some affirmative defense or seek affirmative relief, he is required under Section (b) to set forth his defenses or claims in a writing filed with the court clerk and served upon opposing counsel or party. This section is designed to afford a plaintiff notice of any affirmative defenses or claims for relief which may be asserted by the defendant. Exhibit 6-A to this rule is an example of the type of notice required of a defendant.

3. Section (c) requires reference to ARCP 12 (a) to determine the time for filing an answer or other response. This section does, however, grant authority to the court to allow a defendant who has timely appeared in person an additional fifteen days within which to file a written answer or response.

**Addition to Reporter's Notes, 1997 Amendment:** Former subdivisions (a) and (b) have been collapsed into a single provision that requires a defendant to file a written answer. Under the previous version of the rule, a defendant could simply appear on the trial date without filing an formal answer, unless he intended to assert an affirmative defense or seek affirmative relief, in which case a written answer was necessary. In ad-

dition, subdivision (a) now specifies that the answer include information set out in the form accompanying the rule, which has also been revised slightly. Consistent with Rule 4, new subdivision (b) provides that an answer to a complaint, cross-claim or third-party claim, as well as a reply to a counterclaim, must be filed within 20 days after service. Former subdivision (c) created confusion in this regard by referencing Rule 12(a) of the Rules of Civil Procedure, under which a longer response time is permitted in certain situations.

**Addition to Reporter's Notes, 2004 Amendment:** Rule 6(b) has been amended to give defendants who are non-residents of Arkansas thirty days to answer any complaint. This change harmonizes the procedure in the civil division of District Court with the procedure in the small claims division. Part of the now-repealed Small Claims Procedure Act, Ark. Code Ann. §§ 16-17-610, prescribed the longer answer time for nonresident defendants in the small claims division. That provision survives in District Court Rule 10(b). To establish uniform procedures between the civil and small claims divisions, Rule 6(b) was amended. This amendment reinstates the pre-1997 procedure for answers in the civil division. See Addition to Reporter's Note, 1997 Amendment to Inferior Court Rule 6.

**Addition to Reporter's Notes, 2012 Amendment:** The rule is revised to adopt the same 30-day response time for district court cross-claims and counterclaims that applies to responses to complaints, cross-claims, and counterclaims in circuit court and to responses to district court complaints.

## CASE NOTES

**Cited:** Ryan v. Reynolds, 70 Ark. App. 54, 16 S.W.3d 556 (2000).

## Rule 7. Jurisdiction — Effect of counterclaim, cross-claim, or third-party claim — Transfer.

(a) *Subject Matter Jurisdiction.* The civil jurisdiction of district courts is set out in Administrative Order Number 18.

(b) *Plaintiff's Claim Exceeds Jurisdictional Amount.* If the plaintiff's claim is in an amount that exceeds the court's jurisdictional limit, the court,



upon its own motion or upon motion of either party, shall dismiss the claim for lack of subject matter jurisdiction.

(c) *Compulsory Counterclaim or Set-off.* If a compulsory counterclaim or a set-off involves an amount that would cause the court to lose jurisdiction of the case, the court, upon its own motion or upon motion of either party, shall transfer the entire case to circuit court for determination therein as if the case had been appealed.

(d) *Permissive Counterclaim, Cross-Claim, or Third-Party Claim.* If a permissive counterclaim, a cross-claim, or a third-party claim involves an amount that would otherwise cause the court to lose jurisdiction of the case, the court shall disregard such counterclaim, cross-claim, or third-party claim and proceed to determine the claim of the plaintiff. (Amended November 18, 1996, effective March 1, 1997; revised December 9, 2004, effective January 1, 2005.)

**Reporter's Notes to Rule 7:** 1. Rule 7 is designed for those situations where a counterclaim, set-off, cross-complaint or third party complaint is raised and the amount asserted therein is in excess of the court's jurisdictional limit. Where the counterclaim or set-off is compulsory as defined by ARCP 13 (a) and involves more than the jurisdictional limit, the court, upon its own motion or upon motion of any party, shall transfer the entire matter to the appropriate circuit court where it shall be tried in its entirety. Where, however, the counterclaim, set-off, cross-complaint or third party complaint is permissive and involves more than the jurisdictional limit, the court shall disregard same and proceed to try the claim of plaintiff.

**Addition to Reporter's Notes, 1997**

**Amendment:** Former subdivisions (a) and (b) have been redesignated as subdivisions (b) and (c), respectively, and have been reworded to reflect the terminology of the Rules of Civil Procedure. New subdivision (a) requires the court to dismiss for lack of subject matter jurisdiction if the plaintiff's claim exceeds the jurisdictional amount, which is presently \$3,000. Previously, the court could transfer the case to circuit court in this situation. *Bonnell v. Smith*, 322 Ark. 141, 908 S.W.2d 74 (1995).

**Addition to Reporter's Notes, 2004**

**Amendment:** Subsection (a) was added to provide the cross-reference to Administrative Order Number 18 and the other subsections were renumbered.

## Rule 8. Judgments — How entered.

(a) *By Default.* When a defendant has failed to file an answer or reply within the time specified by Rule 6(b) of these rules, a default judgment may be rendered against him.

(b) *Upon the Merits.* Where the court has decided the case, it shall enter judgment in favor of the prevailing party for the relief to which the party is deemed entitled.

(c) *Docket Entry.* The court shall timely enter in the docket the date and amount of the judgment, whether rendered by default or upon the merits.

(d) *Judgment Lien.* A judgment entered by a district court in this state shall not become a lien against any real property unless a certified copy of such judgment, showing the name of the judgment debtor, the date and amount thereof, shall be filed in the office of the circuit clerk of the county in which such land is situated. (Amended November 18, 1996, effective March 1, 1997; revised December 9, 2004, effective January 1, 2005.)

**Reporter's Notes to Rule 8:** 1. This rule requires that a formal record be made showing the date and amount of the judgment entered. It retains the provision of superseded *Ark. Stat. Ann.* § 26-1123 (Repl. 1962) that no judgment from an inferior court could be

considered a lien against real property unless such judgment was filed for record with the circuit clerk of the county in which the real property was located.

**Addition to Reporter's Notes, 1997**

**Amendment:** Subdivision (a) has been

amended to take into account the requirement, imposed by amended Rule 6(a), that a formal answer be filed. The previous version provided for a default judgment if the defendant did not appear in court on the trial date.

The subdivision has also been revised to correct the cross-reference and to make plain that it applies to any party against whom affirmative relief has been sought.

## CASE NOTES

### ANALYSIS

Dismissal.  
Entry of judgment.  
Timeliness.

#### Dismissal.

Circuit court did not err in dismissing a corporation's action against a limited liability company without prejudice under Ark. R. Civ. P. 41(b) due to the corporation's complaint for failure to obtain service because the corporation's failure to comply with Ark. R. Civ. P. 4(b) operated as an involuntary dismissal for purposes of Rule 41(b) and did not trigger the two-dismissal rule of Rule 41(b); the prior dismissal of the suit in district court was due to a lack of subject-matter jurisdiction and was not a voluntary nonsuit or a voluntary dismissal under Rule 41(a) because the corporation had no choice and no unilateral right to allow the case to proceed in district court, and the literal application of Rule 41(b) to the case would bring about a harsh and absurd result that did not serve the purpose behind the two-dismissal rule. *Jonesboro Healthcare Ctr., LLC v. Eaton-Moery Envtl. Servs.*, 2011 Ark. 501, — S.W.3d —, 2011 Ark. LEXIS 585 (Dec. 1, 2011).

#### Entry of Judgment.

While ARAP 4(e) establishes that a judgment is entered when it is filed with the clerk of a circuit, chancery, or probate court, the procedure is decidedly different from the manner in which a judgment is entered in inferior court [now district court] proceedings; that difference becomes quickly apparent by a review of this rule and AICR 9 [now ADCR 9]. These rules, particularly subsection (c) of this rule, reflect that an inferior court [now district court], such as the municipal court, en-

ters any judgment it renders by entering, in a timely manner, the date and amount of the judgment in the court's docket; this specific procedure for entering judgments in an inferior court [now district court] is in marked contrast to that applicable to courts of general jurisdiction under ARAP 4(e), where judgments are entered only when they are filed with the clerk of those courts. *West Apts., Inc. v. Booth*, 297 Ark. 247, 760 S.W.2d 861 (1988).

A judgment is entered in municipal court by entering the date and the amount of the judgment in the court's docket. *Murray v. State*, 344 Ark. 7, 37 S.W.3d 641 (2001).

A judgment was properly entered when the pertinent information was written on the summons by a special judge; it was not necessary for the entry to be made in a docket book. *Murray v. State*, 344 Ark. 7, 37 S.W.3d 641 (2001).

#### Timeliness.

The circuit court was correct in dismissing defendant's appeal as untimely where he failed to timely appeal from the municipal court and failed to avail himself of the provision in Rule 9(c) by filing an affidavit with the circuit court. *Norman v. Swift*, 69 Ark. App. 42, 9 S.W.3d 559 (2000).

Circuit court properly dismissed customers' appeal for lack of jurisdiction where, pursuant to Garland County, this rule and Ark. Dist. Ct. R. 9(a), more than thirty days had elapsed before the customers filed their appeal, which was untimely. *Lewis v. Robertson*, 96 Ark. App. 114, 239 S.W.3d 30 (2006).

**Cited:** *Jones v. City of Flippin*, 47 Ark. App. 102, 886 S.W.2d 875 (1994); *Board of Zoning Adjustment v. Cheek*, 328 Ark. 18, 942 S.W.2d 821 (1997); *Ryan v. Reynolds*, 70 Ark. App. 54, 16 S.W.3d 556 (2000).

## Rule 9. Appeals to circuit court.

[Note: For appeals in criminal cases, see **Rule 36 of the Arkansas Rules of Criminal Procedure.**]

(a) *Time for Taking Appeal From District Court.* All appeals in civil cases from district courts to circuit court must be filed in the office of the clerk of the particular circuit court having jurisdiction of the appeal within 30 days from the date of a docket entry awarding judgment regardless of whether a formal judgment is entered. The 30-day period is not extended by a motion



for new trial, a motion to amend the court's findings of fact or to make additional findings, or any other motion to vacate, alter or amend the judgment.

(b) *How Taken From District Court.* A party may take an appeal from a district court by filing a certified copy of the district court's docket sheet, which shows the awarding of judgment and all prior entries, with the clerk of the circuit court having jurisdiction over the matter. Neither a notice of appeal nor an order granting leave to appeal shall be required. The appealing party shall serve a copy of the certified docket sheet upon counsel for all other parties, and any party proceeding pro se, by any form of mail that requires a signed receipt.

(c) *Procedure on Appeal From District Court.*

(1) All the parties shall assert all their claims and defenses in circuit court. Within thirty days after a party perfects its appeal to circuit court by filing a certified copy of the district court docket sheet with the circuit clerk, the party who was the plaintiff in district court shall file a complaint and plead all its claims in circuit court. The party who was the defendant in district court shall file its answer, motions, and claims within the time and manner prescribed by the Arkansas Rules of Civil Procedure. All the parties shall serve their pleadings and other papers on counsel for all opposing parties, and on any party proceeding pro se, by any form of mail which requires a signed receipt.

(2) At the time they file their complaint, answer, motions, and claims, the parties shall also file with the circuit clerk certified copies of any district court papers that they believe are material to the disputed issues in circuit court. Any party may also file certified copies of additional district court papers at any time during the proceeding as the need arises.

(3) As soon as practicable after the pleadings are closed, the circuit court shall establish a schedule for discovery, motions, and trial.

(4) Except as modified by the provisions of this rule, and except for the inapplicability of Rule of Civil Procedure 41, the Arkansas Rules of Civil Procedure shall govern all the circuit court proceedings on appeal of a district court judgment as if the case had been filed originally in circuit court.

(d) *Supersedeas Bond on Appeal From District Court.* Whenever an appellant entitled thereto desires a stay on appeal to circuit court in a civil case, he shall present to the district court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be to the effect that appellant shall pay to appellee all costs and damages that shall be affirmed against appellant on appeal; or if appellant fails to prosecute the appeal to a final conclusion, or if such appeal shall for any cause be dismissed, that appellant shall satisfy and perform the judgment, decree, or order of the inferior court. All proceedings in the district court shall be stayed from and after the date of the court's order approving the supersedeas bond.

(e) *Special Provisions For Appeals From County Court to Circuit Court.* Unless otherwise provided in this subdivision, the requirements of subdivisions (a), (b), (c), and (d) govern appeals from county court to circuit court. A party may take an appeal from the final judgment of a county court by filing a notice of appeal with the clerk of the circuit court having jurisdiction over the matter within thirty (30) days from the date that the county court filed its order with the county clerk. A certified copy of the county court's

final judgment must be attached to the notice of appeal. In the circuit-court proceeding, the party who was the petitioner or plaintiff in county court shall have all the obligations of the plaintiff in a case that has been appealed from district court to circuit court. If there were no defendants in the county-court proceeding, then the petitioner/plaintiff shall name all necessary, adverse parties as defendants in its complaint filed in circuit court.

(f) *Administrative Appeals.*

(1) If an applicable statute provides a method for filing an appeal from a final decision of any governmental body or agency and a method for preparing the record on appeal, then the statutory procedures shall apply.

(2) If no statute addresses how a party may take such an appeal or how the record shall be prepared, then the following procedures apply.

(A) *Notice of Appeal.* A party may appeal any final administrative decision by filing a notice of appeal with the clerk of the circuit court having jurisdiction of the matter within thirty (30) days from the date of that decision. The notice of appeal shall describe the final administrative decision being appealed and specify the date of that decision. The date of decision shall be either the date of the vote, if any, or the date that a written record of the vote is made. The party shall serve the notice of appeal on all other parties, including the governmental body or agency, by serving any person described in Arkansas Rule of Civil Procedure 4(d)(7), by any form of mail that requires a return receipt.

(B) *The Record on Appeal.* Within thirty (30) days after filing its notice of appeal, the party shall file certified copies of all the materials the party has or can obtain that document the administrative proceeding. Within thirty (30) days after these materials are filed, any opposing party may supplement the record with certified copies of any additional documents that it believes are necessary to complete the administrative record on appeal. At any time during the appeal, any party may supplement the record with a certified copy of any document from the administrative proceeding that is not in the record but the party believes the circuit court needs to resolve the appeal.

(C) *Procedure on Appeal.* As soon as practicable after all the parties have made their initial filing of record materials, the court shall establish a schedule for briefing, hearings, and any other matters needed to resolve the appeal. (Amended May 26, 1987, effective July 1, 1987; amended November 18, 1996, effective March 1, 1997; amended January 22, 2004; revised December 9, 2004, effective January 1, 2005; amended October 9, 2008, effective January 1, 2009.)

**Reporter's Notes to Rule 9:** 1. While Rule 9 does not change prior Arkansas law concerning the time for taking an appeal from an inferior court to circuit court, it does change prior procedures for taking an appeal. Section (b) removes the requirement found in superseded *Ark. Stat. Ann.* § 26-1302 (Repl. 1962) that the appellant file an affidavit that the appeal was not taken for purposes of delay. Also abolished is the requirement found in superseded *Ark. Stat. Ann.* § 26-1302(3) (Repl. 1962) that a bond be posted as a condition precedent for appeal. Since such a bond is not required for an appeal from any other court in Arkansas, it was deemed unneces-

sary under these rules, particularly since appeals from inferior courts are tried de novo.

2. The contents of the record need not be extensive for an appeal. As a minimum, however, the record should reflect the claim form, the written answer or response, if any, the judgment of the court and any other writings or documents filed in the inferior court or offered in evidence. As under prior Arkansas law, the appellant retains the responsibility for obtaining and filing the record with the circuit clerk.

**Addition to Reporter's Notes, 1987 Amendment:** Rule 9(d) is amended to require that a supersedeas bond, with such



surety as the court may require, be presented to the inferior court if a stay is sought pending appeal to circuit court. Under the prior rule, such a bond was posted with and approved by the circuit clerk. The rule was changed in light of the expanded jurisdiction given municipal courts under Amendment 64 to the Constitution. Amended Rule 9(d) follows closely Rule 8(c) of the Rules of Appellate Procedure.

**Addition to Reporter's Notes, 1997 Amendment:** The second sentence of subdivision (b) has been divided into two sentences and revised to make clear that the clerk's duty to prepare and certify the record for an appeal is conditioned upon the appellant's payment of any fees authorized by law. This requirement is consistent with the notion that the responsibility for perfecting an appeal rests with the appellant, not with the clerk. See *Hawkins v. City of Prairie Grove*, 316 Ark. 150, 871 S.W.2d 357 (1994).

**Addition to Reporter's Notes, 2004 Amendment:** The new second sentence of subdivision (a) incorporates the holding of the Court of Appeals in *Barnett v. Howard*, 79 Ark. App. 293, 94 S.W.3d 342 (2002). The new second sentence of subdivision (b) provides that neither a notice of appeal nor order granting an appeal is required to perfect an appeal to circuit court. The Supreme Court has made plain that all that is necessary is the timely filing of the inferior court record or an affidavit that the record is unavailable. E.g., *McBride v. State*, 297 Ark. 410, 762 S.W.2d 785 (1989); *Ottens v. State*, 316 Ark. 1, 871 S.W.2d 329 (1994). However, an express statement in Rule 9 was deemed desirable in light of reports that some clerks have demanded a notice of appeal or court order.

**Addition to Reporter's Notes, 2008 Amendment:** The rule has been substantially rewritten to eliminate several points of confusion and difficulty.

Subdivision (a) has been amended. The rule prescribes that the thirty-day time to appeal from a district court runs from the date that the court makes a docket entry of judgment. This change conforms the rule to precedent. E.g., *Lewis v. Robertson*, 96 Ark. App. 114, 239 S.W. 3d 30 (2006). This change also preserves the flexibility that district courts need to dispose of many cases with only a docket entry. Counsel and parties proceeding pro se must monitor the district court's docket carefully to determine when the time to appeal begins to run.

The procedure prescribed in subdivision (b) for filing an appeal has been changed. Instead of having to file a certified copy of the entire district court record, now the appealing party must file with the circuit clerk only a certified copy of the district court docket sheet. This document should show all pro-

ceedings in the district court, including the judgment appealed from. This simplification makes it easier to perfect an appeal. It eliminates the difficulty that parties often encountered in getting a complete certified record from the district court clerk within thirty days of the judgment. This change also eliminates the need for former subdivision (c), which provided an affidavit procedure when the certified district court record was unavailable and which resulted in litigation about that procedure. E.g., *Nettles v. City of Little Rock*, 96 Ark. App. 86, 238 S.W.3d 635 (2006). New subdivision (b) also conforms the rule to case law. In *McNabb v. State*, 367 Ark. 93, 238 S.W.3d 119 (2006), the supreme court held that a party satisfied former rule 9's requirement that the appealing party file "a record of the proceedings" in the district court by filing a certified district court docket sheet with the circuit clerk.

To ensure notice of the appeal to opposing parties, the appealing party must serve the docket sheet on all other parties by some form of mail that generates a signed receipt. This provision echoes the requirements of Arkansas Rule of Appellate Procedure — Civil 3(f) about serving a notice of appeal. Rule of Civil Procedure 4 does not apply and service of process is not required.

Former Rule 9 was silent about the procedure that circuit courts should follow in perfected appeals from district court. This silence led to confusion. E.g., *Wright v. City of Little Rock*, 366 Ark. 96, 233 S.W.3d 644 (2006). New subdivision (c) outlines the procedure in circuit court: the party who was the plaintiff in the district court must file a complaint and plead its claims again; the other parties must file their answers, motions, and claims; all the parties must file certified copies of whatever district court materials they believe are important; and then the circuit court should handle the case like any other matter pursuant to the Arkansas Rules of Civil Procedure.

The requirement to plead again is new. It better captures the truth that appeals from district court are appellate in form but original in fact. This new pleading requirement generated a corresponding amendment in Rule of Civil Procedure 81(b), which formerly made pleading again discretionary with the circuit court.

Under settled precedent, an appeal from a district court judgment may not be dismissed without prejudice, either by a party's voluntary nonsuit or by the circuit court. Such a dismissal leaves the district court's judgment intact and finally adjudicates the matter. *Wright, supra*; *Watson v. White*, 217 Ark. 853, 233 S.W.2d 544 (1950). With that exception, and subject to the particularized requirements of this rule, the Arkansas Rules of Civil Procedure apply to circuit court proceedings

on appeal from a district court's judgment. To insure that all parties have notice of the claims and defenses in circuit court, and to avoid defaults, all the parties must serve their pleadings by some form of mail requiring a signed receipt.

New subdivision (e) contains some needed special provisions for appeals to circuit court from final orders of the county court. Unless subdivision (e) provides a different procedure, the provisions of subdivisions (a), (b), (c), and (d) govern appeals from county courts to circuit court. This new provision conforms Rule 9 to precedent: the district court rules govern appeals from county courts. *Pike Ave. Dev. Co. v. Pulaski County*, 343 Ark. 338, 37 S.W.3d 177 (2001). Under the Arkansas Constitution, the county courts have jurisdiction over a number of matters, most prominently county taxes (including those on real property) and roads. See generally David Newbern & John J. Watkins, 2 Arkansas Practice Series: Civil Practice & Procedure § 2:6 (4th ed. 2005 & Supp. 2007). Former Rule 9 was written solely in terms of appeals from district court, and its requirements did not fit appeals from county courts well. The revised provisions of Rule 9 (a)-(d) are a better fit, but some special provisions for appeals in county-court cases are nonetheless needed.

The procedures used in county courts vary. Some, for example, do not maintain a docket sheet for each matter. All final orders of county courts, however, are filed with the county clerk. New subdivision (e) ties the time for taking an appeal from a county court, and the method of perfecting that appeal, to the filing of the county court's final order. A party seeking to appeal must file a notice of appeal with the appropriate circuit clerk within thirty days of the date that the county court enters its final order. The notice should describe the order being appealed from and must attach a certified copy of that order. The timely filing of this notice is jurisdictional, as was the timely filing of a certified record or affidavit of unavailability under the former rule. *Pike Ave.*, *supra*. Some cases in county court involve petitioners and respondents, rather than plaintiffs and defendants, and some have no adverse party named. New subdivision (e) addresses these issues by making the party who sought relief in the county court the plaintiff in any appeal to circuit court and obligates that party to open the pleadings with a complaint naming all necessary, adverse parties as defendants. Whether a party is necessary should be determined by reference to Rule of Civil Procedure 19 and the cases interpreting it. Absent a specific and contrary provision in subdivision (e), all the provisions of subdivisions (a), (b), (c), and (d) apply to appeals from county court to circuit court.

Subdivision (f) is new. Rule 9 has long governed appeals from decisions by certain governmental bodies, such as zoning boards and city councils, to circuit court. See generally Newbern & Watkins, *supra* § 2:4. The fit between the provisions of the rule and these administrative appeals, however, was imprecise. This resulted in problems for litigants in perfecting their appeals. *E.g.*, *Bd. of Zoning Adjustment of City of Little Rock v. Cheek*, 328 Ark. 18, 942 S.W.2d 821 (1997); *Franks v. Mountain View*, 99 Ark. App. 205, — S.W. 3d — (2007). The provisions of new subdivision (f) are tailored for administrative appeals.

Paragraph (f)(1) is a default provision: if a statute prescribes the method for filing an appeal or preparing the record on appeal, or both, then the statutory procedures apply. Paragraph (f)(2) and its subparts describe the governing procedures if no applicable statutory procedure exists. A party perfects its appeal under new paragraph (f)(2)(A) by filing a timely notice of appeal with the circuit court. The notice should describe the administrative decision being appealed and the date of that decision. The thirty-day window in which to file the notice is standard. Ark. R. App. P. — Civil 4(a). In cases involving administrative action, uncertainty sometimes arose about the exact date of the decision: was it, for example, when a vote was taken or when the minutes reflecting a vote were approved? *Cf. Cheek, supra*. The revised rule eliminates this uncertainty by allowing either the date of any vote, or the date of a writing embodying the decision (e.g., a letter determination or approved minutes), to be the date of decision. This provision is intended to loosen the governing standard so that parties do not lose their rights to seek judicial review of an administrative decision based on a hypertechnical concern about precisely when the government body made its decision. This new provision ensures that all parties will be informed about the appeal by mandating service of the notice of appeal by any form of mail that requires a return receipt. The certificate of service on the notice should show compliance with this requirement.

New provision (f)(2)(B) creates a new and less rigid procedure for getting the administrative record to the circuit court. The former rule's problematic requirement linking the filing of the record to perfecting the appeal has been eliminated. The record-keeping practices of local administrative bodies vary widely, but this variance should not handicap litigants. Getting any needed administrative record materials to the circuit court is a housekeeping matter, not a jurisdictional requirement. The revised rule instructs all the parties to take turns filing certified copies of whatever materials they possess or can obtain that document the administrative proceed-



ings. And the parties may supplement the record at any time during the circuit court proceeding if important documents from the administrative process become available.

New provision (f)(2)(C) clarifies that, once

the parties have made their initial record filings, the circuit court should enter an order scheduling whatever proceedings are needed — discovery, briefing, or hearings — to resolve the case.

## RESEARCH REFERENCES

**Ark. L. Rev.** Case Note, Lost in Translation: Combs v. City of Springdale, An Overview of the Ins and Outs of Appeals Procedure for Administrative Decisions by Local Governments, 61 Ark. L. Rev. 351.

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## CASE NOTES

### ANALYSIS

Construction.  
Applicability.  
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### Construction.

This rule is mandatory and jurisdictional and leaves the circuit court without authority to accept untimely appeals. *Hawkins v. City of Prairie Grove*, 316 Ark. 150, 871 S.W.2d 357 (1994); *J&M Mobile Homes, Inc. v. Hampton*, 347 Ark. 126, 60 S.W.3d 481 (2001).

The 30-day requirement for filing under the rule is mandatory and jurisdictional, and the circuit court has no authority to accept untimely appeals. *State v. Dawson*, 343 Ark. 683, 38 S.W.3d 319 (2001).

### Applicability.

This rule mandating an appeal within thirty days of judgment in civil cases, is also the appropriate procedure for criminal appeals. *Bocksnick v. City of London*, 308 Ark. 599, 825 S.W.2d 267 (1992).

This rule applies to criminal appeals as well as civil case appeals. *Allred v. State*, 310 Ark. 476, 837 S.W.2d 469 (1992); *Laxton v. State*, 49 Ark. App. 148, 899 S.W.2d 479 (1995).

The timely filing of an appeal from municipal court is controlled by this rule, rather than § 16-17-213. *Hawkins v. City of Prairie Grove*, 316 Ark. 150, 871 S.W.2d 357 (1994).

Although this rule only applies explicitly to appeals in civil cases, the Arkansas Supreme Court has held that the rule also governs

appeals from municipal court to circuit court in criminal cases; these cases also hold that the thirty-day period for filing the record is jurisdictional and that this issue may be raised for the first time on appeal. *Jones v. City of Flippin*, 47 Ark. App. 102, 886 S.W.2d 875 (1994).

Landowners' time for filing their appeal to the circuit court was governed by this rule; even assuming that the 60-day provision of § 27-66-403(b) applied, the manner or procedure for perfecting the appeal would still be controlled by this rule, and not only did the landowners fail to file their notice of appeal in a timely manner, but the filing of the notice of appeal alone was ineffective to perfect the appeal. *Barnett v. Howard*, 353 Ark. 756, 120 S.W.3d 564 (2003).

Where police chief appealed from a decision of the civil service commission terminating the chief for cause, the Arkansas Supreme Court held that, once the requirements of § 14-51-308(e)(1)(B) were met, an appeal from a decision of the civil service commission to the circuit court should proceed in accordance with the rules of the Arkansas Supreme Court, specifically, this rule, governing an appeal from inferior courts. *Clark v. Pine Bluff Civ. Serv. Comm'n*, 353 Ark. 810, 120 S.W.3d 541 (2003).

Landowner's complaint filed in circuit court was not an appeal of final action taken by the City Council, but was, instead, a complaint against the mayor based on his alleged failure to comply with a mandatory duty; therefore, § 14-56-425 did not apply, and the landowner was not required to comply with the directives of this rule, and the circuit court had subject-matter jurisdiction of his claims. *Brock v. Townsell*, 2009 Ark. 224, 309 S.W.3d 179 (2009).

Subsection (e) of this rule applies in situations where a county court does not maintain

a docket sheet. *Pack v. Clark*, 2010 Ark. App. 756, — S.W.3d —, 2010 Ark. App. LEXIS 806 (Nov. 10, 2010).

### **Default Judgments.**

Denial of a motion to set aside a default judgment is an appealable order, and there is no reason to deny such appeals from municipal to circuit courts. *Marcinkowski v. Affirmative Risk Mgt. Corp.*, 322 Ark. 580, 910 S.W.2d 679 (1995).

Debtor's appeal to the circuit court from a magistrate's order denying her motion to set aside a default judgment was timely because it was made well within 30 days of the date of the denial of her motion to set aside as required by subsection (a) of this rule, although the default judgment had been entered over a year earlier. There was no time limit for seeking relief from default under Ark. R. Civ. P. 55(c). *Gurien v. Access Credit Mgmt.*, 2011 Ark. App. 711, — S.W.3d —, 2011 Ark. App. LEXIS 763 (Nov. 16, 2011).

### **Duty of Counsel.**

It is the duty of counsel, not the judge, clerk, or reporter, to perfect the appeal. *Edwards v. City of Conway*, 300 Ark. 135, 777 S.W.2d 583 (1989).

The duty to perfect an appeal rests upon the counsel of the appealing party. *Ottens v. State*, 316 Ark. 1, 871 S.W.2d 329 (1994).

### **Entry of Judgment.**

The language of subsection (a) of this rule, providing for appeal to circuit court, is similar to ARAP 4(e), which provides that time for appeal runs from the date of filing. *West Apts., Inc. v. Booth*, 297 Ark. 247, 760 S.W.2d 861 (1988).

While ARAP 4(e) establishes that a judgment is entered when it is filed with the clerk of a circuit, chancery, or probate court, the procedure is decidedly different from the manner in which a judgment is entered in inferior court proceedings; that difference becomes quickly apparent by a review of AICR 8 [now ADCR 8] and this rule. These rules, particularly AICR 8(c), reflect that an inferior court [now district court], such as the municipal court, enters any judgment it renders by entering, in a timely manner, the date and amount of the judgment in the court's docket; this specific procedure for entering judgments in an inferior court [now district court] is in marked contrast to that applicable to courts of general jurisdiction under ARAP 4(e), where judgments are entered only when they are filed with the clerk of those courts. *West Apts., Inc. v. Booth*, 297 Ark. 247, 760 S.W.2d 861 (1988).

### **Jurisdiction.**

When the time for filing an appeal is fixed by a rule or statute, the provision which limits the time is jurisdictional in nature. *Ottens v.*

*State*, 316 Ark. 1, 871 S.W.2d 329 (1994).

In landowner's challenge to a decision by the board of zoning adjustment that he had abandoned a nonconforming use of the property, the circuit court never had jurisdiction where the landowner failed to perfect his appeal in the time and manner provided by this rule. *Board of Zoning Adjustment v. Cheek*, 328 Ark. 18, 942 S.W.2d 821 (1997).

When property owners and builder requested a writ of mandamus in circuit court, challenging a city's stop-work order on a building permit, the circuit court lacked jurisdiction as the builder and property owners prematurely circumvented the appellate process by filing a writ of mandamus prior to the board of zoning adjustment reaching a final decision on the matter. *Douglas v. City of Cabot*, 347 Ark. 1, 59 S.W.3d 430 (2001).

Failure to comply strictly with the rule precluded the circuit court from having jurisdiction over the appeal; filing of certified copy of the transcript of the lower proceedings had been within 30 days. *J&M Mobile Homes, Inc. v. Hampton*, 347 Ark. 126, 60 S.W.3d 481 (2001).

Homeowners association's appeal from the trial court's dismissal of its appeal of a planning commission's decision was dismissed; the trial court lacked jurisdiction over the appeal as the association failed to file certified minutes of the commission's hearing or an affidavit showing that it had requested certification of the record. *Pierce Addition Homeowners Ass'n v. City of Vilonia Planning Comm'n*, 76 Ark. App. 393, 65 S.W.3d 485 (2002).

Because this rule did not apply to the property owner's cause of action for deprivation of property against individual appellees, the trial court had jurisdiction to hear those claims and the judgment on the pleadings as to those claims involving the councilman, mayor, and former mayor were reversed and remanded to the trial court. *Ingram v. City of Pine Bluff*, 355 Ark. 129, 133 S.W.3d 382 (2003).

Judgment notwithstanding the verdict was appropriately granted to a city because a property owner failed to exhaust available administrative remedies or otherwise comply with this rule where the owner failed to appeal from a stop-work order before filing a declaratory judgment action seeking to invalidate a condemnation resolution and, therefore, the circuit court lacked subject-matter jurisdiction. *Talley v. City of N. Little Rock*, 2009 Ark. 601, — S.W.3d —, 2009 Ark. LEXIS 786 (2009).

Once the requirements of § 14-51-308(e)(1)(B) have been met, an appeal from a decision of the civil service commission to circuit court should proceed in accordance with the rules of the court governing an appeal from inferior courts; thus, a party



appealing a decision of the civil service commission has, pursuant to subsection (c) of this rule, thirty days from the entry of the commission's written decision to file a record with the circuit court. *Barrows v. City of Fort Smith*, 2010 Ark. 73, 360 S.W.3d 117 (2010).

#### **Not Good Cause.**

A lack of knowledge of the rules in itself does not constitute good cause for failure to file a timely notice of appeal. Citing *Garner v. State*, 293 Ark. 309, 737 S.W.2d 637 (1987). *Norman v. Swift*, 69 Ark. App. 42, 9 S.W.3d 559 (2000).

#### **Perfection of Appeal.**

The defendant's appeal from municipal court was perfected on the date that she filed an affidavit that stated that the municipal court clerk refused to certify and prepare the record for her appeal, rather than on the date that she posted an appeal bond. *Worley v. State*, 71 Ark. App. 80, 26 S.W.3d 142 (2000).

Where defendant filed, in the circuit court, the record of the municipal court proceedings regarding her conviction for driving while intoxicated within 30 days of the entry of judgment, she was not required to file a notice of appeal to perfect her appeal to circuit court. *Crump v. Ford*, 346 Ark. 156, 55 S.W.3d 295 (2001).

Appellant had to either actually lodge the record in the circuit court, or file an affidavit with the circuit court clerk stating that he requested the inferior court clerk [now district court clerk] to prepare the record and the clerk neglected to prepare and certify that record for purposes of appeal. *J&M Mobile Homes, Inc. v. Hampton*, 347 Ark. 126, 60 S.W.3d 481 (2001).

Even assuming that § 27-66-403(b) applied and appellants had 60-days to appeal the county court order denying their petition to establish a private road, this rule would still control the procedure for perfecting the appeal; because the filing of the notice of appeal alone was ineffective to perfect the appeal and appellants did not timely file the record, the appeal was properly dismissed. *Barnett v. Howard*, 79 Ark. App. 293, 94 S.W.3d 342 (2002), *aff'd* 353 Ark. 756, 120 S.W.3d 564 (2003).

Even assuming, without deciding that § 14-51-308(e)(1)(B) was applicable to the terminated police chief, the chief would have had 30 days from the entry of the civil service commission's written decision to file a record with the circuit court or to file an affidavit showing that he had requested a record from the commission pursuant to subsection (c) of this rule, the circuit court was correct in its finding that the chief's failure to comply with the filing requirements of this rule required

the dismissal of the case. *Clark v. Pine Bluff Civ. Serv. Comm'n*, 353 Ark. 810, 120 S.W.3d 541 (2003).

Dismissal of landowner's appeal was proper as the landowner did not perfect his appeal by filing it with a certified record of the city council proceedings that constituted the final decision under § 14-56-425, as required by this rule. *Combs v. City of Springdale*, 366 Ark. 31, 233 S.W.3d 130 (2006).

Property owners' appeal of the denial of nonconforming use status was improperly dismissed because their appeal was perfected under this rule and § 14-56-425 by the timely filing of the record in circuit court; Ark. R. Civ. P. 4 did not apply because there was no requirement of service of summons and complaint for the appeal and, to the extent that *Weiss v. Johnson*, 331 Ark. 409, 961 S.W. 2d 28 (1998), was inconsistent, it was overruled. *Wright v. City of Little Rock*, 366 Ark. 96, 233 S.W.3d 644 (2006).

Dismissal of the Arkansas Game and Fish Commission's (AGFC) appeal from a county judge's declaration of a public easement of public land next to the landowner's property was improper as a certified copy of the record was filed in the office of the circuit court in timely fashion, a file stamp was not essential for a "filing," and the requirements of subsection (b) of this rule were met. Ark. Game & Fish Comm'n v. Eddings, 2009 Ark. 359, 324 S.W.3d 328 (2009).

#### **Record of Proceedings.**

The necessary record in an appeal from a denial of a motion to suppress evidence and a misdemeanor conviction in municipal court would have included the information, the motion, and the judgment of the municipal court. *Smith v. State*, 316 Ark. 32, 870 S.W.2d 716 (1994).

Under this rule, the appellant has the burden of requesting the clerk to prepare and certify the record of the inferior court [now district court] proceedings, and is also charged with the responsibility of filing such record in the office of the circuit clerk; alternatively, the appellant must file an affidavit in the office of the circuit court clerk showing that he has requested the clerk of the inferior court [now district court] to prepare and certify the record for purposes of appeal and that the clerk has neglected to prepare and certify such record for purposes of appeal. *Pace v. Castleberry*, 68 Ark. App. 342, 7 S.W.3d 347 (1999).

An appeal bond signed by the municipal judge and filed by the appellant was not sufficient to perfect the appellant's municipal appeal, even if the appeal bond contained the same information as the transcript, since an appeal bond cannot serve as a replacement of the record. *Baldwin v. State*, 74 Ark. App. 69, 45 S.W.3d 412 (2001).

District court's docket sheet was sufficient to satisfy a "record of proceedings" as the docket sheet included the violation defendant was charged with, the dates of the violation and arrest, defendant's plea, and the disposition of the case, and the docket sheet was obtained from the district court clerk in compliance with subsection (b) of this rule; thus, the circuit court erred in finding it was without jurisdiction due to the untimeliness of the appeal as it was undisputed that defendant timely filed the certified docket sheet within 30 days of the date of judgment. *McNabb v. State*, 367 Ark. 93, 238 S.W.3d 119 (2006).

### **Substantial Compliance.**

The filing of an affidavit and appeal bond within the 30 days after a judgment in municipal court does not constitute substantial compliance with the requirements for taking an appeal from municipal court to circuit court. *Bass v. State*, 9 Ark. App. 211, 657 S.W.2d 218 (1983).

A notice of appeal is not necessary to perfect an appeal from municipal court to circuit court. As long as the record of the inferior court [now district court] proceeding is filed with the circuit clerk within 30 days of the entry of the judgment, the appeal is perfected. *McBride v. State*, 297 Ark. 410, 762 S.W.2d 785 (1989).

Filing a notice of appeal within thirty (30) days of the conviction does not suffice to perfect an appeal; the appealing party must file the record of the inferior court [now district court] proceeding within thirty (30) days in order to bring an appeal. *Ottens v. State*, 316 Ark. 1, 871 S.W.2d 329 (1994).

Trial court had jurisdiction to hear landowners' appeal as their affidavit was sufficient to comply with this rule where the substance of the affidavit and the clerk's response made clear that the record was not available to the landowners on July 7 and would not be available until after it was transcribed and approved by the city board of directors. *Nettles v. City of Little Rock*, 96 Ark. App. 86, 238 S.W.3d 635 (2006).

This rule mandated the filing of a certified copy of a docket sheet in order to perfect an appeal to the circuit court. Since an appeal transcript was filed instead of a docket sheet, the appeal was dismissed because compliance was strict; substantial compliance would not suffice as this rule's provisions were mandatory and jurisdictional. *Johnson v. Dawson*, 2010 Ark. 308, 365 S.W.3d 913 (2010).

Circuit court erred in dismissing an appeal of an order directing the placement of a roadway over appellants' property because by filing their complaint and attaching to it a certified copy of a county court's final order, appellants complied with subsection (e) of this rule; the fact that other certified documents were also attached was of no consequence.

*Pack v. Clark*, 2010 Ark. App. 756, — S.W.3d —, 2010 Ark. App. LEXIS 806 (Nov. 10, 2010).

Although a local utility customer failed to file a notice of appeal to the circuit court as required under this rule, which applied to an appeal from the municipal utility's decision, but instead filed a complaint alleging that it was seeking judicial review of a final administrative order, the complaint properly described the final administrative decision and specified the date of that decision as required. *Mt. Pure, LLC v. Little Rock Wastewater Util.*, 2011 Ark. 258, — S.W.3d —, 2011 Ark. LEXIS 245 (June 16, 2011).

### **Supersession of Section.**

Section 16-96-505, which places the responsibility for filing the transcript for inferior court [now district court] appeals on the court itself, has been superseded by this rule. *Bocksnick v. City of London*, 308 Ark. 599, 825 S.W.2d 267 (1992); *Ottens v. State*, 316 Ark. 1, 871 S.W.2d 329 (1994).

Section 16-17-213 has been superseded by this rule. *Hawkins v. City of Prairie Grove*, 316 Ark. 150, 871 S.W.2d 357 (1994).

There is no perceivable public policy reason for the General Assembly to provide a six-month period to appeal from a county court order involving a property assessment adjustment and, therefore, Inferior Court Rule 9 [now District Court Rule 9] governs such an appeal and supersedes all portions of § 16-67-201 to the contrary. *Pike Ave. Dev. Co. v. Pulaski County*, 343 Ark. 338, 37 S.W.3d 177 (2001).

### **Timeliness.**

The fact that a plea of guilty was entered in municipal court does not prevent an appellant from perfecting an appeal to circuit court. However, where the appellant's notice of appeal and transcript were both filed over six months after the date of the municipal court judgment, the appellant failed to timely file his notice of appeal. *Bass v. State*, 9 Ark. App. 211, 657 S.W.2d 218 (1983).

Where judgment against defendant was entered by the municipal judge by docket entry, and no appeal was perfected within 30 days, there was no jurisdiction in the circuit court to hear an appeal as it was untimely, and thus there was no jurisdiction to grant a "new trial," and a hearing on that motion would have been superfluous. *Allred v. State*, 310 Ark. 476, 837 S.W.2d 469 (1992).

Where defendant convicted of a misdemeanor in municipal court filed a motion to proceed as a pauper in circuit court, former ARCrP 36.22 did not stay the time for appeal pursuant to this rule, since the motion to proceed as a pauper in circuit court was not one of the specified post-trial motions, and it was not pending in the trial court. *Smith v. State*, 316 Ark. 32, 870 S.W.2d 716 (1994).



Under this rule, a party has 30 days from entry of judgment to file an appeal; where defendant delayed five months before filing its motion for appeal with the circuit court, the circuit court was without jurisdiction or authority to accept defendant's untimely appeal from the judgment. *McCourt Mfg. Co. v. Credit Bureau*, 319 Ark. 23, 888 S.W.2d 650 (1994).

A late filing in circuit court thwarts the right to a jury trial. Subsection (a) of this rule is mandatory and jurisdictional. *Lineberry v. State*, 322 Ark. 84, 907 S.W.2d 705 (1995).

A notice of appeal is not required in an appeal from municipal court to circuit court; filing such a notice of appeal within 30 days of the municipal court conviction is not sufficient to comply with this rule. *Laxton v. State*, 49 Ark. App. 148, 899 S.W.2d 479 (1995).

Defendant's notice of appeal from a conviction for second-degree battery was timely filed on July 31, 1995, where judgment was entered June 29, 1995; the day of entry of judgment was not counted, making the 30th day fall on a Saturday, thereby allowing the defendant to file the notice the following Monday, July 31. *Kersh v. State*, 56 Ark. App. 39, 938 S.W.2d 569 (1997).

The circuit court lacked jurisdiction where the appellant failed to file his notice of appeal from the municipal court within 30 days of judgment. *Barnett v. City of Dardanelle*, 56 Ark. App. 131, 938 S.W.2d 572 (1997).

The circuit court was correct in dismissing defendant's appeal as untimely where he failed to timely appeal from the municipal court and failed to avail himself of the provision in subsection (c) of this rule by filing an affidavit with the circuit court. *Norman v. Swift*, 69 Ark. App. 42, 9 S.W.3d 559 (2000).

The appellant failed to comply with the rule where neither the record nor a proper affidavit was filed within the 30-day period, notwithstanding the contention that the appellant's president included a prayer for an appeal in his affidavit and complaint which were timely filed and that it could later amend the affidavit to correct it. *Pike Ave. Dev. Co. v. Pulaski County*, 343 Ark. 338, 37 S.W.3d 177 (2001).

Circuit court correctly granted the motion on the pleadings as to the property owner's counts against the city and planning commission where the owner's appeal, filed two years after the city's decision, was well outside the 30-day requirement and was thus untimely because the counts had nothing to do with action by the city council and the circuit court did not have subject matter jurisdiction. *Ingram v. City of Pine Bluff*, 355 Ark. 129, 133 S.W.3d 382 (2003).

Although circuit court erred in finding that the law of the case doctrine kept it from considering an appeal from the denial of a

Ark. R. Civ. P. 60 motion in a road dispute, the error was harmless; there was no basis for relief under Rule 60(c)(4) because the alleged fraud was not caused by an adverse party. *Barnett v. Howard*, 363 Ark. 140, 211 S.W.3d 494 (2005).

In appellants' action to establish a road that would allow a reasonable means of access to their land, the trial court erred in refusing to entertain an appeal from a county court's denial of appellants' Ark. R. Civ. P. 60(c)(4) motion; as appellants complied with this rule within 30 days from the entry of the county court's order, the trial court had jurisdiction to conduct a de novo review. *Barnett v. Howard*, 363 Ark. 140, 211 S.W.3d 494 (2005).

Circuit court properly dismissed customers' appeal for lack of jurisdiction where, pursuant to Garland County, Ark., Dist. Ct. R. 8 and subsection (a) of this rule, more than thirty days had elapsed before the customers filed their appeal, which was untimely. *Lewis v. Robertson*, 96 Ark. App. 114, 239 S.W.3d 30 (2006).

Where the city council permitted a landowner to make curb cuts in front of his home that were contrary to the development plans' uniform design, the developers did not appeal that decision within thirty days as required by this rule. The trial court did not have jurisdiction over their complaint and appeal filed a year later; the developers did not file either a certified copy of the city council's proceedings or an affidavit stating that they could not timely file the record. *Franks v. Mountain View*, 99 Ark. App. 205, 258 S.W.3d 799 (2007).

Employer's appeal to a circuit court from a district court order directing the employer, as garnishee, to pay an employee's wages to a creditor, was untimely under this rule. The time for filing an appeal to the circuit court was not extended by a motion to set aside the district court's order, and the appellate court therefore lacked jurisdiction. *Ark. State Univ. v. Prof'l Credit Mgmt., Inc.*, 2009 Ark. 153, 299 S.W.3d 535 (2009).

Because a construction company failed to perfect its appeal of the final decision of a city's planning commission in the time and manner provided by this rule, the trial court did not have jurisdiction to hear it, and the commission's decision was a final action under § 14-56-425 since it ended the controversy and left no issues to be resolved as to the right-of-way requirement; because the decision was a final action, the company was required to comply with the directives of this rule in filing an appeal, but it did not file its complaint until more than thirty days after the commission's decision, and failure to comply with the requirements of this rule prevented the trial court from acquiring subject-matter jurisdiction. Ark. Constr. &

Excavation, LLC v. City of Maumelle, 2009 Ark. App. 874, — S.W.3d —, 2009 Ark. App. LEXIS 1006 (Dec. 16, 2009).

**Cited:** Taylor v. Jefferson County Dep’t of Social Servs., 18 Ark. App. 206, 712 S.W.2d 332 (1986); State Child Support Enforcement Unit v. Markham, 292 Ark. 449, 730 S.W.2d 497 (1987); Lowe v. State, 300 Ark. 106, 776 S.W.2d 822 (1989); Rowell v. White & Assocs., 302 Ark. 225, 788 S.W.2d 489 (1990); Moreland v. Vickers Chevrolet Co., 37 Ark. App. 1, 826 S.W.2d 289 (1992); Sosebee v. County Line Sch. Dist., 320 Ark. 412, 897 S.W.2d 556 (1995); Earp v. Benton Fire Dep’t, 52 Ark. App. 66, 914 S.W.2d 781 (1996); Barnett v. Howard, 363 Ark. 150, 211 S.W.3d 490 (2005); Robinson v. Villines, 2009 Ark. 632, 362 S.W.3d 870 (2009).

**Rule 10. Procedure in small claims division.**

(a) *Commencement of action — Form of claim and notice to defendant.*

(1) Actions in the small claims division of district court shall be commenced whenever the claimant or the personal representative of a deceased claimant shall file with the clerk of the court a claim in substantially the following form:

In the District Court of \_\_\_\_\_, State of Arkansas.

Small Claims Division

\_\_\_\_\_  
Plaintiff

vs. No. \_\_\_\_\_

\_\_\_\_\_  
Defendant

Defendant’s Address: \_\_\_\_\_

Nature of Claim: \_\_\_\_\_

Nature and Amount of Relief Claimed: \_\_\_\_\_

Date Claim Arose: \_\_\_\_\_

Factual Basis of Claim: \_\_\_\_\_

\_\_\_\_\_  
Signature of Plaintiff

\_\_\_\_\_  
Plaintiff’s Address

**SUMMONS AND NOTICE TO DEFENDANT**

You are hereby warned to file a written answer with the clerk of this court within thirty (30) days after you receive this claim and forward a copy to the plaintiff at the address above or a default judgment may be entered against you.

\_\_\_\_\_ (Signature of Clerk or Judge)

\_\_\_\_\_ District Court Clerk

Address: \_\_\_\_\_

**RETURN OF SERVICE**

STATE OF ARKANSAS  
COUNTY OF \_\_\_\_\_



I, \_\_\_\_\_, certify that I served the within Claim Form on the defendant, \_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_ m. on \_\_\_\_\_, 2 \_\_\_\_\_, by \_\_\_\_\_.  
 \_\_\_\_\_ (Show manner of service)

\_\_\_\_\_  
 Name and office, if any

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2 \_\_\_\_\_,  
 (To be completed if service by other than a Sheriff, Constable, or Clerk)

\_\_\_\_\_  
 Notary Public

My commission expires: \_\_\_\_\_

(2) *Preparation, etc., of claim form.* The plaintiff shall prepare the claim form as is set forth in this rule. The claim form shall be presented by the plaintiff in person. Upon receipt of the claim form and filing fee, the clerk shall file the claim form and proceed to assist the plaintiff in obtaining service on the defendant. In all cases, a copy of the answer in substantially the same form as set forth in this rule shall be included by the clerk with the claim form to be served on the defendant.

(3) *Service of process.*

(A) Unless service by the sheriff or other authorized person is requested by the plaintiff, the defendant shall be served by certified mail.

(B) The clerk shall enclose a copy of the claim form in an envelope addressed to the defendant at the address stated in the claim form, prepay the postage, the cost of which may be collected from the plaintiff at time of filing, and mail the envelope to the defendant by certified mail and request a return receipt from addressee only. The clerk shall attach to the original claim form the receipt for the certified letter and the return card thereon or other evidence of service of the claim form. No separate summons is required.

(C) Service hereunder shall be in accordance with Rule 4 of the Arkansas Rules of Civil Procedure.

(b) *Answer by defendant.* A defendant shall file an answer with the clerk of the court within thirty (30) days after the service of the claim form upon the defendant. The defendant shall mail a copy of the answer to the plaintiff.

(c) *Form of answer — Affirmative relief.* The defendant shall file with the clerk of the court his or her answer and assert any affirmative relief he or she may claim in substantially the following form:

In the District Court of \_\_\_\_\_  
 Small Claims Division

\_\_\_\_\_  
 Plaintiff

vs. \_\_\_\_\_ No. \_\_\_\_\_

\_\_\_\_\_  
 Defendant

Defendant's Address: \_\_\_\_\_  
 Reason for Denial of Plaintiffs Claim: \_\_\_\_\_

Nature and Amount of Affirmative Relief (if any): \_\_\_\_\_

Date Affirmative Claim Arose: \_\_\_\_\_

Factual Basis of Affirmative Claim: \_\_\_\_\_

\_\_\_\_\_  
Signature of Defendant

(d) *Taking of evidence — Third-party practice.*

(1) The plaintiff and the defendant shall have the right to offer evidence in their behalf by witnesses appearing at the hearing or, with the permission of the court, at any other time.

(2) Actions in the small claims division of district court shall be tried informally before the court with relaxed rules of evidence.

(3) No depositions shall be taken and no interrogatories or other discovery proceedings shall be used in proceedings, except in the aid of execution.

(4) No new parties shall be brought into an action in the small claims division of district court, and no party shall be allowed to intervene.

(e) *Judgments and orders — Awarding of costs — Appeals.*

(1) The judge may give judgment and make such orders as to time of payment or otherwise as may be deemed by him or her to be right and just. However, judgments and orders shall be in writing and entered upon the official record in the same manner as other judgments and orders of the district court.

(2) No prejudgment attachment or prejudgment garnishment shall issue in any suit in the small claims division of district court.

(3) Proceedings to enforce or collect a judgment shall be in all respects as in other cases, except that security interests may be proved at the same time as the proof of the claim. The order of judgment may include an order of delivery directing the sheriff to deliver the property subject to the security interests to the plaintiff. If the court issues an order of delivery, no further action shall be necessary on the part of the plaintiff to obtain possession of the property.

(4) Except as otherwise ordered by the court, no execution or enforcement proceedings shall issue on any judgment until after the expiration of ten (10) days from the entry thereof.

(5) The prevailing party in an action in the small claims division of district court is entitled to costs of the action, including the costs of service and notice directing the appearance of the defendant and the costs of enforcing any judgment rendered in the action.

(6) Appeals may be taken from the judgment rendered in the small claims division of district court in the same manner as other civil appeals are taken from district courts.

(f) *Restrictions on participation by attorneys.* See Administrative Order Number 18. (Revised December 9, 2004, effective January 1, 2005; amended June 2, 2011, effective July 1, 2011.)

**Reporter's Notes to Rule 10:** 1. This rule makes it clear that the Arkansas Rules of Civil Procedure and the Arkansas evidentiary rules govern and apply in all claims in inferior courts unless such rules have been modified or altered herein. Procedurally, the cases

tried in the inferior courts should basically follow the procedural and evidentiary rules used in circuit and chancery courts in Arkansas.

**Addition to Reporter's Notes, 2004 Amendment:** The provision previously con-



tained in Inferior Court Rule 10, which concerned the applicability of the Rules, now appears in Rule 1 of the District Court Rules.

Effective January 1, 2005, the implementing legislation for Amendment 80 to the Arkansas Constitution repeals various statutes, including the Small Claims Procedure Act, Ark. Code Ann. §§ 16-17-601 *et seq.*, for the district courts. The procedural rules for the Small Claims Division of District Court are now contained in Rule 10 of the District Court Rules. This rule echos the now-repealed statutory procedures and makes no substantive changes in those procedures.

The claim form which appeared in Ark. Code Ann. § 16-17-607 is now contained in subsection (a) of this rule. It was amended to

clarify that non-resident defendants have thirty days to answer any complaint. See District Court Rule 10(b). The form was also amended to add "Summons and" to the "Notice to Defendant" section. The sentence "No separate summons is required" was added to subsection (a)(3)(B). These additions clarify that a separate summons is not required in district court.

Subsection (d) is derived from Ark. Code Ann. § 16-17-612 and subsection (e) is derived from Ark. Code Ann. § 16-17-613. Former Ark. Code Ann. § 16-17-612 (a), which set out restrictions on participation by attorneys in small claim actions, is now found in Administrative Order Number 18.

### CASE NOTES

#### Default Judgments.

Pursuant to this rule, a municipal court defendant who has suffered a default judgment may have review of the court's refusal to set aside the default judgment in response to request pursuant to ARCP 55(c). *Marcinkowski v. Affirmative Risk Mgt. Corp.*,

322 Ark. 580, 910 S.W.2d 679 (1995).

**Cited:** *West Apts., Inc. v. Booth*, 297 Ark. 247, 760 S.W.2d 861 (1988); *Bocksnick v. City of London*, 308 Ark. 599, 825 S.W.2d 267 (1992); *Kersh v. State*, 56 Ark. App. 39, 938 S.W.2d 569 (1997); *Barnett v. Howard*, 353 Ark. 756, 120 S.W.3d 564 (2003).

### Rule 11. Uniform paper size.

All briefs, motions, pleadings, records, transcripts, and other papers required or authorized by these rules shall be on 8½" by 11" paper. (Adopted May 15, 1989; revised December 9, 2004, effective January 1, 2005.)

**Publisher's Notes.** The May 15, 1989 Per Curiam read: "In our per curiam order of December 19, 1988, we suspended our earlier order on the subject of doing away with the practice of abstracting the record for appeal and substituting a practice by which the parties would submit an appendix or appendices. We took that action because we wished to examine the possibility of changing from the use of legal size paper to letter size paper in all the courts, and we became aware that unless the changes occurred at the same time, appendices would likely be composed of paper of a different size from that of any brief we might permit to be filed, and that appendices might be composed of documents of varying paper sizes. The accompanying possible handling and storage problems made it seem a good idea to put off the changes until we had sought the recommendation of our Committee on Rules of Pleading, Practice, and Procedure (Civil)."

"We have now received a recommendation from the committee along with suggestions as to the rules which should be revised to accomplish the change in paper size."

"In addition to the committee's recommendations, we have studied those submitted by

lawyers, judges, law firms, and lawyers' associations submitted in response to our earlier request for comments on the basic rules we proposed for the purpose of moving to the system of appendices rather than abstracts. Many of those suggestions have been implemented in the amendments we publish today."

"As we noted in our per curiam order of October 17, 1988, on this subject, we wish to have a trial period. These amendments will become effective this date; however, any case in which the appellant's brief is submitted or becomes due between now and December 31, 1989, may be presented in accordance with the rules in effect up until today. That will give this court sufficient time to observe the new practice. If we choose to retain the new system, we will be able to make that decision prior to the publication of the 1989 revision of the Rules Book which accompanies the Arkansas Code Annotated. The rules requiring appendices rather than abstracts may then be made permanent."

"During the trial period an appellant will be in the position of choosing the manner in which the briefs will be presented. If the appellant chooses to present a brief with an

appendix rather than an abstract, then the appellee will be required to proceed in accordance with the new rules. If the appellant chooses to work under the abstract system, the appellee will do so also."

"While we may well decide, depending on the results of the trial period, to retain the abstracting practice, we will make permanent the changes with respect to paper size and doing away with printed briefs. Judges, clerks, lawyers, court reporters and others thus will have until January 1, 1990, to prepare to present all legal documents on 8 1/2" by 11" paper."

"The purposes of these changes are to decrease the cost of appellate litigation, increase the ease and accuracy of the evaluation of cases at the appellate level, and provide uniformity as well as compatibility with the age of the word processor in the case of the paper size. We acknowledge and appreciate the comments we received from members of the bench and bar, and we count on continued cooperation as we evaluate the appendix system."

The October 2, 1989 Per Curiam read: "By per curiam order of May 15, 1989, we published changes of court rules necessary to implement a system of appeals using appendices rather than abstracts of record. The order also provided for a change to a uniform 8 1/2" by 11" paper size to be used in all courts. The order provided that the changes with respect to paper size would come into effect January 1, 1990. The other changes having to do with using appendices rather than abstracts of record on appeal went into effect on May 15, 1989, but permitted an appellant to choose to follow the rules in effect until that date for cases in which the appellant's brief was submitted or became due between May 15, 1989, and December 31, 1989."

"We have reviewed the appeals now ready for submission and those which will be ready prior to December 31, 1989. Most appellants have chosen to follow the old rules. We have concluded we will not be able to decide the relative merits of the two methods by the end of this year because we will have had too little experience with appendices. The trial period is, therefore, extended until July 15, 1990. Any case in which the appellant's brief is submitted or becomes due prior to July 15, 1990, may be presented in accordance with the rules in effect up until May 15, 1989."

"The paper size changes are not affected by this order. All courts will begin using 8 1/2" by 11" paper no later than January 1, 1990."

The June 10, 1991 Per Curiam read: "On and after August 1, 1991, all briefs submitted to the Supreme Court and the Court of Ap-

peals will be accompanied by abstracts of record, as provided in Arkansas Supreme Court and Court of Appeals Rule 9 [now see S. Ct. & Ct. App. R. 4-2]. We will no longer accept briefs including appendices.

"The Per Curiam Order by which we created a trial period for experimental changes in our Rules was issued May 15, 1989, entitled, 'In re: Amendments to the Arkansas Rules of Civil Procedure, the Arkansas Rules of Appellate Procedure, the Arkansas Supreme Court Administrative Orders, the Rules of the Arkansas Supreme Court and Court of Appeals, and the Inferior Court Rules.' In that Order we made it clear that the rules changes having to do with the appendix experiment were adopted on a trial basis but that the changes no longer allowing printed briefs and establishing uniform paper size were to be permanent. We hereby revoke the changes, other than those having to do with printed briefs and paper size, which provided for submitting appendices rather than abstracts. We retain the changes with respect to paper size.

"The reason for ending the appendix experiment at this time is that we have found that it adds to the difficulty of, and time consumed in, reading briefs. If our case load and that of the Court of Appeals were not so great, we would be less willing to revert entirely to the abstracting system. Given the numbers of cases we must decide to remain current with our docket, however, we cannot tolerate the additional work we find the appendix system to have caused.

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RESEARCH REFERENCES

**Ark. L. Notes.** Watkins, Procedural Notes  
from All Over, 1989 Ark. L. Notes 65.





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# UNIFORM RULES FOR CIRCUIT AND CHANCERY COURTS

[ABOLISHED]

**Publisher's Notes.** The Supreme Court of Arkansas, in its per curiam of Dec. 21, 1987, abolished these rules effective Mar. 14, 1988. The per curiam provided, in pertinent part:

"... While the changes we adopt today at the suggestion of the committee are generally explained in the accompanying reporter's notes, we wish to comment upon the abolition of *Arkansas Rule of Civil Procedure 83*. In 1984 the committee suggested that we abolish all local court rules. We declined to do so at that time, but asked the committee to document its complaint that local rules were unnecessary and were serving as little more than traps for the unwary lawyer or litigant participating in a case while away from home. The committee came back to us with documented instances of conflict between local rules and the Arkansas Rules of Civil Procedure. We noted that at that juncture some trial judges announced that they could well do without local rules and declared that they would no longer have them.

"We then embarked upon a compromise. We asked the trial courts to review their local rules and to tender revised versions of their local rules. We then received proposed local rules from a number of the trial judges. We submitted those proposals to our committee for review, and we ultimately approved most of them, excepting from approval those which were in direct conflict with the Arkansas Rules of Civil Procedure. The many trial judges who did not respond to our order that they review and submit proposed rules to us for review no longer have local rules, as our per curiam order of December 22, 1986, stated: 'As of July 1, 1987, the only local rules in effect in the circuit, chancery and probate courts will be those filed subsequent to June 24, 1985, and approved by this court after review by the appropriate committee or committees.'

"In our initial screening, and as we have continued to review local rules tendered to us, we and the committee have observed that many of the rules are no more than 'house-keeping' orders having nothing to do with the conduct of lawyers or litigants. Others are

duplicative of the Arkansas Rules of Civil Procedure and thus serve no purpose except to say the same thing a different way and provide unnecessary fodder for disagreement. Sometimes, hidden within these innocuous and repetitious provisions, there are procedural requirements which do not conflict with the Arkansas Rules of Civil Procedure and which may seriously affect the rights of litigants. To become aware of these rules, a litigant or counsel may have to wade through many pages of confusing materials.

"A member of the bar of this state, or a litigant representing himself or herself, should be able to go into any of our courts and know what to expect without having to read, in some instances, 50 pages of local rules trying to discern their effect. We recognize that some of the local rules may have great merit, and if they do, we should consider adopting them for all our courts. The Uniform Rules for Circuit and Chancery Courts apparently resulted from an attempt to create uniform 'local rules.' We are also abolishing those rules as of March 14, 1988, as we find them to be unnecessary in view of the since-adopted Arkansas Rules of Civil Procedure and Arkansas Rules of Criminal Procedure. The useful portions of those rules have been transferred to the Arkansas Rules of Civil Procedure and to the Administrative Orders we also publish today.

"We recognize that not all our judges operate under the same conditions, however, when the inconvenience caused by not having local rules is balanced against the inconvenience caused by them and, more importantly, against the often unanticipated and unnecessary effect they may have upon the rights of litigants, we conclude the scales tip in favor of not having them. We note that the Supreme Court of Kentucky, the state which gave us so much of our original statutory procedure, abolished its comparable Rule 83 in 1982.

"It is not our intention to subvert the power of the trial courts to preside as they see fit within the universal procedural rules we have established. We presume there will be a need for trial judges to publish administrative or-

ders which will attend to necessary 'house-keeping' matters, such as the time and place court shall commence, the duties of the bailiff and the reporter and so on. It is, however, our intention that we will no longer sanction the promulgation by the trial courts of orders which may be characterized as procedural rules which will detract from the ability of any litigant or member of the bar of this state to know the fundamental rules of litigation which may affect their rights adversely no matter what court of this state they may be before. By doing away with Rule 83, we relieve the trial courts of filing local rules with this court, and we no longer sanction or recognize those which have been filed to date.

"As always, we invite the members of the bench and bar, and indeed any person, to make suggestions of rule changes to us through the appropriate committee. The reporters of our civil and criminal procedure rules committees, respectively, are:

Professor John J. Watkins  
School of Law  
University of Arkansas  
Fayetteville, AR 72701

Samuel A. Perroni, Esq.  
Suite 215  
10810 Executive Center Dr.  
Little Rock, AR 72211"



# ADMINISTRATIVE ORDERS OF THE SUPREME COURT

## Order

1. Special Judges in Circuit Court
2. Dockets and Other Records
3. Trial Briefs — Trial and Appellate Court Decisions — Time Limitations and Reports
4. Verbatim Trial Record
5. Criminal Cases Where Alleged Victim Under Age Fourteen
6. Broadcasting, Recording, or Photographing in the Courtroom
7. Arkansas Supreme Court and Court of Appeals Records Retention Schedule
8. Forms for Reporting Case Information in All Arkansas Trial Courts
9. Compensatory Time Record Policy for Arkansas Official Court Reporters
10. Child Support Guidelines
11. Arkansas Code of Professional Responsibility for Interpreters in the Judiciary

## Order

12. Official Forms
13. Judicial Exemption From Jury Service
14. Administration of Circuit Courts
15. Attorneys
  - 15.1. Attorney Qualifications and Standards
  - 15.2. Pro Bono Legal Services by Non-admitted Licensed Attorneys
16. Procedures Regarding the Assignment of Judges
17. Professional Practicum Rule
18. Administration of District Courts
19. Access to Court Records
  - 19.1. Redaction in Administrative Records
20. Private Civil Process Servers Appointment — Qualifications
21. Electronic Filing

## ADMINISTRATIVE ORDER NUMBER 1 — SPECIAL JUDGES IN CIRCUIT COURT

### Section 1.

The procedure set out in this administrative order is intended to apply when the judge of a circuit court shall fail to attend on any day scheduled for the holding of that court due to an emergency or sudden illness, or when a judge's disqualification from presiding in any pending case is unanticipated. It should be employed to address unforeseen situations in which a replacement cannot be assigned pursuant to Administrative Order No. 16 — Procedures Regarding the Assignment of Judges. Administrative Order No. 16 requires that when a circuit judge is temporarily unable to serve, first, the other judges in the circuit should attempt to cover the absence; next, the Chief Justice should be requested to make an assignment; lastly, Administrative Order No. 1 should be utilized.

### Section 2.

When a special judge is to be elected, notice shall be given by the clerk of the court to the regular practicing attorneys in the county served by the court in the most practical manner under the circumstances, including giving notice by telephone or by posting the notice in a public and conspicuous place in the courtroom. Upon notice from the clerk of the court, the regular practicing attorneys attending the court may elect a special judge. The attorneys present in the courtroom shall elect one of their number as special judge. The election shall be conducted by the clerk of the court, who will accept nominations from the attorneys present. Only

attorneys who are qualified to serve as special judge may vote in the election of a special judge. The election shall be by secret ballot. The attorney receiving a majority of the votes shall be declared elected as special judge. He or she shall immediately be sworn in by the clerk and shall immediately enter upon the duties of the office. He or she shall adjudicate those causes pending at the time of his or her election.

#### CASE NOTES

**Cited:** McClain v. State, 361 Ark. 133, 205 S.W.3d 123 (2005).

### Section 3.

No person who is not an attorney regularly engaged in the practice of law in the State of Arkansas and duly licensed and in good standing to do so, and who is not a resident possessed of the qualifications required of an elector of this state, whether registered to vote or not, shall be elected special judge. A law clerk is not eligible to be elected as a special judge.

### Section 4.

For purposes of this rule, each division of circuit court in a multi-judge county shall be considered to be a separate court.

### Section 5.

The clerk of the court in the county in which the special judge election is held shall make a record of the proceedings, which shall be a part of the record of the court and shall be in substantially the following form:

IN THE \_\_\_\_\_ COURT OF \_\_\_\_\_ COUNTY, ARKANSAS  
IN THE MATTER OF \_\_\_\_\_, SPECIAL JUDGE

Now on this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, Honorable \_\_\_\_\_ [notified the clerk that he/she was unable to attend or preside over this court on this day][failed to attend and preside over this court on this day].

WHEREUPON, the Clerk gave notice pursuant to Administrative Order No. 1 that an election was to be held for a Special Judge to preside during the absence of said Judge.

AND THEREAFTER, Honorable \_\_\_\_\_, an attorney at law, a resident of the State of Arkansas and possessing the required qualifications, having received a majority of the votes cast at such special election, at which only the practicing attorneys in attendance in the Court were allowed to vote, was found and declared to be duly elected Special Judge to preside during the absence of Honorable \_\_\_\_\_.

WHEREUPON, the Clerk did administer the oath of office required by law for such Special Judge, and he/she assumed the bench and entered upon the discharge of his/her duties herein.

---

Clerk



OATH OF OFFICE

STATE OF ARKANSAS            )  
                                          )  
COUNTY OF \_\_\_\_\_ )

I, \_\_\_\_\_, do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Arkansas, and that I will faithfully discharge the duties of the office of Special Judge of \_\_\_\_\_ Court, \_\_\_\_\_ Division, \_\_\_\_\_ County, upon which I am about to enter.

\_\_\_\_\_  
Special Judge  
Witnesses:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Clerk  
By:  
\_\_\_\_\_  
Deputy Clerk

(Adopted December 21, 1987, effective March 14, 1988; amended May 24, 2001, effective July 1, 2001; amended May 27, 2010.)

ADMINISTRATIVE ORDER NUMBER 2 — DOCKETS  
AND OTHER RECORDS

(a) *Docket.* The clerk shall keep a book known as a “civil docket,” designated by the prefix “CV”; a book known as a “probate docket,” designated by the prefix “PR”; a book known as a “domestic relations docket,” designated by the prefix “DR”; a book known as a “criminal docket,” designated by the prefix “CR”; and a book known as a “juvenile docket,” designated by the prefix “JV”. Each action shall be entered in the appropriate docket book. Cases shall be assigned the letter prefix corresponding to that docket and a number in the order of filing. Beginning with the first case filed each year, cases shall be numbered consecutively in each docket category with the four digits of the current year, followed by a hyphen and the number assigned to the case, beginning with the number “1”. For example:

criminal	CR2002-1
civil	CV2002-1
probate	PR2002-1
domestic relations	DR2002-1
juvenile	JV2002-1

All papers filed with the clerk, all process issued and returns thereon, all appearances, orders, verdicts and judgments shall be noted chronologically

in the dockets and filed in the folio assigned to the action and shall be marked with its file number. These entries shall be brief, but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. Where there has been a demand for trial by jury it shall be shown on the docket along with the date upon which demand was made. In counties where the county clerk serves as the ex officio clerk of any division of the circuit court, the filing requirement for any pleading, paper, order, judgment, decree, or notice of appeal shall be satisfied when the document is filed with either the circuit clerk or the county clerk.

(b) *Judgments and Orders.*

(1) The clerk shall keep a judgment record book in which shall be kept a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

(2) The clerk shall denote the date and time that a judgment, decree or order is filed by stamping or otherwise marking it with the date and time and the word "filed." A judgment, decree or order is entered when so stamped or marked by the clerk, irrespective of when it is recorded in the judgment record book.

(3) If the clerk's office has a facsimile machine, the clerk shall accept facsimile transmission of a judgment, decree or order filed in such manner at the direction of the court. The clerk shall stamp or otherwise mark a facsimile copy as filed on the date and time that it is received on the clerk's facsimile machine during the regular hours of the clerk's office or, if received outside those hours, at the time the office opens on the next business day. The date stamped on the facsimile copy shall control all appeal-related deadlines pursuant to Rule 4 of the Arkansas Rules of Appellate Procedure — Civil. The original judgment, decree or order shall be substituted for the facsimile copy within fourteen days of transmission.

(4) At any time that the clerk's office is not open for business, and upon an express finding of extraordinary circumstances set forth in an order, any judge may make any order effective immediately by signing it, noting the time and date thereon, and marking or stamping it "filed in open court." Any such order shall be filed with the clerk on the next day on which the clerk's office is open, and this filing date shall control all appeal-related deadlines pursuant to Rule 4 of the Arkansas Rules of Appellate Procedure — Civil.

(c) *Indices.* Suitable indices of the civil, probate, domestic relations, criminal, and juvenile dockets and of every judgment or order referred to in Section (b) of this rule shall be kept by the clerk under the direction of the court.

(d) *Other Books and Records.* The clerk shall also keep such other books and records as may be required by law and as directed by the Supreme Court.

(e) *Uniform Paper Size.* All records prepared by the clerk shall be on 8½" x 11" paper.

(f) *Clerk Defined.* When used herein, the term clerk refers to the clerks of the various circuit courts of the state; provided, that in the event probate matters are required by law to be filed in the office of county clerk, then the term clerk shall also include the county clerk for this limited purpose. (Adopted December 21, 1987, effective March 14, 1988; amended May 15,



1989; amended July 17, 1989; amended October 12, 1989; amended January 22, 1998; amended June 24, 1999; amended December 9, 1999, effective January 1, 2000; amended May 24, 2001, subsections (a)-(e) effective January 1, 2002, subsection (f) effective July 1, 2001; amended March 13, 2003; amended February 10, 2005.)

**Publisher's Notes.** This order supersedes ARCP 79.

The May 15, 1989 Per Curiam read: "In our per curiam order of December 19, 1988, we suspended our earlier order on the subject of doing away with the practice of abstracting the record for appeal and substituting a practice by which the parties would submit an appendix or appendices. We took that action because we wished to examine the possibility of changing from the use of legal size paper to letter size paper in all the courts, and we became aware that unless the changes occurred at the same time, appendices would likely be composed of paper of a different size from that of any brief we might permit to be filed, and that appendices might be composed of documents of varying paper sizes. The accompanying possible handling and storage problems made it seem a good idea to put off the changes until we had sought the recommendation of our Committee on Rules of Pleading, Practice, and Procedure (Civil).

"We have now received a recommendation from the committee along with suggestions as to the rules which should be revised to accomplish the change in paper size.

"In addition to the committee's recommendations, we have studied those submitted by lawyers, judges, law firms, and lawyers' associations submitted in response to our earlier request for comments on the basic rules we proposed for the purpose of moving to the system of appendices rather than abstracts. Many of those suggestions have been implemented in the amendments we publish today.

"As we noted in our per curiam order of October 17, 1988, on this subject, we wish to have a trial period. These amendments will become effective this date; however, any case in which the appellant's brief is submitted or becomes due between now and December 31, 1989, may be presented in accordance with the rules in effect up until today. That will give this court sufficient time to observe the new practice. If we choose to retain the new system, we will be able to make that decision prior to the publication of the 1989 revision of the Rules Book which accompanies the Arkansas Code Annotated. The rules requiring appendices rather than abstracts may then be made permanent.

"During the trial period an appellant will be in the position of choosing the manner in which the briefs will be presented. If the appellant chooses to present a brief with an appendix rather than an abstract, then the

appellee will be required to proceed in accordance with the new rules. If the appellant chooses to work under the abstract system, the appellee will do so also.

"While we may well decide, depending on the results of the trial period, to retain the abstracting practice, we will make permanent the changes with respect to paper size and doing away with printed briefs. Judges, clerks, lawyers, court reporters and others thus will have until January 1, 1990, to prepare to present all legal documents on 8½" by 11" paper.

"The purposes of these changes are to decrease the cost of appellate litigation, increase the ease and accuracy of the evaluation of cases at the appellate level, and provide uniformity as well as compatibility with the age of the word processor in the case of the paper size. We acknowledge and appreciate the comments we received from members of the bench and bar, and we count on continued cooperation as we evaluate the appendix system."

The October 2, 1989 Per Curiam read: "By per curiam order of May 15, 1989, we published changes of court rules necessary to implement a system of appeals using appendices rather than abstracts of record. The order also provided for a change to a uniform 8½" by 11" paper size to be used in all courts. The order provided that the changes with respect to paper size would come into effect January 1, 1990. The other changes having to do with using appendices rather than abstracts of record on appeal went into effect on May 15, 1989, but permitted an appellant to choose to follow the rules in effect until that date for cases in which the appellant's brief was submitted or became due between May 15, 1989, and December 31, 1989.

"We have reviewed the appeals now ready for submission and those which will be ready prior to December 31, 1989. Most appellants have chosen to follow the old rules. We have concluded we will not be able to decide the relative merits of the two methods by the end of this year because we will have had too little experience with appendices. The trial period is, therefore, extended until July 15, 1990. Any case in which the appellant's brief is submitted or becomes due prior to July 15, 1990, may be presented in accordance with the rules in effect up until May 15, 1989.

"The paper size changes are not affected by this order. All courts will begin using 8½" by 11" paper no later than January 1, 1990."

The June 10, 1991 Per Curiam read: "On

and after August 1, 1991, all briefs submitted to the Supreme Court and the Court of Appeals will be accompanied by abstracts of record, as provided in Arkansas Supreme Court and Court of Appeals Rule 9. We will no longer accept briefs including appendices.

"The Per Curiam Order by which we created a trial period for experimental changes in our Rules was issued May 15, 1989, entitled, "In re: Amendments to the Arkansas Rules of Civil Procedure, the Arkansas Rules of Appellate Procedure, the Arkansas Supreme Court Administrative Orders, the Rules of the Arkansas Supreme Court and Court of Appeals, and the Inferior Court Rules." In that Order we made it clear that the rules changes having to do with the appendix experiment were adopted on a trial basis but that the changes no longer allowing printed briefs and establishing uniform paper size were to be permanent. We hereby revoke the changes, other than those having to do with printed briefs and paper size, which provided for submitting appendices rather than abstracts. We retain the changes with respect to paper size.

"The reason for ending the appendix experiment at this time is that we have found that it adds to the difficulty of, and time consumed in, reading briefs. If our case load and that of the Court of Appeals were not so great, we would be less willing to revert entirely to the abstracting system. Given the numbers of cases we must decide to remain current with our docket, however, we cannot tolerate the additional work we find the appendix system to have caused.

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"If we find a way to bring our case load and that of the Court of Appeals within reason, we may return to the appendix system, with some revisions, because we continue to wish to implement the goals stated in our original order. We would like our system to be as inexpensive and simple as possible. Under other circumstances we will be able to exercise the patience required to permit lawyers and litigants to become accustomed to the change and to fine tune it with revisions."

The first 1999 amendment of this Rule added the subdivision (1) and (2) designations in (b); in (b)(2), added the second sentence; and added (b)(3) and (4). New subdivision

(b)(3) provides that judgments, decrees, and orders may be filed with the clerk by facsimile transmission if the court so directs. New subdivision (b)(4) addresses emergency situations when an order needs to be effective immediately, but the clerk's office is not open. This amendment to subsection (b) of Administrative Order No. 2 became effective June 24, 1999.

The second 1999 amendment to this order substituted "four digits" for "the last two digits" in the second sentence of subsection (a). This change was necessitated by the coming of the year 2000. Instead of two digits (9901) for the docket year, the case number will be four digits (2000-1). This amendment to subsection (a) of Administrative Order No. 2 became effective January 1, 2000.

#### **Reporter's Notes (1999):**

Subdivision (c)(2) of this rule does not authorize the filing of judgments, decrees or orders by facsimile transmission. However, Administrative Order No. 2(b), as amended in 1999, requires any clerk's office with a facsimile machine to "accept facsimile transmission of a judgment, decree or order filed in such manner at the direction of the court." The faxed judgment, decree or order is effective when entered by the clerk. To ensure the permanency of official court records, the original judgment, decree or order must be substituted for the facsimile copy within 14 days of transmission, but this step does not have any bearing on the effectiveness of the faxed document or the time for taking an appeal.

#### **Addition to Reporter's Notes (2000):**

The second paragraph of this rule provides that a judgment or decree "is effective only when ... set forth [on a separate document] and entered as provided in Administrative Order No. 2." As amended in 1999 [effective 1/1/00], Administrative Order No. 2(b) provides that a judgment, decree or order is "entered" when stamped or otherwise marked by the clerk with the time and date and the word "filed," irrespective of when it is recorded in the judgment book. When the clerk's office is not open for business, and upon an express finding of extraordinary circumstances, an order is effective immediately when signed by the judge. Such order must be filed with the clerk on the next day on which the clerk's office is open, and this filing date controls all appeal-related deadlines.

The amendment to Administrative Order No. 2(b) also requires any clerk's office with a facsimile machine to "accept facsimile transmission of a judgment, decree or order filed in such manner at the direction of the court." The faxed judgment, decree or order is effective when entered by the clerk. To ensure the permanency of official court records, the original judgment, decree or order must be sub-



stituted for the facsimile copy within 14 days of transmission, but this step does not have

any bearing on the effectiveness of the faxed document or the time for taking an appeal.

## CASE NOTES

### ANALYSIS

In general.

Construction with other law.

Effective judgment.

Jurisdiction.

#### In General.

The Supreme Court has made it clear that a judgment or decree is not effective until it has been "entered" as provided in ARCP 58 and this order. *Morrell v. Morrell*, 48 Ark. App. 54, 889 S.W.2d 772 (1994).

In a wrongful death action filed by the special administrator of decedent's estate, the trial court properly granted the doctors' motion to dismiss for lack of subject matter jurisdiction because the suit was filed before the order appointing the administrator was filed with the court clerk and a judicial order is not effective under Ark. R. Civ. P. 58 and this order until it is filed with the clerk of court. *Filyaw v. Bouton*, 87 Ark. App. 320, 191 S.W.3d 540 (2004).

Where a judge made several findings in its oral ruling about whether a bank had backed out of a loan to a turkey farm from which a propane company was to be created, the trial court's oral findings were not made part of the written order and, thus, did not present a basis for appeal. *Cnty. Bank of N. Ark. v. Tri-State Propane*, 89 Ark. App. 272, 203 S.W.3d 124 (2005).

Despite an oral pronouncement, because there was no written judgment regarding a default judgment entered in a foreclosure action, the case was dismissed without prejudice under Ark. R. Civ. P. 54(b); the record was void of any proof that one alleged interest holder was served, so it was impossible to tell if a default judgment was appropriate. *Nat'l Home Ctrs., Inc. v. Coleman*, 370 Ark. 119, 257 S.W.3d 862 (2007).

In a case involving a dispute over credit life insurance, an appeal was timely filed under Ark. R. App. P. Civ. 4(a) because the first judgment in the case did not comply with this order where the original of the facsimile-filed judgment was never filed with the trial court. The appeal was timely filed from a second judgment. *Francis v. Protective Life Ins. Co.*, 98 Ark. App. 1, 249 S.W.3d 828 (2007).

#### Construction with Other Law.

With respect to judgment and commitment orders, they are effective upon entry of record in accordance with this order, and to the extent that § 16-65-121 directly conflicts with the rules of the Supreme Court of Arkansas and Arkansas caselaw, and it is superseded; thus, a trial court is well within its authority to modify a sentence pronounced in open court prior to entry of judgment as long as it complies with other pertinent criminal rules. *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003).

#### Effective Judgment.

Dismissal of the appeal from a finding in favor of a parent and his son in their action after the son was injured in an all-terrain vehicle accident was proper because there were parties who were orally dismissed from the case without entry of subsequent written orders of dismissal; thus, the supreme court lacked jurisdiction. No written orders of dismissal were entered of record, and because the oral dismissals were not effective until reduced to writing, the order currently appealed was not a final order under subdivision (b)(2) of this Administrative Order. *Carr v. Nance*, 2010 Ark. 25, — S.W.3d —, 2010 Ark. LEXIS 37 (Jan. 21, 2010).

#### Jurisdiction.

Trial court never lost subject matter jurisdiction and was free to hear additional evidence and to alter its oral decision to admit a purported will to probate because no written order had been entered and filed of record from the prior hearing; pursuant to subdivision (b)(2) of this order, an oral order announced from the bench does not become effective until reduced to writing and filed. *Judkins v. Hoover*, 351 Ark. 552, 95 S.W.3d 768 (2003), overruled in part *West v. Williams*, 355 Ark. 148, 133 S.W.3d 388 (2003).

**Cited:** *Blaylock v. Shearson Lehman Bros.*, 330 Ark. 620, 954 S.W.2d 939 (1997); *West v. Williams*, 355 Ark. 148, 133 S.W.3d 388 (2003); *McGhee v. Ark. State Bd. of Collection Agencies*, 368 Ark. 60, 243 S.W.3d 278 (2006); *Willis v. Crumbly*, 370 Ark. 374, 259 S.W.3d 417 (2007).

## **ADMINISTRATIVE ORDER NUMBER 3 — TRIAL BRIEFS — TRIAL AND APPELLATE COURT DECISIONS — TIME LIMITATIONS AND REPORTS**

1. *Trial briefs.* All matters which are under submission to a trial judge should be promptly, efficiently, and fairly determined. The total time for all parties to file briefs in any case in the circuit courts is limited to a period not to exceed thirty (30) days after the trial is completed and the case is ready for decision. Upon a showing or written statement of special circumstances in a particular case, the time for filing briefs may be extended, reduced, or eliminated at the discretion of the trial judge.

2. *Trial court decisions.*

A. Judges of circuit courts are directed to submit to the Administrative Office of the Courts at the end of each calendar quarter, reports of cases which have been under advisement for more than ninety (90) days after final submission. These reports are to be submitted on forms supplied by the Administrative Office of the Courts. In cases which have been pending for more than ninety (90) days after final submission, the quarterly report shall include the date when the case was submitted and a statement of the reasons necessitating the delay in rendering a decision. If there are no cases which are pending for that length of time, the report shall simply state "none."

B. For purposes of subdivision 2(A) of this order, civil cases under final submission include those with motions submitted for decision that could result in the resolution or dismissal of the case, as well as those cases that have been fully tried and submitted on their merits. If a civil case has been fully tried, or a potentially dispositive motion argued at a hearing, then the case shall be under final submission at the conclusion of the trial or hearing, or on the date any post-trial or post-hearing briefing is filed, whichever last occurs. If no hearing is held on a potentially dispositive motion, then the case shall be under final submission on the date a party files with the circuit clerk a copy of a letter notifying the circuit judge that the motion is ready for decision. The letter shall enclose copies of all the filed papers relating to the motion and reflect service on all other counsel of record.

C. For purposes of subdivision 2(A) of this order, a motion, application, or petition requesting post-conviction relief in a criminal case, including a petition under Arkansas Rule of Criminal Procedure 37, shall be considered under final submission on the date that the petitioner files with the circuit clerk a copy of a letter notifying the circuit judge that the motion, application, or petition has been filed. The letter to the judge shall enclose all copies of pleadings and documents relating to the motion, application, or petition and shall reflect service on the prosecuting attorney. If, within ninety (90) days of the date on which the letter is filed with the circuit clerk, the judge sets a hearing on the motion, application, or petition, then the date on which the petition is considered under final submission shall be extended until the date on which the hearing concludes or the date on which the last post-hearing briefing is filed, whichever last occurs.

D. The Administrative Office of the Courts shall promptly review all reports filed by the trial courts, and if it determines that the delay in any case was not caused by the parties or their counsel, it shall recommend to the Supreme Court a judge to be assigned or appointed to dispose of the delayed case.



E. Willful noncompliance with the provisions of the order shall constitute grounds for discipline under the provisions of Canon 3B(8) of the Arkansas Code of Judicial Conduct. Any judge whose quarterly report is not received by the 15th of the month following the end of the previous quarter (i.e., January 15, April 15, July 15, October 15) will be automatically referred to the Judicial Discipline and Disability Commission for possible discipline.

3. *Appellate court decisions.*

A. Justices and Judges of the Arkansas Supreme Court and Court of Appeals are directed to submit to the Chief Justice of the Supreme Court at the end of each quarter a report of any case in which an opinion has not been issued within sixty (60) days from the case's submission. The report shall include a statement of the reason necessitating the delay in issuing an opinion.

B. The Supreme Court will review the reasons given for delay in any reported case and make any reassignment or take any appropriate action necessary to dispose of the case.

C. Willful noncompliance with the provisions of this order shall constitute grounds for discipline under the provisions of Canon 3B(8) of the Arkansas Code of Judicial Conduct.

4. *Effective date.* This order shall become effective commencing January 1, 1991, and the initial quarterly reports shall be filed on or before March 31, 1991, and the last day of each quarterly month thereafter. (Adopted November 19, 1990, effective January 1, 1991; amended December 23, 1996; amended May 24, 2001, effective July 1, 2001; amended September 27, 2001; amended October 18, 2001; amended September 27, 2007.)

**Publisher's Notes.** The Dec. 23, 1996, Per Curiam provided, in part: "The addition of the second sentence in subsection (2)(C) with respect to the late filing of quarterly reports shall become effective with the reports due March 31, 1997, which must be filed no later than April 15, 1997."

**Court Notes, 2007:** New subdivision (2)(B) has been added to clarify when, for purposes of this order, the circuit court takes civil cases under final submission. For dispositive motions where no hearing is held, the order now obligates counsel (or a pro se party) to write the court and provide copies of all the motions, thus fixing a clear submission date. This letter must also be served on all parties and filed with the circuit clerk. Former subdivisions (2)(B) and (2)(C) have been renumbered.

New subdivision 2(C) addresses Rule 37 petitions and similar post-conviction motions in criminal cases. Rule 37.3(a) permits the circuit court to dispose of a Rule 37 petition

without a hearing based on the files and records of the case. Subdivision 2(C) requires the circuit judge to report Rule 37 petitions that have not been so disposed within ninety (90) days after the petitioner files the notification letter described in the subdivision. If within that 90-day period, the judge schedules a hearing on the petition, as provided in Rule 37.3(c), then the petition is not considered under final submission until ninety (90) days after the later of the conclusion of the hearing or the filing of any post-hearing briefs.

Subdivision 2(C) does not apply to post-trial motions filed under Arkansas Rule of Criminal Procedure 33.3. Pursuant to Rule of Appellate Procedure — Criminal 2(b)(1), such motions are deemed denied on the 30th day after the entry of judgment, unless the court denies the motion before that date. Consequently, a circuit court should never have a Rule 33.3 post-trial motion under advisement for more than ninety (90) days.

## CASE NOTES

**Cited:** Willis v. Crumbly, 370 Ark. 374, 259 S.W.3d 417 (2007).

## ADMINISTRATIVE ORDER NUMBER 4 — VERBATIM TRIAL RECORD

(a) *Verbatim Record.* Unless waived on the record by the parties, it shall be the duty of any circuit court to require that a verbatim record be made of all proceedings, including any communications between the court and one or more members of the jury, pertaining to any contested matter before the court or the jury.

(b) *Back-up System.* When making a verbatim record, an official court reporter or substitute court reporter shall always utilize a back-up system in addition to his or her primary reporting system in order to insure preservation of the record.

(c) *Exhibits.* Physical exhibits received or proffered in evidence shall be stored pursuant to the requirements of Section 21 of the Regulations of the Board of Certified Court Reporter Examiners, Official Court Reporter Retention Schedule.

(d) *Sanctions.* Any person who fails to comply with these requirements shall be subject to the discipline provisions of the Rules and Regulations of the Board of Certified Court Reporter Examiners in addition to the enforcement powers of the court, including contempt.

(e) *Electronic Recording.*

1. *Applicability.* This subsection (e) shall apply to state district court judges presiding over matters pending in circuit courts pursuant to Administrative Order Number 18 and to circuit court judges upon request to and approval by the Supreme Court.

2. *Electronic recording.* An audio recording system may make the verbatim record of court proceedings. A recording system used for the purpose of creating the official record of a court proceeding shall meet the standards adopted and published by the Administrative Office of the Courts ("AOC"). The system shall be approved by the AOC, and it shall be tested and court personnel shall be trained before the system is implemented. The system shall include a back-up capability to satisfy the requirement of subsection (b) of this Administrative Order.

3. *Record security.* (A) The trial court shall maintain the electronic recordings of court proceedings and all digital files, backup files, and archive files consistent with standards adopted and published by the AOC.

(B) Subsection (c) of this Administrative Order regarding the storage of trial exhibits when using an electronic recording system is supplemented by the following: During the period in which the records are required to be retained, the trial court may order items of physical evidence held for storage and safekeeping by the attorneys of record, and such arrangements shall be appropriately documented. Forms of orders and receipts are appended to the Regulations of the Board of Certified Court Reporter Examiners. When physical exhibits include firearms, contraband, or other similar items, the trial court may order such items transferred to the sheriff or other appropriate governmental agency for storage and safekeeping. The sheriff or governmental agency shall sign a receipt for such items and shall acknowledge that the items shall not be disposed of until authorized by subsequent court order. See Regulation 21 of the Regulations of the Board of Certified Court Reporter Examiners for the record retention schedule and other requirements for maintaining records and exhibits.



4. *Official transcripts.* When a transcript is required and is to be prepared from an audio recording, the official court reporter of the circuit judge to which the case is assigned shall be responsible for preparing the transcript, and the statutory rate and payment provisions shall apply. A transcript prepared from an audio recording of a court proceeding prepared and certified by an official court reporter is an official transcript for purpose of appeal or other use. (Adopted May 6, 1991, effective July 1, 1991; amended May 24, 2001, effective July 1, 2001; amended February 21, 2008; amended April 9, 2009, effective June 1, 2009; amended February 9, 2011, effective July 1, 2011.)

## CASE NOTES

### ANALYSIS

Record not required.

Record required.

Writ to compel recording.

### Record Not Required.

Where appellant did not complete drug court, he was required to serve a six-year sentence for forgery and a ten-year suspended sentence for theft. The drug court's failure to make a record of its proceedings under this order, did not preclude review of appellant's claim that he was entitled to pre-jail sentencing credit. *Laxton v. State*, 99 Ark. App. 1, 256 S.W.3d 518 (2007).

### Record Required.

Because the state and the defense did not waive their right to a verbatim record, the trial court's failure to make a verbatim record of the in-chambers conferences on the defendant's directed-verdict motion was error; although the state voiced no objection to the trial court's handling of the directed-verdict motion in this manner, the Supreme Court of Arkansas would not construe the state's silence on the issue at trial as implying a waiver of this requirement and warned that in the future the record requirement would be strictly construed and enforced. *Robinson v. State*, 353 Ark. 372, 108 S.W.3d 622 (2003).

Remand of a criminal case was necessary to conduct defendant's motion to suppress evidence on the record because an appellate court was unable to conduct a de novo review

without the complete record. *George v. State*, 356 Ark. 345, 151 S.W.3d 770 (2004).

Although a videotape containing defendant's statements was part of the record on appeal, the relevant portions had not been abstracted, nor had a transcript been provided, and the record was not a verbatim recording of what occurred below; thus, the case was remanded to the trial court to settle the record regarding which of the police officer's remarks were objected to by defendant and were subsequently reviewed by the trial court and which portion of the videotape was played for the jury. *Williams v. State*, 362 Ark. 416, 208 S.W.3d 761 (2005).

Where the trial judge failed to make a verbatim record of the business's motion in limine, this alone was sufficient to warrant a reversal of the trial court's judgment. *Riverside Marine Remanufacturers, Inc. v. Booth*, 93 Ark. App. 48, 216 S.W.3d 611 (2005).

### Writ to Compel Recording.

Petition for a writ of mandamus or prohibition to compel a circuit court to record chamber conferences as required by this order, or not to hold unrecorded conferences without the petitioner's waiver, was denied because there was no record that any in-chambers conference was held without being recorded. *Thompson v. Guthrie*, 373 Ark. 443, 284 S.W.3d 455 (2008).

**Cited:** *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003).

## ADMINISTRATIVE ORDER NUMBER 5 — CRIMINAL CASES WHERE ALLEGED VICTIM UNDER AGE FOURTEEN

Ark. Code Ann. § 16-10-130 (1987) provides that all courts of this state shall, in the absence of extraordinary circumstances, give precedence to the trial of criminal cases over other matters, civil or criminal, when the alleged victim is under age fourteen. Effective immediately, when a case affected by § 16-10-130 is not tried within nine months following arraignment, the circuit judge before whom the case is pending will inform the Administrative

Office of the Courts in writing the reason or reasons the case has not been tried. Thereafter, at intervals of ninety (90) days the trial court will inform the Office of the Courts as to the status of the case. During the pendency of the case no continuance shall be granted on motion of either the state or the defendant except upon written order detailing the reasons for, and the duration of, the delay. (Adopted October 5, 1992.)

### **ADMINISTRATIVE ORDER NUMBER 6 — BROADCASTING, RECORDING, OR PHOTOGRAPHING IN THE COURTROOM**

(a) *Application — Exception.* This Order shall apply to all courts, circuit, district, and appellate, except as set out below.

(b) *Authorization.* A judge may authorize broadcasting, recording, or photographing in the courtroom and areas immediately adjacent thereto during sessions of court, recesses between sessions, and on other occasions, provided that the participants will not be distracted, nor will the dignity of the proceedings be impaired.

(c) *Exceptions.* The following exceptions shall apply:

(1) An objection timely made by a party or an attorney shall preclude broadcasting, recording, or photographing of the proceedings.

(2) The court shall inform witnesses of their right to refuse to be broadcast, recorded, or photographed, and an objection timely made by a witness shall preclude broadcasting, recording or photographing of that witness.

(3) The following shall not be subject to broadcasting, recording, or photographing:

all juvenile matters in circuit court,

all probate and domestic relations matters in circuit court (e.g., adoptions, guardianships, divorce, custody, support, and paternity), and

all drug court proceedings.

(4) In camera proceedings shall not be broadcast, recorded, or photographed except with consent of the court.

(5) Jurors, minors without parental or guardian consent, victims in cases involving sexual offenses, and undercover police agents or informants shall not be broadcast, recorded, or photographed.

(d) *Procedure.* The broadcasting, recording, or photographing of any court proceeding shall comply with the following rules:

(1) The court shall direct that the news media representatives enter into a pooling arrangement for the broadcasting, recording, or photographing of a trial. Any representative of a news medium wanting to broadcast, record, or photograph court proceedings shall present to the court a written statement agreeing to share with other media representatives. The media pool shall select one of its members to serve as pool coordinator. The media pool shall establish its own procedures, not inconsistent with these rules or with the wishes of the court, and the pool coordinator shall arbitrate any problems that arise. If a problem arises that requires the assistance of the court, the pool coordinator alone shall be responsible for coordinating with the court. A plan for the placement of the broadcast equipment shall be prepared and filed by the pool coordinator, subject to the final approval of the court.



(2) The court shall retain ultimate control of the application of these rules over the broadcasting, recording, or photographing of a trial. Decisions made as to the details are final and are not subject to appeal. The court may in its discretion terminate the broadcasting, recording, or photographing at any time. Such a decision should not be made in an effort to edit the proceedings but only as one necessary in the interest of justice.

(3) The media pool may have two cameras in the courtroom during the course of a trial. One camera shall be used for still photography, and one camera shall be used for television photography. Both cameras shall remain in stationary positions outside the bar of the courtroom. Videotape recording and other electronic equipment not a component part of the cameras shall be located in an area remote from the courtroom to be designated by the court.

(4) One additional audio system for radio broadcasting shall be permitted provided that all microphones and related essential wiring will be unobtrusive and located in places designated in advance by the basic courtroom plan. The pool coordinator shall permit the installation of a pickup distribution box to be located outside the courtroom area to allow additional agencies access to the audio feed.

(5) Only television or photographic equipment that does not require distracting sound or light shall be employed to cover court proceedings. No artificial lighting device shall be employed in connection with television cameras. Any court approved alterations in existing lighting or wiring shall be accomplished by and at the expense of the media pool.

(6) Camera and audio equipment shall be installed or removed only when the court is not in session. Film changes shall not be made while court is in session. No audio equipment shall be used to record conversations between attorneys and clients or conversations between attorneys and the court held outside the hearing of the jury.

(7) Electronic devices shall not be used in the courtroom to broadcast, record, photograph, e-mail, blog, tweet, text, post, or transmit by any other means except as may be allowed by the court.

(8) If a court has its own broadcasting, recording, or photography system, the court's system shall be used, subject to the provisions of this Order, unless different or additional arrangements are necessary in the court's discretion.

(9) The Supreme Court and Court of Appeals may make audio and video recordings of oral arguments and other proceedings.

A. Oral arguments and other appellate proceedings may be recorded, broadcasted or webcasted through a live or tape-delayed format as the Supreme Court shall direct. Commercial and educational broadcasters may be allowed to connect to the court's systems for recording or broadcasting proceedings subject to the court's requirements.

B. Recordings will be maintained by the Clerk of the Supreme Court and the Court of Appeals and shall be retained until such time as the Supreme Court shall order their destruction. Copies of audio and video recordings may be made available to the public at a price representing the cost of copying as shall from time to time be established by the Supreme Court.

C. An objection under subsection (c)(1) of this Order to the broadcasting, recording, or photographing of an oral argument or other appellate proceeding shall be made to the court, and the court in its discretion shall decide whether broadcasting, recording, or photographing will be permitted.

(e) *Contempt*. Failure to abide by any provision of this Order can result in a citation for contempt against the news representative and his or her agency. (Adopted July 5, 1993; amended May 24, 2001, effective July 1, 2001; amended May 27, 2010; amended July 27, 2011, effective August 1, 2011.)

**Cross References.** As to broadcasting or publishing criminal trial information, see ARCrP 38.1.

#### CASE NOTES

**Violations.**

An alleged violation this order is not appealable after an ARCrP 24.3(b) conditional

guilty plea. *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997).

## ADMINISTRATIVE ORDER NUMBER 7 — ARKANSAS SUPREME COURT AND COURT OF APPEALS RECORDS RETENTION SCHEDULE

### Section 1. Statement of policy.

Unless otherwise provided by law or as set forth herein, all records of the Arkansas Supreme Court and Court of Appeals shall be permanently maintained.

### Section 2. Transfer of permanent records.

a. Physical custody of any record to be maintained permanently, may be transferred to any institution which maintains a special collections department by letter agreement upon approval by the Arkansas Supreme Court. Title to records which must be permanently maintained shall remain with the Arkansas Supreme Court.

b. The Clerk shall permanently maintain a log of transferred records. The log shall list record series, description of records transferred, to whom transferred, and the date of transfer.

### Section 3. Alternatives to permanent retention.

a. Once microfilmed in a manner approved by the Administrative Office of the Courts, any paper record may be destroyed or donated by the Clerk, regardless of the number of years stated for retention in the Retention Schedule found in Section 6 below.

b. Once the period of retention has expired, or the record has been microfilmed, whichever occurs first, the paper record may be donated, transferring full title possession to any institution which maintains a special collections department.

c. Any interested institution shall advise the Clerk of the institution's desire to receive notification when records become available for donation or transfer. The Clerk shall determine the recipient of the record(s) where more than one institution requests custody or custody and title. Records which are available for donation or transfer and which have not been



requested within ninety (90) days of the notification shall be subject to disposal as set forth in Section 4 below.

d. The Clerk shall permanently maintain a log of donated records. The log shall list record series, descriptions of records donated, to whom donated, and date of donation.

**Section 4. Disposal of records.**

a. When records have been damaged or destroyed by decay, vermin, fire, water, or by other means which renders them illegible, the Clerk may dispose of the remains as provided in subsection b.

b. Records shall be disposed of by burning, shredding, recycling, or by depositing them in a public landfill.

c. Exhibits shall be disposed of as provided in Rule 3-6 of the Rules of the Arkansas Supreme Court and Court of Appeals.

d. The Clerk shall permanently maintain a log of disposed of records. The log shall list record series, descriptions of records disposed of, and method and date of disposal.

**Section 5. Records omitted.**

a. Any record not listed in the Records Retention Schedule shall be maintained permanently or until provided for otherwise in the retention schedule.

b. Omitted records should be brought to the attention of the Administrative Office of the Courts by letter which includes a description of the record, age of the record, and such photocopies as will assist in understanding the content and purpose.

c. Any recommendations for changes in the Retention Schedule should be brought to the attention of the Administrative Office of the Courts.

**Section 6. Retention schedule.**

Record Type	Retention Instructions
Supreme Court and Court of Appeals Docket Books:	Retain Permanently.
Supreme Court and Court of Appeals Case Indices:	Retain Permanently.
Supreme Court and Court of Appeals Record of Proceedings:	Retain Permanently.
Civil Case Records and Case Files: After 1940	Retain seven (7) years after case is closed, then offer for donation.
Criminal Case Records and Case Files: After 1940	
Death Penalty.	Retain Permanently.
Life without Parole.	Retain Permanently.
Life.	Retain Permanently.
Felony with greater than 10 year sentence.	Retain ten (10) years after case is closed, then offer for donation.
Other criminal cases with	Retain five (5) years after

10 year sentence or less.	case is closed, then offer for donation.
Civil and Criminal Records:	
Prior to and including 1940	Retain Permanently.
Rule on Clerk Denied Records:	
Supreme Court and Court of Appeals Case Record and Case File.	Retain five (5) years.
Employment Security Division:	
Case Record and Case File.	Retain three (3) years.
Supreme Court and Court of Appeals Opinions:	
Original copy of Opinions and Per Curiam Opinions.	Retain Permanently.
Financial Records including: Supreme Court & Court of Appeals, Clerk's Office, Court Library, Appellate Committees, Personnel, Arkansas Attorneys, Arkansas Bar Account, Court Reporters, Client Security Fund:	
Vouchers, Ledgers, Receipts, Contracts, Cancelled Checks, Bank Statements, Fees, Audit Reports, Tax Reports, Social Security Reports, Retirement Reports, Purchase Orders, Insurance Reports, and Requisition Reports.	Retain three (3) years following legislative audit.
Other Supreme Court and Court of Appeals Documents including:	
All case related motions, petitions, summons, mandates, and bonds, which have been filed separately from the case file.	Retain as long as Case file is maintained.
Original actions, motions, and petitions.	Retain seven (7) years.
Per Curiam Orders.	Retain as long as Case file is maintained.
Arkansas Attorney Records:	
Petitions for Licenses.	Retain Permanently.
Student Practice.	
Rule 15 Petitions.	Retain five (5) years.
Professional Association Members List.	Retain Permanently.
Professional Association Members Receipts.	Retain three (3) years



Committee on Professional  
Conduct Files.  
Correspondence and  
Misc. Letters.  
Certification of Registration.

following Legislative audit.

Retain Permanently.

Retain three (3) years.

Retain three (3) years.

Board of Certified Court Reporter  
Examiners Disciplinary files,  
which may include, but is  
not limited to:

Grievance Forms, Complaints,  
Responses, Probable Cause  
Vote Sheets, Motions,  
Discovery, Final Orders, Notices  
of Appeal, Transcripts from  
Hearings, and Opinions from  
the Supreme Court  
Applications for Certifi-  
cation and related files

Retain Permanently.

Retain two (2) years  
following the date of testing.

Retain Permanently.

Retain three (3) years.

Records from Board meetings  
Correspondence  
All other documents not  
referenced in this section  
or other rules or  
regulations

Retain seven (7) years.

United States Supreme Court Records:  
US Supreme Court Mandates.

Retain as long as Case  
File is maintained.

US Supreme Court  
Writs of Certiorari.

Retain as long as Case  
File is maintained.

Other Records maintained by  
Clerk's Office including:

Court of Appeals Motion  
Assignment Sheet, Court of  
Appeals Motion Pending file  
Supreme Court and Court of  
Appeals Syllabus, Court of  
Appeals Oral Argument file,  
Court of Appeals Submissions  
file, Condition of Supreme  
Court Docket Summary file.

Immediate Disposal.

Court Clerk Correspondence in-  
cluding:

Correspondence to Civil  
Procedure Committee, Letters to  
Clerk Certifying Briefs,  
Employment  
Security Division Late Filing  
Correspondence, Oral Arguments

Confirmation Letters, Library  
Delinquent Accounts  
Correspondence.

Immediate Disposal.

Miscellaneous or General  
Correspondence:

Retain one (1) year. (Amended  
January 15, 2009.)

### Section 7. Definitions.

- a. *Clerk*. The Clerk of the Supreme Court and Court of Appeals.
- b. *Immediate disposal*. The record(s) may be disposed of at the discretion of the Clerk.
- c. *Retain as long as case file is maintained*. The record(s) should be returned to the case file if possible, but if this is not possible, the record shall be retained in accordance with the instructions for retention of the case file to which it would belong.
- d. *Retain permanently*. The record(s) must forever be retained by the Clerk, transferred pursuant to Section 2(a), or microfilmed pursuant to Section 3(a).
- e. *Retain (#) years, then offer for donation*. The record(s) shall be retained the specified period and then offered for donation, pursuant to Section 3.
- f. *Retain (#) years following legislative audit*. The record(s) shall be retained the specified number of years from the date of publication of the legislative audit report.
- g. *Retain (#) years*. The record(s) shall be retained for the specified period.
- h. *Case closed*. Supreme Court and Court of Appeals cases shall be considered closed once a mandate is issued or another written order of final disposition is entered.
- i. *Case record*. The trial court or administrative tribunal case record, and the court reporter's certified transcript, lodged with the appellate court as provided by Rules 3-1, 3-2, 3-3, and 3-4 of the Rules of the Arkansas Supreme Court and Court of Appeals, as well as the attorneys' briefs.
- j. *Case file*. All correspondence, motions, petitions, orders, dispositions, and mandates issued and filed during the appellate process. (Adopted June 20, 1994.)

## ADMINISTRATIVE ORDER NUMBER 8 — FORMS FOR REPORTING CASE INFORMATION IN ALL ARKANSAS TRIAL COURTS

### Section I. Scope.

In every action filed in the circuit courts, a form designed for the uniform collection of case data shall be completed and filed with the initial pleading and again at final disposition. The forms shall be used in assigning and allocating cases and to collect statistical case data. The forms shall not be admissible as evidence in any court proceeding or replace or supplement the filing and service of pleadings, orders, or other papers as required by law or the rules of this Court. This Order in no way affects the use of the Sentencing Order (which refers to the Sentencing Order effective January 1, 2012 and the former Judgment and Commitment Order or Judgment and



Disposition Order in judicial proceedings as authorized by Court Rule or statute. (Amended December 15, 2011, effective January 1, 2012.)

## **Section II. Responsibility for forms.**

a. *Administrative Office of the Courts.* The Administrative Office of the Courts (AOC) shall be responsible for the content and format of the forms after consultation with other appropriate agencies or as may be required by law. The AOC shall be responsible for training in the use of these forms and for initial dissemination of the forms.

b. *Court clerk.* The court clerk shall not accept an initial pleading which is not accompanied by the appropriate completed form. The court clerk shall maintain a supply of forms to ensure their availability to attorneys or pro se litigants. The court clerk shall weekly forward a copy of the forms which have been filed to the AOC unless the court clerk or other official as designated by the trial court reports electronically to the AOC. Those counties which report electronically should not send copies of the paper forms unless specifically requested to do so by the AOC. These forms shall replace all forms currently used for reporting case data to the AOC. For the purposes of this Administrative Order, court clerk means the elected circuit clerk, or his/her deputy clerks in whose office a pleading, order, judgment, or decree is filed, except in the event probate matters are required by law to be filed in the office of county clerk, then the term clerk shall also include the county clerk for this limited purpose.

c. *Multiple claims.* If a complaint asserts multiple claims which involve different subject matter divisions of the circuit court, the cover sheet for that division which is most definitive of the nature of the case should be selected and completed. Attorneys or pro se litigants should be cognizant that claims which are wholly unrelated may be severed and proceeded with separately under Rule 18(b) of the Rules of Civil Procedure.

## **Section III. Procedure.**

a. *Criminal cases.* The office of the prosecuting attorney shall be responsible for completion of the criminal information form and for filing it in the Office of the Circuit Clerk who shall forward a copy to the AOC pursuant to SECTION (II)(b).

Upon conviction and sentencing to the Arkansas Department of Correction, the office of the prosecuting attorney shall be responsible for completion of the Sentencing Order. The Order shall be submitted to the circuit judge for signature and filed in the Office of the Circuit Clerk. The clerk shall forward a copy to the AOC pursuant to SECTION (II)(b) and to counsel of record for the defendant.

Where the final disposition does not result in a commitment to the Arkansas Department of Correction but may include any of the following—probation, suspended imposition of sentence, commitment to the Department of Community Punishment or to the county jail, a fine, restitution, and/or court costs—the office of the prosecuting attorney shall be responsible for completion of the Sentencing Order, which shall be submitted to the circuit judge for signature and filed in the Office of the Circuit Clerk. The clerk shall forward a copy to the AOC pursuant to SECTION (II)(b). and to counsel of record for the defendant.

Where the case is dismissed or nolle prossed because of the speedy trial rule, the case is transferred, or the defendant is acquitted, the office of the prosecuting attorney shall be responsible for completion of the Reporting Form for Defense-Related Dispositions which shall be submitted to the circuit judge for signature and filed in the Office of the Circuit Clerk. The clerk shall forward a copy to the AOC pursuant to SECTION (II)(b). and to counsel of record for the defendant.

b. *Civil, Probate, and Domestic Relations cases.* When an action is commenced, the attorney or pro se litigant filing the initial pleading shall be responsible for completion of the filing information on the appropriate reporting form, and that form shall be filed with the court clerk. The court clerk shall not accept the pleading unless it is accompanied by the reporting form. The court clerk shall file the original in the case file and shall forward a copy of the reporting form to the AOC pursuant to SECTION II.b.

When the final order/decreed/judgment is presented to the court clerk for filing, the clerk or other appropriate official as designated by the trial court shall complete with the assistance of the parties and their attorneys the disposition information on the original form in the case file. The court clerk shall not file and enter the order unless it is accompanied by the completed reporting form. The court clerk shall sign, date, and forward a copy of the completed reporting form to the AOC pursuant to SECTION II.b.

c. *Juvenile cases.* When an action is commenced, unless otherwise designated by the judge, the attorney or pro se litigant filing the petition shall be responsible for completion of the filing information on the appropriate reporting form, and that form shall be filed with the court clerk. The court clerk shall not accept an initial pleading unless it is accompanied by the reporting form. The court clerk shall forward a copy of the reporting form to the AOC pursuant to Section II.b.

Pursuant to A.C.A. § 16-13-603(d)(2), the judge shall designate a staff person who shall be responsible for completing the disposition information on the appropriate juvenile reporting form when an order is entered and forwarding the form to the court clerk for filing. The court clerk shall not accept the order unless it is accompanied by the reporting form. The court clerk shall sign, date, and forward a copy of the reporting form to the AOC pursuant to SECTION II.b. (Adopted February 26, 1996; amended April 14, 1997; amended December 4, 1997; amended effective July 1, 2000; amended May 24, 2001, effective July 1, 2001, except section II.(c) [Multiple claims] effective January 1, 2002; amended November 1, 2001, effective January 1, 2002; amended February 9, 2011, effective April 1, 2011; amended December 15, 2011, effective January 1, 2012.)

**Publisher's Notes.** The per curiam order of November 1, 2001, declared the effective date of the amendment was to be January 1, 2001, to coincide with the effective date of

revised cover sheets. The Publisher has construed this to mean January 1, 2002, as reflected in the rule's history line.



FORMS

REPORTING FORM FOR DEFENSE-RELATED DISPOSITIONS

[See Administrative Order Number 8, Section III (a)]

IN THE \_\_\_\_\_ COURT OF \_\_\_\_\_

COUNTY, ARKANSAS

\_\_\_\_\_ DIVISION

State of Arkansas  
v.

CASE NUMBER \_\_\_\_\_

ENTRY DATE \_\_\_\_\_

(Defendant's Full Name)  
Arrest Tracking #: \_\_\_\_\_  
SID # \_\_\_\_\_

(Date of Arrest) \_\_\_\_\_ (Date Information Filed) \_\_\_\_\_  
Count # \_\_\_\_\_ A.C.A. § \_\_\_\_\_

[WHEN MULTIPLE COUNTS ARE INVOLVED, PLACE THE COUNT #  
(NOT "X" OR "\_\_\_\_") ON THE LINE BELOW THAT APPLIES TO EACH  
COUNT]

Non-Trial \_\_\_\_\_ Bench Trial \_\_\_\_\_ Jury Trial \_\_\_\_\_  
Acquitted \_\_\_\_\_ Acquitted because of Mental Defect \_\_\_\_\_  
Transferred \_\_\_\_\_ Transferred to Juvenile Court \_\_\_\_\_  
Dismissed with prejudice because of speedy-trial rule \_\_\_\_\_  
Nolle prossed because of speedy-trial rule \_\_\_\_\_  
This Form was submitted by: \_\_\_\_\_

(Signature of Prosecuting Attorney)

(Circuit Judge)  
I certify this is a true and correct record of this Court.  
Date: \_\_\_\_\_ Circuit Clerk/Deputy: \_\_\_\_\_

ADMINISTRATIVE ORDER NUMBER 9 —  
COMPENSATORY TIME RECORD POLICY FOR  
ARKANSAS OFFICIAL COURT REPORTERS

A. *Procedures.* To ensure statewide compliance with the Fair Labor Standards Act of 1938 (29 U.S.C. § 207(o)(6)), each official court reporter shall complete all sections of the Compensatory Time Record For Arkansas Official Court Reporters form, which is appended hereto, sign the time record to certify that it correctly reports all hours worked in excess of the 40 hour work week that are not excluded by 29 U.S.C. § 207(o), and monthly submit the record to his/her appointing judge for approval.

The appointing judge shall approve and sign each monthly record certifying that, to the best of his/her knowledge, the time record reflects a true and accurate record of compensatory time earned for all hours worked in excess of the 40 hour work week, as defined by the Fair Labor Standards Act

("FLSA"). The appointing judge shall grant the court reporter compensatory time at the rate of one and one-half times the number of hours worked in excess of the 40 hour work week pursuant to this policy.

For the purpose of determining the 40 hour FLSA work week, the established work week shall begin on Saturday at 12:01 a.m. and continue through Friday at 12:00 midnight. Any time excluded by 29 U.S.C. § 207(o) and any time taken off for holidays, compensatory time leave, sick leave, annual leave or any other purpose during the week shall not be counted in determining whether the employee has worked 40 hours.

The appointing judge shall be responsible for maintaining the approved time record and shall forward copies of the previous three months records within the first fifteen days of every calendar quarter (i.e., January 15, April 15, July 15, and October 15) to the Administrative Office of the Courts ("AOC"). The time records shall be retained by the AOC for three years or until completion of an audit by the State Auditor's Office of the AOC, whichever is longer.

Court reporters shall be permitted to use accrued compensatory time as soon as possible when the court is not in session and without unduly disrupting the operations of the court. The appointing judge shall approve use of compensatory time. Compensatory time may be used in lieu of sick leave or annual leave.

Under no circumstances shall the outstanding balance of compensatory time exceed 90 hours. The appointing judges are responsible for ensuring that court reporters do not exceed this maximum balance of compensatory time.

Accrued compensatory time should be used prior to the employee's termination of employment. If accrued compensatory time is not used prior to the employee's termination of employment, the appointing judge shall hold the official court reporter position vacant for a period equivalent to the period for which accrued compensatory time is paid. The payment for compensatory time shall be at the ending rate of pay for the employee.

The compensatory time records for official reporters is not intended for use by substitute court reporters. Substitute court reporters shall be governed by the provisions of A.C.A. § 16-13-509 as described in the AOC publication, Arkansas State Trial Court Employee Manual.

#### *B. Enforcement.*

(i) The failure of court reporters to comply with the requirements of this Order shall constitute grounds for discipline under the provisions of Section 19(c) of the Regulations of the Board of Certified Court Reporter Examiners and Section 7 of the Rule Providing for Certification of Court Reporters. (ii) The failure of appointing judges to comply with the requirements of this Order shall constitute grounds for discipline under the provisions of Canon 3 (C) of the Arkansas Code of Judicial Conduct. (Adopted December 23, 1996, effective January 1, 1997.)

## **ADMINISTRATIVE ORDER NUMBER 10 — CHILD SUPPORT GUIDELINES**

### **Section I. Authority and scope.**

Pursuant to Act 948 of 1989, as amended, codified at Ark. Code Ann. § 9-12-312(a) and the Family Support Act of 1988, Pub. L. No. 100-485 (1988), the Court adopts and publishes Administrative Order Number 10 —



**Child Support Guidelines.** This Administrative Order includes and incorporates by reference the attached weekly, biweekly, semimonthly, and monthly family support charts and the attached Affidavit of Financial Means.

It is a rebuttable presumption that the amount of child support calculated pursuant to the most recent revision of the Family Support Chart is the amount of child support to be awarded in any judicial proceeding for divorce, separation, paternity, or child support. The court may grant less or more support if the evidence shows that the needs of the dependents require a different level of support.

All orders granting or modifying child support (including agreed orders) shall contain the court's determination of the payor's income, recite the amount of support required under the guidelines, and recite whether the court deviated from the Family Support Chart. If the order varies from the guidelines, it shall include a justification of why the order varies as may be permitted under Section V hereinafter. It shall be sufficient in a particular case to rebut the presumption that the amount of child support calculated pursuant to the Family Support Chart is correct, if the court enters in the case a specific written finding within the Order that the amount so calculated, after consideration of all relevant factors, including the best interests of the child, is unjust or inappropriate. (Amended April 26, 2007, effective May 3, 2007; republished with revisions June 14, 2007.)

#### CASE NOTES

##### ANALYSIS

Allowance.  
Deviation from guidelines.  
Factors considered.  
Modification.  
Net-worth method.  
Order deficient.  
Quarterly accounting.  
Self-employed payors.

##### **Allowance.**

Trial court did not abuse its discretion in deviating from the child support chart provided by this section and by disallowing a mother's request for a \$3,000 allowance per month so that she could work part-time or not at all because considering the child support chart, evidence, testimony, and exhibits, the trial court determined that the increase to \$10,317 per month was reasonable and allowed both homes to provide for the children in like manner; the trial court found that the presumptive amount of monthly support provided by the family support chart was rebutted based on credible evidence, the testimony, the exhibits, and the needs of the children. *Gilbow v. Travis*, 2010 Ark. 9, — S.W.3d —, 2010 Ark. LEXIS 12 (Jan. 14, 2010).

##### **Deviation from Guidelines.**

Trial court erred because it did not follow the child support guidelines in awarding retroactive child support and it did not take into account the child's best interests when it deviated from the chart amount in awarding prospective child support; in addition, the trial court failed to reference the child-sup-

port guidelines in either its letter opinion or in its judgment and failed to apply the deviation factors in this section. *Akins v. Mofield*, 355 Ark. 215, 132 S.W.3d 760 (2003).

Trial court erred in reducing appellee mother's child support obligation to \$24 per week without considering estimates of her income for the first quarter of 2003; the evidence showed that appellee had from \$7,167.32 to \$8,441.32 per month in income during the first quarter of 2003 and, at that level, child support should have been set at \$250.02 weekly. *Huey v. Huey*, 90 Ark. App. 98, 204 S.W.3d 92 (2005).

Father was allowed to claim the youngest child as a dependent and receive a tax exemption where the circuit court determined that the mother had not been employed since the birth of the last child and that the support of \$4,653.00 per month for the child in the mother's custody was more than 50% of the support required to maintain the child in her lifestyle. *Hill v. Kelly*, 368 Ark. 200, 243 S.W.3d 886 (2006).

Husband stipulated to the amount of his income, and the court set child support based upon the chart, and the payment of counseling was a factor for a court to consider when determining whether to deviate from the chart amount; because there was no deviation from the chart amount, the trial court was not required to make any written findings and the husband's income was such that he could readily afford to bear the expense of the

children's counseling. *Rudder v. Hurst*, 2009 Ark. App. 577, 337 S.W.3d 565 (2009).

#### **Factors Considered.**

Circuit court, in figuring father's income, properly ruled that the child support modifications were set on February 6, 2003, the effective date of the filing of the motion to modify; the circuit court's order contained substantial calculations of the father's income based upon previous tax returns that showed a material change in circumstances to justify a modification of child support. *Hill v. Kelly*, 368 Ark. 200, 243 S.W.3d 886 (2006).

Circuit court properly imputed to mother a minimum-wage income for child support for two older children in the amount of \$6,694 where the father did not present evidence as to the mother's lifestyle or earning capacity. *Hill v. Kelly*, 368 Ark. 200, 243 S.W.3d 886 (2006).

Where the father's income of \$540,217.00 exceeded that shown on the chart, he was directed to pay child support under § III(b) of this order in the amount of twenty-one percent of his income; upon a loss of \$63,078.00 in income, the trial court erred by reducing his child support obligation from \$8,333.00 to \$7,607.75 as the award was a deviation downward from the family support chart. *Morehouse v. Lawson*, 94 Ark. App. 374, 231 S.W.3d 86 (2006).

Where the husband was ordered to pay 21 percent of his net income of \$476,171.00 in monthly child support, he failed to rebut the presumption that the chart amount was proper; considering the factors set forth in this section, the court found that the husband lived extravagantly and had sufficient assets to buy a \$70,000.00 ring for his fiancée and donate \$4,000.00 per month to charity. *Morehouse v. Lawson*, 94 Ark. App. 374, 231 S.W.3d 86 (2006).

Benefits received by children from social security are properly considered for purposes of a downward deviation under this order; however, a father was not entitled to a full credit for the amount that his children received from social security. *Lee v. Lee*, 95 Ark. App. 69, 233 S.W.3d 698 (2006).

In a divorce action, a trial court did not err when it relied on a former husband's total net income and averaged the husband's salary to determine income for child support payments, which were presumptively proper under the guidelines and family support chart of Ark. Code Ann. § 9-12-312(a)(2) and this order. *Taylor v. Taylor*, 369 Ark. 31, 250 S.W.3d 232 (2007).

Circuit court did not clearly err in finding that the husband's income for child-support purposes was that reflected on his tax returns; it was clear that the husband's ownership in the limited partnership was a significant portion of his net worth; thus, that

ownership interest would be a proper consideration. *Brown v. Brown*, 373 Ark. 333, 284 S.W.3d 17 (2008).

Circuit court erred in ordering a father to pay child support and child support arrearage because the circuit court's order did not contain a determination of the father's income, did not refer to the guidelines pursuant to § 9-12-312(a)(2) or the support amount required thereunder, and did not recite whether it deviated from the family-support chart as required under this order; under this section, the circuit court's order shall (1) contain the circuit court's determination of the payor's income, (2) recite the amount of support required under the guidelines, and (3) recite whether the circuit court deviated from the family support chart. *Bradford v. Johnson*, 2010 Ark. App. 492, — S.W.3d —, 2010 Ark. App. LEXIS 525 (June 16, 2010).

#### **Modification.**

Where the father was awarded child custody and the mother was ordered to pay child support based on the child-support chart rate set forth in this order, she was not entitled to a reduction in child support based on allegations that she could not make ends meet while the father was placing some of the child support funds into his savings account. The mother did not show a change of circumstances, nor did she rebut the presumption that the amount of child support awarded under the family-support chart was reasonable. *Hubanks v. Baughman*, 2009 Ark. App. 585, — S.W.3d —, 2009 Ark. App. LEXIS 736 (Sept. 16, 2009).

#### **Net-Worth Method.**

Where father's tax returns were unreliable due to discrepancies in his testimony, a trial court did not err by using the net-worth method to determine his obligation since such was authorized under this rule; however, the order should have been made retroactive under § 9-14-107(d) to when the petition was filed. *Tucker v. Tucker*, 96 Ark. App. 194, 239 S.W.3d 532 (2006).

Increase in the father's child support was proper as the circuit court first considered the father's tax returns and it was only after finding the tax returns unreliable that the circuit court proceeded to the net-worth approach; the reviewing court could not say that the circuit court's use of the net-worth approach in determining the father's disposable income was clearly erroneous. *Tucker v. Office of Child Support Enforcement*, 368 Ark. 481, 247 S.W.3d 485 (2007).

#### **Order Deficient.**

Trial court erred by awarding back child support to be paid by the legal father of a child because the order did not contain a determination of the father's income, did not refer to the guidelines or the support amount



required thereunder, and did not recite whether there was a deviation from the family support chart. *Madison v. Osburn*, 2012 Ark. App. 212, — S.W.3d —, 2012 Ark. App. LEXIS 322 (Mar. 14, 2012).

#### Quarterly Accounting.

Trial court did not err in dismissing husband's petition for a quarterly accounting of child support payments where he failed to demonstrate an accounting was warranted; husband paid \$570 per month, and wife paid \$250 per month for medical insurance alone, leaving her with a little over \$300 per month to provide the son with shelter, food, clothes, and any other day-to-day necessity. *Schuessler v. Schuessler*, 86 Ark. App. 347, 185 S.W.3d 107 (2004).

#### Self-Employed Payors.

Trial court erred in calculating husband's child support obligation because it did not follow the child support guidelines in calculating his income; this rule requires that child support for self-employed payors be calculated based on the last two years' federal and state income tax returns, but husband's income was calculated solely on one year's tax returns. *Cole v. Cole*, 89 Ark. App. 134, 201 S.W.3d 21 (2005).

For self-employed payors, the circuit court should first consider the last two years' federal and state income tax returns and the quarterly estimates for the current year, including contributions made to retirement plans, alimony paid, self-employed insurance paid, depreciation to the extent that it reflects the actual decrease in value of an asset and, if the circuit court determines that the tax returns are unreliable, then it shall make specific findings explaining the basis of its determination; the circuit court shall then proceed using the net-worth method, and the circuit court shall establish a beginning net worth at the start of the relevant period and an ending net worth at the end of the period, considering living expenses and allowable deductions for the same period. *Tucker v. Office of Child Support Enforcement*, 368 Ark. 481, 247 S.W.3d 485 (2007).

In a child support case, a trial court did not err by imputing minimum wage earnings to an unemployed father; *Ark. Sup. Ct. Admin. Order No. 10(c)* was not used because the father was not self-employed. *Norman v. Cooper*, 101 Ark. App. 446, 278 S.W.3d 569 (2008).

**Cited:** *McDougal v. McDougal*, 2011 Ark. App. 13, — S.W.3d —, 2011 Ark. App. LEXIS 13 (Jan. 5, 2011).

## Section II. Definition of income.

a. Income means any form of payment, periodic or otherwise, due to an individual, regardless of source, including wages, salaries, commissions, bonuses, workers' compensation, disability, payments pursuant to a pension or retirement program, and interest less proper deductions for:

1. Federal and state income tax;
2. Withholding for Social Security (FICA), Medicare, and railroad retirement;
3. Medical insurance paid for dependent children; and
4. Presently paid support for other dependents by court order, regardless of the date of entry of the order or orders.

Cases reflect that the definition of "income" is "intentionally broad and designed to encompass the widest range of sources consistent with this State's policy to interpret 'income' broadly for the benefit of the child." *Evans v. Tillery*, 361 Ark. 63, 204 S.W.3d 547 (2005); *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002); *McWhorter v. McWhorter*, 346 Ark. 475, 58 S.W.3d 840 (2001); and *Davis v. Office of Child Support Enforcement*, 341 Ark. 349, 20 S.W.3d 273 (2000).

b. In order to further this State's policy to interpret "income" broadly for the benefit of the child, a support order may include as its basis a percentage of a bonus to be received in the future. This child-support obligation shall terminate when the underlying child-support obligation terminates. When a payor's income includes a bonus amount, use the following percentages of the payor's net bonus to set and establish the amount of support:

One dependent: 15%

Two dependents: 21%

Three dependents: 25%

Four dependents: 28%

Five dependents: 30%

Six dependents: 32%

The child support attributable to a bonus amount shall be in addition to the periodic child-support obligation. Defining income to include a percentage of a bonus changes Arkansas case law. The effect is specifically to overrule the result reached in *Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000). (Amended April 26, 2007, effective May 3, 2007; republished with revisions June 14, 2007; amended February 3, 2011, effective March 1, 2011.)

#### CASE NOTES

##### **Income.**

The term income, as defined by this section, includes Social Security Disability benefits paid directly to a noncustodial parent's chil-

dren as a result of that parent's disability. Ark. Office of Child Support Enforcement v. Hearst, 2009 Ark. 599, 357 S.W.3d 450 (2009).

### **Section III. Calculation of support.**

a. *Basic Considerations.* The most recent revision of the family support charts is based on the weekly, biweekly, semimonthly and monthly income of the payor parent as defined in Section II.

For purposes of computing child support payments, a month consists of 4.334 weeks. Biweekly means a payor is paid once every two weeks or 26 times during a calendar year. Semimonthly means a payor is paid twice a month or 24 times during a calendar year.

Use the lower figure on the chart for income to determine support. Do not interpolate (i.e., use the \$200.00 amount for all income pay between \$200.00 and \$210.00 per week.)

The amount paid to the Clerk of the Court or to the Arkansas Clearinghouse for administrative costs pursuant to Ark. Code Ann. § 9-12-312(e)(1)(A), § 9-10-109(b)(1)(A), and § 9-14-804(b) is not to be included as support.

b. *Income Which Exceeds Chart.* When the payor's income exceeds that shown on the chart, use the following percentages of the payor's weekly, biweekly, semimonthly or monthly income as defined in SECTION II to set and establish a sum certain dollar amount of support:

One dependent: 15%

Two dependents: 21%

Three dependents: 25%

Four dependents: 28%

Five dependents: 30%

Six dependents: 32%

To compute child support when income exceeds the chart, add together the maximum weekly, biweekly, semimonthly, or monthly chart amount, and the percentage of the dollar amount that exceeds that figure, using the percentage above based upon the number of dependents. *Example:* The maximum on the weekly chart is \$1,000 a week. If a payor's net weekly income is \$1,200 and support will be computed for one child-add \$149 (the chart amount of support for one child when payor's net weekly income is \$1,000) and \$30 (15% of \$200, the amount exceeding the maximum chart amount), for total child support of \$179. *Hill v. Kelly*, 368 Ark. 200, —



S.W.3d — (2006) (case decided before the Administrative Order was amended to include this computation and example).

c. *Nonsalaried Payors*. For Social Security Disability recipients, the court should consider the amount of any separate awards made to the disability recipient's spouse and children on account of the payor's disability. SSI benefits shall not be considered as income.

For Veteran's Administration disability recipients, Workers' Compensation disability recipients, and Unemployment Compensation recipients, the court shall consider those benefits as income.

For military personnel, see the latest military pay allocation chart and benefits. Basic Allowance for Housing (BAH) and Basic Allowance for Subsistence (BAS) should be added to other income to reach total income. Military personnel are entitled to draw BAH at a "with dependents" rate if they are providing support pursuant to a court order. However, there may be circumstances in which the payor is unable to draw BAH or may draw BAH only at the "without dependents" rate. Use the BAH for which the payor is actually eligible. In some areas, military personnel receive a variable allowance. It may not be appropriate to include this allowance in calculation of income since it is awarded to offset living expenses which exceed those normally incurred.

For commission workers, support shall be calculated based on minimum draw plus additional commissions.

For self-employed payors, support shall be calculated based on the last two years' federal and state income tax returns and the quarterly estimates for the current year. A self-employed payor's income should include contributions made to retirement plans, alimony paid, and self-employed health insurance paid; this figure appears on line 22 of the current federal income tax form. Depreciation should be allowed as a deduction only to the extent that it reflects actual decrease in value of an asset. Also, the court shall consider the amount the payor is capable of earning or a net worth approach based on property, life-style, etc. For "clarification of the procedure for determining child support by using the net-worth method," see *Tucker v. Office of Child Support Enforcement*, 368 Ark. 481, — S.W.3d — (2007).

d. *Imputed Income*. If a payor is unemployed or working below full earning capacity, the court may consider the reasons therefor. If earnings are reduced as a matter of choice and not for reasonable cause, the court may attribute income to a payor up to his or her earning capacity, including consideration of the payor's life-style. Income of at least minimum wage shall be attributed to a payor ordered to pay child support.

e. *Spousal Support*. The chart assumes that the custodian of dependent children is employed and is not a dependent. For the purposes of calculating temporary support only, a dependent custodian may be awarded 20% of the net take-home pay for his or her support in addition to any child support awarded. For final hearings, the court should consider all relevant factors, including the chart, in determining the amount of any spousal support to be paid.

f. *Allocation of Dependents for Tax Purposes*. Allocation of dependents for tax purposes belongs to the custodial parent pursuant to the Internal Revenue Code. However, the Court shall have the discretion to grant dependency allocation, or any part of it, to the noncustodial parent if the benefit of the allocation to the noncustodial parent substantially outweighs the benefit to the custodial parent.

*g. Health Insurance.* In addition to the award of child support, the court order shall provide for the child's health care needs, which normally would include health insurance if available to either parent at a reasonable cost. (Amended April 26, 2007, effective May 3, 2007; republished with revisions June 14, 2007.)

#### CASE NOTES

##### ANALYSIS

Calculation.

Income.

Social security payments.

##### Calculation.

Under subsection (c) of this rule, the trial court erred in the methodology that it used in calculating the husband's income for purposes of setting child support. Although he had been a self-employed payor in the past, his employment status changed to a direct employee on January 1, 2008, and had remained such since that time; thus, the trial court erred in treating him as a self-employed payor. *Boudreaux v. Boudreaux*, 2009 Ark. App. 685, — S.W.3d —, 2009 Ark. App. LEXIS 850 (Oct. 21, 2009).

##### Income.

The term income, as defined by Section II of this Administrative Order, includes Social Security Disability benefits paid directly to a noncustodial parent's children as a result of that parent's disability. *Ark. Office of Child Support Enforcement v. Hearst*, 2009 Ark. 599, 357 S.W.3d 450 (2009).

Because the father's income was significantly lower than when the child-support amount was originally set and he did not commit criminal offenses to reduce his child-support obligation, the reduction in his income was not a matter of choice under subsection d of this section, and the reduction of his child-support obligation was not an abuse of discretion. *Bendinelli v. Bendinelli*, 2012 Ark. App. 127, — S.W.3d —, 2012 Ark. App. LEXIS 227 (Feb. 8, 2012).

##### Social Security Payments.

Under subsection (c) of this order, a father was not entitled to discharge his child-support arrears based on his son's receipt of a \$15,835 lump-sum payment from the Social Security Administration. The payment did not relieve the inequities borne by the mother and caused by the father's failure to honor his child-support obligation; the mother testified at length regarding her difficulty accumulating sufficient income to cover her expenses. *Grays v. State Office of Child Support Enforcement*, 375 Ark. 38, 289 S.W.3d 12 (2008).

#### Section IV. Affidavit of financial means.

The Affidavit of Financial Means shall be used in all family support matters. The trial court shall require each party to complete and exchange the Affidavit of Financial Means prior to a hearing to establish or modify a support order. (Amended April 26, 2007, effective May 3, 2007; republished with revisions June 14, 2007.)

#### Section V. Deviation considerations.

*a. Relevant Factors.* Relevant factors to be considered by the court in determining appropriate amounts of child support shall include:

1. Food;
2. Shelter and utilities;
3. Clothing;
4. Medical expenses;
5. Educational expenses;
6. Dental expenses;
7. Child care (includes nursery, baby sitting, daycare or other expenses for supervision of children necessary for the custodial parent to work);
8. Accustomed standard of living;
9. Recreation;
10. Insurance;



11. Transportation expenses; and
  12. Other income or assets available to support the child from whatever source, including the income of the custodial parent.
- b. *Additional Factors.* Additional factors may warrant adjustments to the child support obligations and shall include:
1. The procurement and maintenance of life insurance, health insurance, dental insurance for the children's benefit;
  2. The provision or payment of necessary medical, dental, optical, psychological or counseling expenses of the children (e.g., orthopedic shoes, glasses, braces, etc.);
  3. The creation or maintenance of a trust fund for the children;
  4. The provision or payment of special education needs or expenses of the child;
  5. The provision or payment of day care for a child;
  6. The extraordinary time spent with the noncustodial parent, or shared or joint custody arrangements;
  7. The support required and given by a payor for dependent children, even in the absence of a court order; and
  8. Where the amount of child support indicated by the chart is less than the normal costs of child care, the court shall consider whether a deviation is appropriate.
- c. *Application of Deviation Factors.* These deviation factors may be considered for both the custodial and the noncustodial parents. (Amended April 26, 2007, effective May 3, 2007; republished with revisions June 14, 2007.)

#### CASE NOTES

##### ANALYSIS

Amounts received by mother from government.

Deviation from guidelines.

##### **Amounts Received by Mother from Government.**

Trial court erred in awarding a mother \$150 per month for her two special needs children, almost 80 percent less than the amount specified in this administrative order, without explaining why the chart amount was inappropriate. Amounts the mother received as an adoption subsidy and Social Security benefits could be considered, but these amounts were not earned by the father and

were meant to benefit the children. *Bass v. Bass*, 2011 Ark. App. 753, — S.W.3d —, 2011 Ark. App. LEXIS 792 (Dec. 7, 2011).

##### **Deviation from Guidelines.**

Trial court erred because it did not follow the child support guidelines in awarding retroactive child support and it did not take into account the child's best interests when it deviated from the chart amount in awarding prospective child support; in addition, the trial court failed to reference the child-support guidelines in either its letter opinion or in its judgment and failed to apply the deviation factors in this section. *Akins v. Mofield*, 355 Ark. 215, 132 S.W.3d 760 (2003).

#### **Section VI. Abatement of support during extended visitation.**

The guidelines assume that the noncustodial parent will have visitation every other weekend and for several weeks during the summer. Excluding weekend visitation with the custodial parent, in those situations in which a child spends in excess of 14 consecutive days with the noncustodial parent, the court should consider whether an adjustment in child support is appropriate, giving consideration to the fixed obligations of the custodial parent which are attributable to the child, to the increased costs of the noncustodial parent associated with the child's visit, and to the relative incomes of both parents. Any partial abatement or reduction of child support

should not exceed 50% of the child support obligation during the extended visitation period of more than 14 consecutive days.

In situations in which the noncustodial parent has been granted annual visitation in excess of 14 consecutive days, the court may prorate annually the reduction in order to maintain the same amount of monthly child support payments. However, if the noncustodial parent does not exercise said extended visitations during a particular year, the noncustodial parent shall be required to pay the abated amount of child support to the custodial parent. (Amended April 26, 2007, effective May 3, 2007; republished with revisions June 14, 2007.)

## **Section VII. Provisions for payment.**

All orders of child support shall fix the dates on which payments shall be made. All support orders issued shall include a provision for immediate implementation of income withholding, absent a finding of good cause not to require immediate income withholding or a written agreement of the parties incorporated in the order setting forth an alternative agreement as required by Ark. Code Ann. § 9-14-218(a). All income withholding forms shall be made a part of the court file by the payee or his or her attorney. Payment shall be made through the Arkansas Clearinghouse pursuant to Ark. Code Ann. § 9-14-805. Times for payment should ordinarily coincide with the payor's receipt of salary, wages, or other income. (Adopted September 25, 1997; amended January 2, 1998; amended May 24, 2001, effective July 1, 2001; amended January 31, 2002, effective February 11, 2002; amended April 26, 2007, effective May 3, 2007; republished with revisions June 14, 2007.)

### **CASE NOTES**

#### **Income or Assets.**

Two large judgments received by father constituted "income" under this rule and, thus, the trial court did not err by ordering the father to pay a percentage of the judgments as a one-time child support obligation; it was irrelevant to the modification proceeding that the father had agreed to repay discharged bankruptcy debts, and the father's monthly obligation was not increased due to the judgments. *Evans v. Tillery*, 361 Ark. 63,

204 S.W.3d 547 (2005).

Denial of mother's motion for an increase in child support was reversed as the trial court erred in ignoring the withholding tables and simply accepting father's assertion he was over withholding taxes to avoid having to pay additional money in taxes as the father obscured the amount of income available for support. *Williams v. Nesbitt*, 95 Ark. App. 79, 234 S.W.3d 343 (2006).



FORMS  
WEEKLY FAMILY SUPPORT CHART

Arkansas					
Weekly Family Support Chart					
Arkansas Adjusted					
Payer Net Weekly Income	One Child	Two Children	Three Children	Four Children	Five Children
100	26	37	44	49	54
110	28	41	49	54	59
120	31	45	53	58	64
130	33	48	57	63	70
140	36	52	61	68	75
150	38	55	66	72	80
160	40	59	70	77	85
170	43	62	74	81	90
180	45	66	77	85	94
190	47	69	81	90	99
200	50	72	85	94	104
210	52	76	89	98	108
220	55	79	93	102	113
230	57	83	97	107	118
240	60	86	102	112	124
250	62	90	106	117	129
260	65	94	110	122	135
270	67	97	115	127	140
280	70	101	119	132	145
290	72	104	123	136	150
300	74	107	126	139	154
310	76	110	129	143	158
320	78	113	133	147	162
330	80	116	136	150	166
340	82	119	139	154	170
350	84	121	142	157	173
360	85	123	144	159	176
370	86	124	146	162	178
380	87	126	148	164	181
390	89	128	150	166	183
400	90	130	152	168	186
410	91	132	154	171	188
420	92	133	157	173	191
430	94	135	159	175	194
440	95	137	161	178	196
450	97	139	163	180	199
460	98	141	165	183	202
470	100	143	167	185	204
480	100	144	169	186	206
490	101	145	170	187	207
500	102	146	171	189	208
510	102	147	172	190	210
520	103	148	173	191	211
530	104	149	174	192	212
540	104	150	175	193	213
550	105	150	175	193	214
560	105	151	176	194	214
570	106	151	176	195	215
580	106	152	177	195	215
590	107	153	177	196	216

<b>Arkansas</b> <b>Weekly Family Support Chart</b> <b>Arkansas Adjusted</b>					
Payor Net Weekly Income	One Child	Two Children	Three Children	Four Children	Five Children
600	108	154	178	197	218
610	109	158	181	200	220
620	110	158	183	202	223
630	112	160	185	205	226
640	113	162	188	207	229
650	115	164	190	210	232
660	116	166	192	212	234
670	117	168	195	215	237
680	119	169	197	218	240
690	120	171	199	220	243
700	121	173	201	222	245
710	122	174	202	224	247
720	123	176	204	226	249
730	124	177	206	227	251
740	125	179	207	229	253
750	126	180	209	231	255
760	127	182	211	233	257
770	128	183	212	235	259
780	129	185	214	237	261
790	130	186	216	238	263
800	131	187	217	240	265
810	133	189	219	242	267
820	134	190	221	244	269
830	135	192	222	246	271
840	136	193	224	247	273
850	137	195	226	249	275
860	137	196	227	251	277
870	138	197	228	252	278
880	139	198	230	254	280
890	140	199	231	255	282
900	141	201	232	257	284
910	142	202	234	258	285
920	143	203	235	260	287
930	143	204	237	261	289
940	144	205	238	263	290
950	145	207	239	264	292
960	146	208	241	266	294
970	147	209	242	268	295
980	148	210	244	269	297
990	148	211	245	271	299
1000	149	213	246	272	300



## BI-WEEKLY FAMILY SUPPORT CHART

<b>Arkansas</b> <b>Bi-Weekly Family Support Chart</b> <b>Arkansas Adjusted</b>					
Payor Net Bi-Weekly Income	One Child	Two Children	Three Children	Four Children	Five Children
200	51	75	89	98	108
220	58	82	97	107	118
240	61	89	106	117	129
260	66	96	114	126	139
280	71	104	123	135	150
300	76	111	131	145	160
320	81	118	139	154	170
340	86	124	147	162	179
360	90	131	155	171	189
380	95	138	162	179	198
400	100	144	170	188	207
420	104	151	178	196	217
440	109	158	185	205	226
460	114	165	194	215	237
480	119	172	203	224	248
500	124	180	212	234	258
520	129	187	221	244	269
540	134	195	230	254	280
560	139	202	238	263	291
580	144	208	245	271	299
600	148	214	252	279	308
620	152	220	259	286	316
640	156	226	265	293	324
660	160	231	272	301	332
680	164	237	279	308	340
700	167	242	284	314	347
720	170	245	288	319	352
740	172	249	292	323	357
760	175	252	297	328	362
780	177	256	301	332	367
800	180	259	305	337	372
820	182	263	309	341	377
840	185	267	313	346	382
860	188	271	318	351	387
880	191	275	322	356	393
900	193	279	326	361	398
920	196	282	331	365	403
940	199	286	335	370	409
960	201	288	337	373	411
980	202	290	339	375	414
1000	203	292	341	377	416
1020	205	294	344	380	419
1040	206	296	346	382	422
1060	208	298	348	384	424
1080	209	299	349	386	426
1100	210	301	350	387	427
1120	211	302	351	388	428
1140	212	303	352	389	429
1160	213	304	353	390	431
1180	214	305	354	391	432
1200	216	307	357	394	435

## BI-WEEKLY FAMILY SUPPORT CHART

<b>Arkansas</b> <b>Bi-Weekly Family Support Chart</b> <b>Arkansas Adjusted</b>					
<b>Payer Net Bi-Weekly Income</b>	<b>One Child</b>	<b>Two Children</b>	<b>Three Children</b>	<b>Four Children</b>	<b>Five Children</b>
1220	218	311	361	399	441
1240	221	315	366	404	446
1260	224	319	371	409	452
1280	226	323	375	415	458
1300	229	327	380	420	463
1320	232	331	384	425	469
1340	235	335	389	430	475
1360	237	339	394	435	480
1380	240	343	398	440	486
1400	242	346	402	444	490
1420	244	349	405	447	494
1440	246	352	408	451	498
1460	248	355	412	455	502
1480	251	357	415	458	508
1500	253	360	418	462	510
1520	255	363	421	466	514
1540	257	366	425	469	518
1560	259	369	428	473	522
1580	261	372	431	477	526
1600	263	375	435	480	530
1620	265	378	438	484	534
1640	267	381	441	488	538
1660	269	384	445	491	542
1680	271	386	448	495	546
1700	273	389	451	498	550
1720	275	392	454	501	554
1740	277	394	457	505	557
1760	278	396	459	508	560
1780	280	399	462	511	564
1800	282	401	465	514	567
1820	283	404	468	517	570
1840	285	406	470	520	574
1860	287	408	473	523	577
1880	288	411	476	526	581
1900	290	413	479	529	584
1920	292	416	481	532	587
1940	294	418	484	535	591
1960	295	420	487	538	594
1980	297	423	490	541	597
2000	299	425	493	544	601



## SEMI-MONTHLY FAMILY SUPPORT CHART

<b>Arkansas</b> <b>Semi-Monthly Family Support Chart</b> <b>Arkansas Adjusted</b>					
Payor Net Semi-Monthly Income	One Child	Two Children	Three Children	Four Children	Five Children
250	64	93	110	122	134
275	70	102	121	133	147
300	76	111	131	145	160
325	82	120	142	157	173
350	88	129	152	168	186
375	94	137	162	179	197
400	100	145	171	189	209
425	106	154	181	200	221
450	112	162	191	211	232
475	118	170	200	221	244
500	124	179	211	233	258
525	130	189	222	245	271
550	137	198	233	258	284
575	143	207	244	270	298
600	149	216	255	282	311
625	155	225	265	293	323
650	160	232	273	302	333
675	165	239	281	311	343
700	170	246	290	320	354
725	175	253	298	329	364
750	180	260	306	338	373
775	183	265	311	344	380
800	186	269	316	350	386
825	189	274	322	355	392
850	192	278	327	361	398
875	196	282	332	367	405
900	199	287	337	373	411
925	202	292	343	379	418
950	206	297	348	384	424
975	210	302	353	390	431
1000	213	307	359	396	438
1025	216	311	363	402	443
1050	218	313	366	405	447
1075	220	316	369	407	450
1100	222	318	371	410	453
1125	223	320	374	413	456
1150	225	323	377	416	460
1175	226	324	378	418	461
1200	228	326	379	419	463
1225	229	327	381	421	464
1250	230	329	382	422	466
1275	231	330	383	423	467
1300	233	333	386	427	471
1325	237	338	392	433	478
1350	240	343	398	440	485
1375	244	348	404	446	492
1400	247	353	409	452	499
1425	251	358	415	459	507
1450	254	363	421	465	514

<b>Arkansas</b> <b>Semi-Monthly Family Support Chart</b> <b>Arkansas Adjusted</b>					
<b>Payer Net Semi-Monthly Income</b>	<b>One Child</b>	<b>Two Children</b>	<b>Three Children</b>	<b>Four Children</b>	<b>Five Children</b>
1475	257	367	427	472	521
1500	261	372	432	478	527
1525	263	376	436	482	532
1550	266	379	440	487	537
1575	268	383	445	491	542
1600	271	387	449	496	547
1625	274	390	453	500	552
1650	276	394	457	505	557
1675	279	397	461	510	563
1700	281	401	465	514	568
1725	284	405	469	519	573
1750	287	408	474	523	578
1775	289	412	478	528	583
1800	292	416	482	532	588
1825	294	419	486	537	593
1850	297	422	490	541	597
1875	299	425	493	545	601
1900	301	428	497	549	606
1925	303	431	500	552	610
1950	305	434	503	556	614
1975	307	437	507	560	618
2000	309	440	510	564	623
2025	311	443	514	568	627
2050	313	446	517	572	631
2075	316	449	521	575	635
2100	318	452	524	579	639
2125	320	455	528	583	644
2150	322	458	531	587	648
2175	324	461	535	591	652
2200	326	464	538	595	656
2225	328	467	541	598	661
2250	330	470	545	602	665
2275	333	473	548	606	669
2300	335	476	552	610	673
2325	337	479	555	614	677
2350	339	482	559	617	682
2375	341	485	562	621	686
2400	342	487	563	623	687
2425	343	488	565	624	689
2450	344	489	566	625	690
2475	345	490	567	627	692
2500	346	491	568	628	693



MONTHLY FAMILY SUPPORT CHART

Arkansas					
Monthly Family Support Chart					
Arkansas Adjusted					
Payer Net Monthly Income	One Child	Two Children	Three Children	Four Children	Five Children
500	127	186	220	243	269
550	140	204	242	267	295
600	152	222	263	290	321
650	165	240	284	314	347
700	177	257	304	336	371
750	189	274	324	358	395
800	200	291	343	379	418
850	212	307	362	400	441
900	224	324	381	421	465
950	235	340	400	442	488
1000	248	359	422	467	515
1050	261	377	444	491	542
1100	273	396	466	515	569
1150	286	414	488	540	596
1200	298	433	511	564	623
1250	310	449	530	585	646
1300	320	464	546	604	666
1350	330	478	563	622	687
1400	340	493	580	640	707
1450	351	507	596	659	727
1500	360	521	612	676	747
1550	366	530	622	688	759
1600	373	538	633	699	772
1650	379	547	643	711	784
1700	385	556	653	722	797
1750	391	565	664	733	810
1800	398	574	674	745	823
1850	405	584	685	757	836
1900	412	594	696	769	849
1950	419	603	707	781	862
2000	426	613	718	793	875
2050	432	622	727	803	887
2100	436	626	732	809	893
2150	439	631	738	815	900
2200	443	636	743	821	906
2250	447	641	748	827	913
2300	450	646	753	833	919
2350	453	649	756	836	923
2400	455	652	759	839	926
2450	458	655	761	841	929
2500	460	657	764	844	932
2550	463	660	766	847	935
2600	467	666	773	854	942
2650	474	676	784	866	957
2700	481	686	796	879	971
2750	487	695	807	892	985
2800	494	705	819	905	999
2850	501	715	830	918	1013
2900	508	725	842	930	1027
2950	515	735	854	943	1041

**Arkansas**  
**Monthly Family Support Chart**  
**Arkansas Adjusted**

<b>Payer Net Monthly Income</b>	<b>One Child</b>	<b>Two Children</b>	<b>Three Children</b>	<b>Four Children</b>	<b>Five Children</b>
3000	521	744	884	955	1054
3050	526	751	873	964	1064
3100	532	759	881	973	1075
3150	537	766	889	982	1085
3200	542	773	897	992	1095
3250	547	780	906	1001	1105
3300	552	788	914	1010	1115
3350	558	795	922	1019	1125
3400	563	802	930	1028	1135
3450	568	809	939	1037	1145
3500	573	817	947	1046	1155
3550	578	824	955	1056	1165
3600	583	831	964	1065	1175
3650	589	839	972	1074	1186
3700	593	845	979	1082	1195
3750	597	851	986	1090	1203
3800	602	857	993	1097	1211
3850	606	863	1000	1105	1220
3900	610	869	1007	1113	1228
3950	614	875	1014	1120	1237
4000	619	881	1021	1128	1245
4050	623	887	1028	1136	1254
4100	627	893	1035	1143	1262
4150	631	899	1041	1151	1270
4200	635	905	1048	1158	1279
4250	640	911	1055	1166	1287
4300	644	917	1062	1174	1296
4350	648	923	1069	1181	1304
4400	652	929	1076	1189	1313
4450	657	935	1083	1197	1321
4500	661	941	1090	1204	1330
4550	665	947	1097	1212	1338
4600	669	953	1104	1220	1346
4650	674	959	1111	1227	1355
4700	678	965	1118	1235	1363
4750	682	971	1124	1243	1372
4800	684	973	1127	1245	1375
4850	686	976	1129	1248	1378
4900	688	978	1132	1251	1381
4950	690	980	1134	1253	1383
5000	691	983	1136	1256	1386



IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, ARKANSAS  
(Domestic Relations Division)

STATE OF ARKANSAS     }  
                                      }  
COUNTY OF \_\_\_\_\_ }

AFFIDAVIT OF FINANCIAL MEANS

Revised 6/2007

\_\_\_\_\_  
Plaintiff  
                                  V.

No. \_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Defendant

The affiant, being duly sworn, says under penalty of perjury that affiant is the  
(PLAINTIFF) (DEFENDANT) (~~strike out one~~) herein, has prepared this financial statement,  
knows the contents thereof, and that it is true and correct.

MY INCOME  
(Complete Block 23 on page 5 FIRST)

1.	How often are you paid? ___ weekly ___ biweekly (26 times a year) ___ monthly ___ semimonthly (twice a month—24 times a year) ___ other	Amount
1.a.	Net Pay: (Take-home) (from line 23.h.)	\$
1.b.	Allowable Deductions: (from line 23.g.)	\$
1.c.	Other Deductions: (from line 24.i.)	\$

Please attach your last three (3) pay stubs to this affidavit.

2. Number of dependents, including self, claimed for tax withholding purposes: \_\_\_\_\_
3. Additional amount, if any, withheld for tax purposes:           \$ \_\_\_\_\_

**OTHER INCOME, FUNDS & LIQUID ASSETS AVAILABLE TO ME**

4.	Funds:	Amount:	Source of funds/assets:
4.a.	All other income received (state source, amount, and how often received):	\$	See attached sheet.
4.b.	Cash on hand or in banks:	\$	
4.c.	Stocks & bonds, etc.:	\$	
4.d.	All other child support:	\$	

**THE CHILDREN**

5.	Financial responsibility of my children:	Number of children:
5.a.	Number of children I have with opposing party:	#
5.b.	Number of other children I have and support:	#
5.c.	Total Number of children living with me whom I support:	#
5.d.	Full Name of child(ren) born or legally adopted of this marriage:	Date of Birth:
1.		
2.		
3.		
4.		



MY MONTHLY EXPENSES

6.	Expense:	Amount:		Expense:	Amount:
a.	Rent/house payment:	\$	k.	Drugs:	\$
b.	Gas & electricity:	\$	l.	Life Insurance:	\$
c.	Water:	\$	m.	Health Insurance:	\$
d.	Telephone:	\$	n.	Auto Insurance:	\$
e.	Food:	\$	o.	Fire Insurance:	\$
f.	Clothing:	\$	p.	Transportation:	\$
g.	Laundry & cleaning:	\$	q.	Other:	\$
h.	Child care:	\$	r.	Other:	\$
i.	Car payment:	\$	s.	Other:	\$
j.	Medical:	\$	t.	Other:	\$
				Total:	\$

Place a check mark by all expenses which are not being paid currently.

CREDITORS

(Complete items 26, 27, & 28 on pages 6 & 7 FIRST)

	Whose Debts:	Total Owed: (A)	Total of Monthly payments: (B)
7.	Joint Debts:	\$	\$
8.	Plaintiff's Debts:	\$	\$
9.	Defendant's Debts:	\$	\$

## GENERAL INFORMATION ABOUT PARTIES

(Do not guess concerning information about opposing party)

	Information about:	Plaintiff	Defendant
10.	Name:		
11.	Address:		
12.	SSN: (last four digits)		
13.	Date of Birth:		
14.	Phone No.: (home)		
15.	Phone No.: (work)		
16.	Employer:		
17.	Employer Address:		
18.	Employer Phone No.:		
19.	Opposing party's net ___ weekly, ___ biweekly, ___ monthly or ___ semimonthly Income:		
20.	Other Income of opposing party:		
21.	Number of children of opposing party:		

## INCOME FROM SALARY

22. How often are you paid?

\_\_\_ weekly      \_\_\_ biweekly      \_\_\_ semimonthly      \_\_\_ monthly      \_\_\_ other  
 52 times a year    26 times a year    24 times a year    12 times a year    Explain



**YOUR NET PAY**  
**(Gross pay minus payroll deductions)**

23.	<b>Income:</b>		<b>Amount</b>	
23.a.	Gross Wages per pay period:		\$	xxxxxxxxxx
		<b>Deductions per check:</b>	xxxxxxxxxx	<b>Amount</b>
23.b.		Federal Income Taxes Withheld:	xxxxxxxxxx	\$
23.c.		State Income Taxes Withheld:	xxxxxxxxxx	\$
23.d.		F.I.C.A., and medicare <sup>1</sup> :	xxxxxxxxxx	\$
23.e.		Health Insurance (children only) <sup>2</sup> :	xxxxxxxxxx	\$
23.f.		Court ordered child support <sup>3</sup> :	xxxxxxxxxx	\$
23.g.		Total Withheld: (b) thru (f) above: Carry to line 1.b. on first page.	xxxxxxxxxx	\$
23.h.	Net take-home pay per pay period: (Subtract 23.g from 23.a)			\$
23.i.	<p><sup>1</sup> F.I.C.A. is Social Security; Include any railroad retirement in F.I.C.A. block. <sup>2</sup> Include the amount you pay to cover the children only. <sup>3</sup> Include any court ordered child support for dependents of previous marriages or previously legally legitimated children and adopted children withheld from current paycheck.</p>			

Repeat salary information on a separate attachment for any other salaried positions you have.

**OTHER DEDUCTIONS FROM MY PAYCHECK**

24.	<b>Item:</b>	<b>Amount:</b>
24.a.	Union dues:	\$
24.b.	Credit Union, thrift plan payments:	\$
24.c.	Pension Benefits and stock purchase plans:	\$
24.d.	Charitable contributions:	\$

24.e.	Debt payments and/or garnishments:	\$
24.f.	Life Insurance payments:	\$
24.g.	Other (Identify):	\$
24.h.	Other (Identify):	\$
24.i.	Total Withheld (total of 24.a. thru 24.h.) (Carry to 1.c. on page 1):	\$

The above deductions will not be considered as direct deductions from your gross pay.

However, they may affect the amount of the child support obligation.

### OTHER COURT ORDERED CHILD SUPPORT

25.	Other court-ordered child support being paid other than by deduction: Attach child support order and proof of payment.	\$
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### CREDITORS & DEBTS

26. Debts in the names of **BOTH PARTIES** are:

	Creditor:	Total amount owed:	Monthly payment:
26.a.		\$	\$
26.b.		\$	\$
26.c.		\$	\$
26.d.		\$	\$
26.e.		\$	\$
26.f.		\$	\$
26.g.		\$	\$
26.h.		\$	\$
	<b>Totals:</b>	\$	\$

Attach additional schedules as needed, and then total - Carry to lines 7(A) & 7(B) on page 3.

27. Debts in the name of only the **PLAINTIFF** are:

	Creditor:	Total amount owed:	Monthly payment:
27.a.		\$	\$



27.b.		\$	\$
27.c.		\$	\$
27.d.		\$	\$
27.e.		\$	\$
	Totals:	\$	\$

Attach additional schedules as needed, and then total - Carry to lines 8(A) & 8(B) on page 3.

28. Debts in the name of only the DEFENDANT are:

	Creditor:	Total amount owed:	Monthly payment:
28.a.		\$	\$
28.b.		\$	\$
28.c.		\$	\$
28.d.		\$	\$
28.e.		\$	\$
	Totals:	\$	\$

Attach additional schedules as needed, and then total - Carry to lines 9(A) & 9(B) on page 3.

Dated this \_\_\_\_\_ of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Affiant

Subscribed and sworn to before me on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Notary Public  
My commission expires: \_\_\_\_\_

NOTICE

BOTH PARTIES MUST COMPLETE AND EXCHANGE THIS SEVEN-PAGE AFFIDAVIT PRIOR TO THE TEMPORARY HEARING. BOTH PARTIES MUST SUPPLY THE ORIGINAL NOTARIZED AFFIDAVIT TO THE COURT. THE COURT WILL PUNISH PERJURY BY APPROPRIATE ACTION.

**Publisher's Notes.** By Per Curiam dated Sept. 25, 1997, the Supreme Court provided: "On February 5, 1990, this Court first adopted guidelines for child support in response to P.L. 100-485 and Ark. Code Ann. § 9-12-312(a). Effective October, 1989, P.L. 100-485 required that all states adopt guidelines for setting child support; that it be a rebuttable presumption that the amount of support calculated from the child-support chart is correct; and that each state's guidelines be reviewed and revised, as necessary, at least every four years. In response to the federal law, the Arkansas General Assembly enacted Ark. Code Ann. § 9-12-312 which included the federal provisions and authorized the Arkansas Supreme Court to develop guidelines based on recommendations submitted to the Court by a committee appointed by the Chief Justice.

"The Committee on Child Support initially made recommendations to the Court which formed the substance of the 1990 Per Curiam Order. On May 13, 1991, pursuant to the Committee's recommendations, the Court issued a new Per Curiam Order which supplemented the original. Then, in compliance with the four-year requirement of P.L. 100-485, the Committee again submitted recommendations to the Court in October, 1993, and the Court issued the most recent Per Curiam Order on October 23, 1993, adopting the guidelines which are published in the Court Rules Volume of the Arkansas Code Annotated.

"In the ensuing four years, the Committee continued to study the existing guidelines pursuant to federal and state law and has once again submitted its recommendations.

"Having carefully considered these most recent recommendations, the Court adopts and publishes Administrative Order Number 10 — Arkansas Child Support Guidelines, effective October 1, 1997. This Administrative Order includes and incorporates by reference the weekly and monthly family support charts and the Affidavit of Financial Means which are attached to Administrative Order Number 10.

"The Court thanks the Committee for its service, and as it has done in the past, directs the Committee and the Chief Justice, as its liaison, to continue its charge pursuant to law and the rules of this Court.

"Newbern, J. dissents. I dissent for the reasons stated in the dissenting opinion of Hickman, J., when the per curiam order adopting the guidelines was issued. In re: Guidelines for Child Support Enforcement, 301 Ark. 627, 784 S.W.2d 589 (1990)."

By Per Curiam dated Jan. 22, 1998, the Supreme Court provided: "On September 25, 1997, based on recommendations received from the Supreme Court Committee on Child Support pursuant to P.L. 100-485 and Ark. Code Ann. § 9-12-312(a), this Court published Administrative Order Number 10, adopting the most recent version of the child-support guidelines including the weekly and monthly family support charts and the Affidavit of Financial Means. The Order became effective October 1, 1997, and certain corrections were made to the charts before the Order reached the printer.

"The Committee has now apprised the Court of an unintended omission on the Affidavit of Financial Means. On page one of the Affidavit, Number 10 should include "(h) child care." This item is not a new consideration, having been included on the Affidavit of Financial Means since the Court first adopted it for use in 1991.

"THEREFORE, effective immediately, the Court republishes Administrative Order Number 10: Arkansas: Arkansas Child Support Guidelines in its entirety including the corrected weekly and monthly family support charts and the corrected Affidavit of Financial Means.

"Newbern, J. dissents. I dissent for the reasons stated in the dissenting opinion of Hickman, J., when the per curiam order adopting the guidelines was issued. In re: Guidelines for Child Support Enforcement, 301 Ark. 627, 784 S.W.2d 589 (1990)."

**Cross References.** For other provisions and annotations regarding child support, see § 9-12-312.

## CASE NOTES

### ANALYSIS

Construction.

Purpose.

Applicability.

Ability to pay.

Chart reference mandatory.

Deviation from guidelines.

Exclusivity.

Income or assets.

Retroactive payments upheld.

Subchapter "s" corporation.

Undue hardship.

### Construction.

The family-support chart is, in essence, a rule promulgated by the Arkansas Supreme Court, and is construed using the same means, including canons of construction, that are used to interpret statutes. *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998).

An interpretation of the provisions of this chart that would permit deduction of income-



tax payments from the income that a child-support payor has available to pay child support is contrary to the purpose of the family-support chart. *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998).

Definition of income for child support purposes was intentionally broad to encompass the widest range of sources consistent with the state's policy to interpret "income" broadly for the benefit of the child. *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002).

#### **Purpose.**

The family-support chart was established to ensure the proper enforcement of child-support awards in this state. *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998).

It is wholly inconsistent with the purpose of the family-support chart to interpret it in such a way as to encourage child-support payors to minimize their child-support income. *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998).

#### **Applicability.**

The Per Curiam Order guidelines of the Arkansas Supreme Court in effect at the time of the hearing on the request for modification of child support is the applicable law pertaining to the modification. *Heflin v. Bell*, 52 Ark. App. 201, 916 S.W.2d 769 (1996).

The child support guidelines Per Curiam Order of 1993 is very similar to the child support guidelines Per Curiam Order of 1991, but the paragraph governing the trial court's continuing jurisdiction to modify support orders is omitted and, therefore, not applicable to child support matters decided after the 1993 Per Curiam Order was issued. *Heflin v. Bell*, 52 Ark. App. 201, 916 S.W.2d 769 (1996).

#### **Ability to Pay.**

The child support chart specifically takes into account payments made under court order to support other children, and allows these payments to be deducted from weekly take home pay. The chart does not refer to support of children not under court order, but a payor spouse's ability to pay can be considered and necessarily includes other children the parent is legally obligated to support. *Stewart v. Winfrey*, 308 Ark. 277, 824 S.W.2d 373 (1992).

Trial court did not err when it ordered incarcerate father to pay \$25 per week in child support; while that exact issue had never been determined in Arkansas, this rule provided that income could be imputed to an unemployed payor of child support and the *Reid* decision upheld the trial court's refusal to totally abate child support due to the father's incarceration. *Allen v. Allen*, 82 Ark. App. 42, 110 S.W.3d 772 (2003).

Given the evidence of the father's affluence, exceptional generosity to his girlfriend and

sisters, and extravagant lifestyle, the trial judge did not abuse his discretion in setting child support in the divorce proceeding in accordance with the presumptive amount derived from the family support chart. *Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003).

#### **Chart Reference Mandatory.**

Courts are required to refer to chart but are not bound to set support payments in accordance with exact terms thereof; degree of dependence upon chart is left to sound discretion of the chancellor. *Thurston v. Pinkstaff*, 292 Ark. 385, 730 S.W.2d 239 (1987) (decision prior to amendment to § 9-12-312 by Acts 1989, No. 948).

Reference to the Family Support Chart is mandatory, and the chart itself establishes a rebuttable presumption of the appropriate amount which can only be explained away by written findings stating why the chart amount is unjust or inappropriate. *Black v. Black*, 306 Ark. 209, 812 S.W.2d 480 (1991).

Where the chancellor's order failed to indicate whether he indeed referred to the chart in making his decision, he projected a support chart amount premised on the defendant's monthly income, and he presumed that amount to be correct, the case was remanded for the chart to be considered. *Black v. Black*, 306 Ark. 209, 812 S.W.2d 480 (1991).

Provisions of property settlement agreement with regard to child support did not compel chancery court to deviate from presumptive amount set out in the child support guidelines to be used in arriving at a fair determination of support. *Alfano v. Alfano*, 77 Ark. App. 62, 72 S.W.3d 104 (2002).

#### **Deviation from Guidelines.**

Where chancellor made specific findings on the record spelling out why the support chart was inappropriate, considering all relevant factors, it was sufficient to rebut the presumption that the amount of child support calculated pursuant to the family support chart was correct. *Scroggins v. Scroggins*, 302 Ark. 362, 790 S.W.2d 157 (1990).

While there is a rebuttable presumption that the amount of support according to the chart is correct, the chancellor in his discretion is not entirely precluded from adjusting the amount as deemed warranted under the facts of a particular case. However, when deviating from the chart, the chancellor must explain his or her reasoning by the entry of a written finding or by making a specific finding on the record. *Waldon v. Waldon*, 34 Ark. App. 118, 806 S.W.2d 387 (1991).

Where the end result reached by the chancellor represented only a slight deviation from the chart amount, the findings made by the chancellor on the record were sufficient to rebut the presumption that the amount of

support according to the chart was correct. *Waldon v. Waldon*, 34 Ark. App. 118, 806 S.W.2d 387 (1991).

The child support chart and the criteria used for deviating from it are not mandatory, but there is a rebuttable presumption that the amount specified in the chart is the appropriate amount. Other matters may have a bearing upon the amount of support reference to the chart is mandatory, but applying the specific chart amounts is not mandatory if it would be unjust or inequitable, and if written findings are made to that effect. *Stewart v. Winfrey*, 308 Ark. 277, 824 S.W.2d 373 (1992).

Given the presumption that the chart amount is reasonable, it is incumbent on the trial courts to give a fuller explanation of their reasons for rejecting the chart; it was not sufficient to state merely that the amount was "unreasonable." *Cochran v. Cochran*, 309 Ark. 604, 832 S.W.2d 252 (1992).

Trial court erred in awarding to the mother, the noncustodial parent, the right to claim a child for tax exemption purposes without providing the requisite written or specific findings to support the decision; an award of a tax exemption to a noncustodial parent resulted in a deviation from the child support chart. *Dumas v. Tucker*, 82 Ark. App. 173, 119 S.W.3d 516 (2003).

#### **Exclusivity.**

The list of factors set out in *In re: Child Support Enforcement Guidelines*, 301 Ark. 627, 784 S.W.2d 589 (1990), for determining whether an amount specified by the chart is unjust or inappropriate is not exclusive. *Stewart v. Winfrey*, 308 Ark. 277, 824 S.W.2d 373 (1992).

#### **Income or Assets.**

Where there was no evidence regarding defendant's weekly take home pay during the relevant time period, the support was set at the minimum level required of an unemployed person. *Barnes v. Barnes*, 311 Ark. 287, 843 S.W.2d 835 (1992).

The language "other income or assets available to support the child from whatever source" is intended to expand, not restrict, the sources of funds to be considered in setting child support. *Belue v. Belue*, 38 Ark. App. 81, 828 S.W.2d 855 (1992).

The chancellor correctly based the amount of child support ordered on a monthly income which included noncustodial Veterans' Administration disability benefits. *Belue v. Belue*, 38 Ark. App. 81, 828 S.W.2d 855 (1992).

Gambling proceeds were properly included as income for purposes of calculating child

support, but the true income could only be arrived at by crediting gambling losses against the winnings. *McWhorter v. McWhorter*, 346 Ark. 475, 58 S.W.3d 840 (2001).

Mandatory Tier II withholdings from the father, a railroad employee, did not form part of disposable income for child support purposes; Tier II withholdings were part of railroad retirement deductions. *Montgomery v. Bolton*, 349 Ark. 460, 79 S.W.3d 354 (2002).

Even if father was considered an employee, rather than self-employed, his income was properly calculated based on an average over a period of time, given the variable nature of his earnings; thus, the trial court did not abuse its discretion by employing an averaging method in determining father's income for child support purposes. *Johnson v. Cotton-Johnson*, 88 Ark. App. 67, 194 S.W.3d 806 (2004).

#### **Retroactive Payments Upheld.**

Where custody petition was filed in 1992, the hearing was held in 1994, and the chancellor made a finding of the father's income as of January 1, 1993, there was no abuse of discretion in the chancellor's ordering support payments retroactive to January 1993. *Heflin v. Bell*, 52 Ark. App. 201, 916 S.W.2d 769 (1996).

#### **Subchapter "S" Corporation.**

This chart does not permit a child-support payor/subchapter S corporation shareholder to deduct from his child-support income the amount of his shareholder earnings retained by the corporation; to interpret the chart to allow this would be to allow the payor to reduce his child-support income by the entire amount of income taxes that he pays on his corporate earnings, whether distributed to him or retained by the corporation. *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998).

#### **Undue Hardship.**

Where the chancellor found that the chart called for \$51.00 per week child support, which would quadruple the noncustodial parent's payments, and, considering his expenses, it would be devastating to increase by four times the amount of his support payments, an increase of the weekly payment to \$30.00 instead of \$51.00 followed the requirements, and applied the rules set out in the supreme court's per curiams by avoiding a modification that would work undue hardship on that party. *Howard v. Wisemon*, 38 Ark. App. 27, 826 S.W.2d 314 (1992).



## ADMINISTRATIVE ORDER NUMBER 11 — ARKANSAS CODE OF PROFESSIONAL RESPONSIBILITY FOR INTERPRETERS IN THE JUDICIARY

### Preamble

Many persons who come before the courts are partially or completely excluded from full participation in the proceedings due to limited English proficiency or a speech or hearing impairment. It is essential that the resulting communication barrier be removed, as far as possible, so that these persons are placed in the same position as similarly situated persons for whom there is no such barrier.<sup>1</sup> As officers of the court, interpreters help assure that such persons may enjoy equal access to justice and that court proceedings and court support services function efficiently and effectively. Interpreters are highly skilled professionals who fulfill an essential role in the administration of justice.

### Applicability

This code shall guide and be binding upon all persons, agencies and organizations who administer, supervise use, or deliver interpreting services to the judiciary.

**Publisher's Notes.** By Per Curiam dated September 30, 1999, effective January 1, 2000, the Arkansas Supreme Court provided: "All persons, whether or not able to understand or communicate adequately in the English language, must be afforded rights when they appear in court. See Ark. Code Ann. § 16-64-111, § 16-89-104, § 16-10-102 and § 25-15-101. It is the intent of this Per Curiam Order to provide for the certification, appointment and use of interpreters for non-English speaking parties or witnesses in all state and local court proceedings.

"Ark. Code Ann. § 16-10-102 established the Administrative Office of the Courts (AOC) subject to the supervision of the Supreme Court of Arkansas to be responsible for the administration of the nonjudicial business of the judicial branch. Ark. Code Ann. § 16-10-127 authorizes and directs the AOC to establish a program to facilitate the use of interpreters and transliterators in all state and local courts in Arkansas and to prescribe the qualifications of and certify persons who may serve as certified interpreters in all courts in the state.

"Therefore, pursuant to our superintending powers, we hereby authorize the AOC, with advice of the Arkansas Judicial Council Ad Hoc Foreign Language Interpreter Certifica-

tion Committee, and in compliance with Administrative Order No. 11 and the rules of Consortium for State Court Interpreter Certification, to prescribe requirements for the recruitment, testing, certification, evaluation, duties, professional conduct, continuing education, certification renewal, and other matters relating to interpreters.

"When an interpreter is requested or when the judge determines that a party or witness has a limited ability to understand and communicate in English, a certified interpreter shall be appointed, using the most current roster of certified interpreters maintained by the AOC. Where possible, but particularly for more complex cases, an interpreter with Advanced Certification as denoted on the roster should be used.

"The judge may appoint a non-certified interpreter only upon a finding that diligent, good faith efforts to obtain a certified interpreter have been made and none has been found to be reasonably available. Recognizing that the judge is the final arbiter of any interpreter's qualifications, a non-certified interpreter may be appointed only after the judge has evaluated the totality of the circumstances including the gravity of the judicial proceeding and the potential penalty or consequence involved. Before appointing a non-

1. Non-English speaker should be able to understand just as much as an English speaker with the same level of education and intelligence.

certified interpreter, the judge shall make a finding that the proposed non-certified interpreter appears to have adequate language skills, knowledge of interpreting techniques, familiarity with interpreting in a court setting, and that the proposed non-certified interpreter has read, understands, and will abide by Administrative Order No. 11, the Arkansas Code of Professional Responsibility for Interpreters in the Judiciary. A summary of the efforts made to obtain a certified interpreter and to determine the capabilities of the proposed non-certified interpreter shall be made on the record or as a docket entry of the legal proceeding.

"A non-English speaking party or witness may at any point in the proceeding waive the right to the services of an interpreter, but only when (1) the waiver is approved by the judge on the record or by docket entry after explaining to the non-English speaking party or witness through an interpreter the nature and effect of the waiver; (2) the judge makes a finding on the record or by docket entry that the waiver has been made knowingly, intelligently, and voluntarily; and (3) in cases where the non-English speaking party or witness has retained/appointed counsel or has the right to counsel, that party or witness has been afforded the opportunity to consult with his or her attorney. At any point in any proceeding, for good cause shown, a non-

English speaking party or witness may retract his or her waiver and request an interpreter.

All interpreters, before commencing their duties, shall take an oath that they will make a true and impartial interpretation using their best skills and judgment in accordance with the standards and ethics of the interpreter profession.

"Any of the following actions shall constitute good cause for the judge to remove an interpreter: (1) being unable to interpret adequately, including where the interpreter self-reports such inability; (2) knowingly and willfully making false interpretation while serving in an official capacity; (3) knowingly and willfully disclosing confidential or privileged information obtained while serving in an official capacity; (4) failing to adhere to the requirements prescribed by the AOC, including the Arkansas Code of Professional Responsibility for foreign language interpreters; (4) failing to follow other standards prescribed by law. The judge shall notify the AOC in writing whenever he or she removes an interpreter, setting forth the reason(s) for that action.

"In all legal proceedings, the cost of providing interpreter services shall be assessed by the judge according to law. Provided, no non-English speaking party or witness shall be denied the services of an interpreter because he or she is unable to pay for those services."

### Commentary

The black letter principles of this model code are principles of general application that are unlikely to conflict with specific requirements of rule or law in the states, in the opinion of the code's drafters. Therefore, the use of the term "shall" is reserved for the black letter principles. Statements in the commentary use the term "should" to describe behavior that illustrates or elaborates the

principles. The commentaries are intended to convey what the drafters of this model code believe are probable and expected behaviors. Wherever a court policy or routine practice appears to conflict with the commentary in this code, it is recommended that the reasons for the policy as it applies to court interpreters be examined.

## Canon 1: Accuracy and Completeness.

Interpreters shall render a complete and accurate interpretation or sight translation, without altering, omitting, or adding anything to what is stated or written, and without explanation.

### Commentary

The interpreter has a twofold duty: 1) to ensure that the proceedings in English reflect precisely what was said by a non-English speaking person, and 2) to place the non-English speaking person on an equal footing with those who understand English. This creates an obligation to conserve every ele-

ment of information contained in a source language communication when it is rendered in the target language.

Therefore, interpreters are obligated to apply their best skills and judgment to preserve faithfully the meaning of what is said in court, including the style or register of speech.



Verbatim, "word for word," or literal oral interpretations are not appropriate when they distort the meaning of the source language, but *every spoken statement, even if it appears non-responsive, obscene, rambling, or incoherent should be interpreted*. This includes apparent misstatements.

Interpreters should never interject their own words, phrases, or expressions. If the need arises to explain an interpreting problem (e.g., a term or phrase with no direct equivalent in the target language or a misunderstanding that only the interpreter can clarify), the interpreter should ask the court's permission to provide an explanation. Interpreters should convey the emotional emphasis of the speaker without reenacting or mimicking the speaker's emotions, or dramatic gestures.

Sign language interpreters, however, *must* employ all of the visual cues that the language they are interpreting for requires - including facial expressions, body language, and hand gestures.

Sign language interpreters, therefore, should ensure that court participants do not confuse these essential elements of the interpreted language with inappropriate interpreter conduct.

The obligation to preserve accuracy includes the interpreter's duty to correct any error of interpretation discovered by the interpreter during the proceeding. Interpreters should demonstrate their professionalism by objectively analyzing any challenge to their performance.

## Canon 2: Representation of Qualifications.

Interpreters shall accurately and completely represent their certifications, training, and pertinent experience.

### Commentary

Acceptance of a case by an interpreter conveys linguistic competency in legal settings. Withdrawing or being asked to withdraw from a case after it begins causes a disruption of court proceedings and is wasteful of scarce public resources. It is therefore essential that

interpreters present a complete and truthful account of their training, certification and experience prior to appointment so the officers of the court can fairly evaluate their qualifications for delivering interpreting services.

## Canon 3: Impartiality and Avoidance of Conflict of Interest.

Interpreters shall be impartial and unbiased and shall refrain from conduct that may give an appearance of bias. Interpreters shall disclose any real or perceived conflict of interest.

### Commentary

The interpreter serves as an officer of the court and the interpreter's duty in a court proceeding is to serve the court and the public to which the court is a servant. This is true regardless of whether the interpreter is publicly retained at government expense or retained privately at the expense of one of the parties.

The interpreter should avoid any conduct or behavior that presents the appearance of favoritism toward any of the parties. Interpreters should maintain professional relationships with their clients, and should not take an active part in any of the proceedings. The interpreter should discourage a non-English speaking party's personal dependence.

During the course of the proceedings, interpreters should not converse with parties, wit-

nesses, jurors, attorneys, or with friends or relatives of any party, except in the discharge of their official functions. It is especially important that interpreters, who are often familiar with attorneys or other members of the courtroom work group, including law enforcement officials, refrain from casual and personal conversations with anyone in court that may convey an appearance of a special relationship or partiality to any of the court participants.

The interpreter should strive for professional detachment. Verbal and non-verbal displays of personal attitudes, prejudices, emotions, or opinions should be avoided at all times.

Should an interpreter become aware that a proceeding participant views the interpreter

as having a bias or being biased, the interpreter should disclose that knowledge to the appropriate judicial authority and counsel.

Any condition that interferes with the objectivity of an interpreter constitutes a conflict of interest. Before providing services in a matter, court interpreters must disclose to all parties and presiding officials any prior involvement, whether personal or professional, that could be reasonably construed as a conflict of interest. This disclosure should not include privileged or confidential information.

The following are circumstances that are presumed to create actual or apparent conflicts of interest for interpreters where interpreters should not serve:

1. The interpreter is a friend, associate, or relative of a party or counsel for a party involved in the proceedings;

2. The interpreter has served in an investigative capacity for any party involved in the case;

3. The interpreter has previously been retained by a law enforcement agency to assist in the preparation of the criminal case at issue;

4. The interpreter or the interpreter's spouse or child has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that would be affected by the outcome of the case;

5. The interpreter has been involved in the choice of counsel or law firm for that case.

Interpreters should disclose to the court and other parties when they have previously been retained for private employment by one of the parties in the case.

Interpreters should not serve in any matter in which payment for their services is contingent upon the outcome of the case.

An interpreter who is also an attorney should not serve in both capacities in the same matter.

## **Canon 4. Professional Demeanor.**

Interpreters shall conduct themselves in a matter consistent with the dignity of the court and shall be as unobtrusive as possible.

### **Commentary**

Interpreters should know and observe the established protocol, rules, and procedures for delivering interpreting services. When speaking in English, interpreters should speak at a rate and volume that enable them to be heard and understood throughout the courtroom, but the interpreter's presence should otherwise be as unobtrusive as possible. Interpreters should work without drawing undue or inappropriate attention to themselves. Interpreters should dress in a manner that is consistent with the dignity of the proceedings of the court.

Interpreters should avoid obstructing the view of any of the individuals involved in the proceedings. However, interpreters who use sign language or other visual modes of communication must be positioned so that hand gestures, facial expressions, and whole body movement are visible to the person for whom they are interpreting.

Interpreters are encouraged to avoid personal or professional conduct that could discredit the court.

## **Canon 5: Confidentiality.**

Interpreters shall protect the confidentiality of all privileged and other confidential information.

### **Commentary**

The interpreter must protect and uphold the confidentiality of all privileged information obtained during the course of his or her duties. It is especially important that the interpreter understand and uphold the attorney-client privilege, which requires confidentiality with respect to any communication between attorney and client. This rule also applies to other types of privileged communications.

Interpreters must also refrain from repeating or disclosing information obtained by them in the course of their employment that may be relevant to the legal proceeding.

In the event that an interpreter becomes aware of information that suggests imminent harm to someone or relates to a crime being committed during the course of the proceedings, the interpreter should immediately disclose the information to an appropriate au-



thority within the judiciary who is not involved in the proceeding and seek advice in regard to the potential conflict in professional responsibility.

### **Canon 6: Restriction of Public Comment.**

Interpreters shall not publicly discuss, report, or offer an opinion concerning a matter in which they are or have been engaged, even when that information is not privileged or required by law to be confidential.

### **Canon 7: Scope of Practice.**

Interpreters shall limit themselves to interpreting or translating, and shall not give legal advice, express personal opinions to individuals for whom they are interpreting, or engage in any other activities which may be construed to constitute a service other than interpreting or translating while serving as an interpreter.

#### **Commentary**

Since interpreters are responsible only for enabling others to communicate, they should limit themselves to the activity of interpreting or translating only. Interpreters should refrain from initiating communications while interpreting unless it is necessary for assuring an accurate and faithful interpretation.

Interpreters may be required to initiate communications during a proceeding when they find it necessary to seek assistance in performing their duties. Examples of such circumstances include seeking direction when unable to understand or express a word or thought, requesting speakers to moderate their rate of communication or repeat or rephrase something, correcting their own interpreting errors, or notifying the court of reservations about their ability to satisfy an assignment competently. In such instances they should make it clear that they are speaking for themselves.

An interpreter may convey legal advice from an attorney to a person only while that attorney is giving it. An interpreter should not explain the purpose of forms, services, or otherwise act as counselors or advisors unless they are interpreting for someone who is acting in that official capacity.

The interpreter may translate language on a form for a person who is filling out the form, but may not explain the form or its purpose for such a person.

The interpreter should not personally serve to perform official acts that are the official responsibility of other court officials including, but not limited to, court clerks, pretrial release investigators or interviewers, or probation counselors.

### **Canon 8: Assessing and Reporting Impediments to Performance.**

Interpreters shall assess at all times their ability to deliver their services. When interpreters have any reservation about their ability to satisfy an assignment competently, they shall immediately convey that reservation to the appropriate judicial authority.

#### **Commentary**

If the communication mode or language of the non-English-speaking person cannot be readily interpreted, the interpreter should notify the appropriate judicial authority.

Interpreters should notify the appropriate judicial authority of any environmental or

physical limitation that impedes or hinders their ability to deliver interpreting services adequately (e.g., the court room is not quiet enough for the interpreter to hear or be heard by the non-English speaker, more than one person at a time is speaking, or principals or

witnesses of the court are speaking at a rate of speed that is too rapid for the interpreter to adequately interpret). Sign language interpreters must ensure that they can both see and convey the full range of visual language elements that are necessary for communication, including facial expressions and body movement, as well as hand gestures.

Interpreters should notify the presiding officer of the need to take periodic breaks to maintain mental and physical alertness and prevent interpreter fatigue. Interpreters should recommend and encourage the use of team interpreting whenever necessary.

Interpreters are encouraged to make inquiries as to the nature of a case whenever possible before accepting an assignment. This enables interpreters to match more closely their professional qualifications, skills, and experience to potential assignments and more accurately assess their ability to satisfy those assignments competently.

Even competent and experienced interpreters may encounter cases where routine proceedings suddenly involve technical or spe-

cialized terminology unfamiliar to the interpreter (e.g., the unscheduled testimony of an expert witness). When such instances occur, interpreters should request a brief recess to familiarize themselves with the subject matter. If familiarity with the terminology requires extensive time or more intensive research, interpreters should inform the presiding officer.

Interpreters should refrain from accepting a case if they feel the language and subject matter of that case is likely to exceed their skills or capacities. Interpreters should feel no compunction about notifying the presiding officer if they feel unable to perform competently, due to lack of familiarity with terminology, preparation, or difficulty in understanding a witness or defendant.

Interpreters should notify the presiding officer of any personal bias they may have involving any aspect of the proceedings. For example, an interpreter who has been the victim of a sexual assault may wish to be excused from interpreting in cases involving similar offenses.

## **Canon 9: Duty to Report Ethical Violations.**

Interpreters shall report to the proper judicial authority any effort to impede their compliance with any law, any provision of this code, or any other official policy governing court interpreting and legal translating.

### **Commentary**

Because the users of interpreting services frequently misunderstand the proper role of the interpreter, they may ask or expect the interpreter to perform duties or engage in activities that run counter to the provisions of this code or other laws, regulations, or policies governing court interpreters. It is incumbent upon the interpreter to inform such persons of

his or her professional obligations. If, having been apprised of these obligations, the person persists in demanding that the interpreter violate them, the interpreter should turn to a supervisory interpreter, a judge, or another official with jurisdiction over interpreter matters to resolve the situation.

## **Canon 10: Professional Development.**

Interpreters shall continually improve their skills and knowledge and advance the profession through activities such as professional training and education, and interaction with colleagues and specialists in related fields. (Adopted December 3, 1998.)

**Publisher's Notes.** By Per Curiam Order delivered December 3, 1998, the Supreme Court provided: "In 1997, a special committee was appointed by the Arkansas Judicial Council to study the issue of a certification program for foreign language interpreters and to make recommendations to the full Judicial Council. Judges and interpreters were appointed to serve on the committee.

"This fall the committee made its report to

the Arkansas Judicial Council and recommended the adoption of the Model Code of Professional Responsibility for Interpreters in the Judiciary. This Code was developed by the National Center for State Courts with advice from experts in the field. It has been adopted by other states which have a certification process for foreign language interpreters.

"The Arkansas Judicial Council endorsed this recommendation at its recent meeting



and has requested that the Supreme Court adopt it. In making its recommendation to us, the Arkansas Judicial Council stated that the Code provides a foundation for acceptable courtroom procedure and protocol and also serves as a basis for education and training of interpreters.

"We commend the Arkansas Judicial Council and the judges and interpreters who served on the committee for their work on this issue.

"Having now thoroughly considered the matter, we adopt, effective immediately, the Code and promulgate it as Administrative Order Number 11 — Arkansas Code of Professional Responsibility for Interpreters in the Judiciary."

### Commentary

Interpreters must continually strive to increase their knowledge of the languages they work in professionally, including past and current trends in technical, vernacular, and regional terminology as well as their application within the court proceedings.

Interpreters should keep informed of all statutes, rules of courts and policies of the

judiciary that relate to the performance of their professional duties.

An interpreter should seek to elevate the standards of the profession through participation in workshops, professional meetings, interaction with colleagues, and reading current literature in the field.

## ADMINISTRATIVE ORDER NUMBER 12 — OFFICIAL FORMS

The following official court forms adopted by the Arkansas Supreme Court are found in the publications noted below and may also be found at the Arkansas Judiciary website: (<http://courts.arkansas.gov>).

1. *Probate Forms*. The Supreme Court, pursuant to Ark. Code Ann. § 28-1-114 and its constitutional and inherent powers to regulate procedure in the courts, has adopted thirty-three probate forms. These official forms supersede all earlier versions. The forms are published in 336 Ark. Appendix (1999).

2. *Court Forms for Orders of Protection*. The Supreme Court, pursuant to Amendment 80 of the Arkansas Constitution, has adopted the following forms to be used in order-of-protection cases: (a) Ex Parte Order of Protection, (b) Notice of Hearing on Petition for Order of Protection, and (c) Final Order of Protection. The Administrative Office of the Courts in collaboration with the Arkansas Judicial Council and others is authorized to prepare instructions to be used with these documents and to make technical corrections from time to time to the documents. These forms are published in 2010 Ark. \_\_\_\_.

# Ex Parte Order of Protection

☐ Amended Order
Case No. Court: Div. County: 

, Arkansas

## Petitioner/Plaintiff

First

Middle

Last

Petitioner's Date of Birth (mm/dd/yyyy)

Race

Sex

Minor Children Protected under this Order:

 d.o.b.

 d.o.b.

 d.o.b.

 d.o.b.

This Order is Effective Until:

*Pursuant to Federal law, this Order shall be enforced by law enforcement officers in all states, territories, districts and tribal lands regardless of whether this Order of Protection is registered locally.*

Versus

## Respondent/Defendant

First

Middle

Last

Address: 

## Respondent Identifiers

Sex	Race	DOB mm/dd/yyyy	Ht	Wt
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>

Eyes	Hair	SS#
<input type="text"/>	<input type="text"/>	<input type="text"/>
Phone #	DL # or other ID#	
<input type="text"/>	<input type="text"/>	

**CAUTION:** ☐ Respondent possesses a firearm  
☐ Respondent has history of extreme violence

**Relationship Identifiers:** ☐ Current or former spouses ☐ Parents of child(ren) in common  
☐ Lived together ☐ Current or past dating relationship ☐ Other Relative (Explain)

## THE COURT HEREBY FINDS AND ORDERS:

That there is jurisdiction over the parties and subject matter, and the Petitioner has presented sufficient evidence to show: 1.) that the victim(s) is (are) in immediate and present danger of domestic abuse or 2.) that the Respondent is scheduled to be released from incarceration within thirty(30) days, and upon the Respondent's release there will be an immediate and present danger of domestic abuse. The Ex Parte Temporary Order of Protection is hereby granted pursuant to the terms herein.

The Respondent is ordered to appear before the Court on the \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_ at \_\_\_\_\_ a.m./p.m. in the Courthouse located at \_\_\_\_\_, \_\_\_\_\_, AR.

**If you fail to appear, the Court will likely make this Order permanent without further notice to you.**

The Respondent is hereby restrained from committing any criminal act against the victim(s) including, but not limited to: acts of violence or Domestic Abuse, A.C.A. §9-15-103 (3); Harassment A.C.A. §5-71-208; Harassing Communications A.C.A. §5-71-209; Stalking A.C.A. §5-71-229; or Terroristic Threatening A.C.A. §5-13-301.



☐ The Respondent is prohibited from initiating any contact with the victim(s) including but not limited to physical presence, telephonic, electronic, oral, written, visual, or video. Respondent also shall not use a third party to contact the victim(s) except by legal counsel or as authorized by law or court order.

☐ The Respondent is excluded from the Petitioner's residence and the immediate vicinity thereof.

Petitioner's Address: \_\_\_\_\_ (or)

☐ The Petitioner's address is excluded from notice to the Respondent.

☐ The Respondent is prohibited from the following places:

**Petitioner's Workplace:** \_\_\_\_\_

**School:** \_\_\_\_\_

**Other (Identify):** \_\_\_\_\_

☐ \_\_\_\_\_ is awarded temporary custody of the minor child(ren):

(Names) \_\_\_\_\_

☐ Any law enforcement officer with jurisdiction is ordered to assist the Petitioner in gaining possession of the dwelling, and/or to otherwise assist in execution or service of the Order of Protection.

☐ Other Orders: \_\_\_\_\_

If the parties (or other persons named herein) are subject to the jurisdiction of another court (i.e. through a divorce or paternity action), upon proper notice and the opportunity to be heard, said court may amend the terms of this Order as appropriate.

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, IT IS SO ORDERED.

\_\_\_\_\_  
CIRCUIT JUDGE

Office of the Circuit Clerk, \_\_\_\_\_ County, \_\_\_\_\_, AR \_\_\_\_\_  
Phone: \_\_\_\_\_

### WARNINGS TO RESPONDENT

--Pursuant to A.C.A. § 9-15-207, a violation of an Order of Protection is a Class A misdemeanor carrying a maximum penalty of one year imprisonment in the county jail or a fine of up to \$2,500, or both. A violation of an Order of Protection under this section within five (5) years of a previous conviction for violation of an Order of Protection is a Class D felony punishable by up to six years in prison or up to a \$10,000 fine or both.

--Crossing state, territorial, or tribal boundaries to violate this Order may result in federal imprisonment pursuant to 18 U.S.C. §2262.

### NOTICE TO LAW ENFORCEMENT

--This Order of Protection is enforceable in every county of this state by any court or law enforcement officer. See A.C.A. §9-15-207(g).

### PROOF OF SERVICE

Case # \_\_\_\_\_ Court Date: \_\_\_\_\_

SERVED: Date \_\_\_\_\_ Time: \_\_\_\_\_ Place \_\_\_\_\_

Attempts Made: List only date and time

1) \_\_\_\_\_ 2) \_\_\_\_\_ 3) \_\_\_\_\_

Served On (Print Name) \_\_\_\_\_

Manner of Service \_\_\_\_\_

Served By (Print Name) \_\_\_\_\_

Title \_\_\_\_\_

Badge # \_\_\_\_\_

### DECLARATION OF SERVER

I declare, under penalty of perjury under the laws of the State of Arkansas that the foregoing information contained in the proof of service is true and correct.

Executed on \_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Server

\_\_\_\_\_  
Address of Server



DRAFT

IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, ARKANSAS  
DOMESTIC RELATIONS DIVISION

\_\_\_\_\_, PETITIONER

v.

No. DR 20 \_\_\_\_ - \_\_\_\_

\_\_\_\_\_, RESPONDENT

NOTICE OF HEARING ON PETITION FOR ORDER OF PROTECTION

You are hereby notified that a petition has been filed in this Court for an Order of Protection by

\_\_\_\_\_, Petitioner, naming you as Respondent. This petition will

be heard on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_, at \_\_\_\_ a.m./p.m., in Room \_\_\_\_\_ at

the \_\_\_\_\_ County Courthouse located at \_\_\_\_\_

\_\_\_\_\_, \_\_\_\_\_ AR.

If you fail to appear, the Court may enter a Final Order of Protection without further notice to you.

\_\_\_\_\_  
CIRCUIT JUDGE

\_\_\_\_\_  
DATE

# Final Order of Protection

☐ Amended Order
Case No. Circuit Court, Div. County: , Arkansas

## Petitioner/Plaintiff

First Middle Last

Petitioner's Date of Birth (mm/dd/yyyy)

Race

Sex

## Minor Children Protected under this Order

 d.o.b.

 d.o.b.

 d.o.b.

 d.o.b.

Versus

## Respondent/Defendant

First Middle Last

Address: Employer: 

**CAUTION:** ☐ Respondent possesses a firearm  
☐ Respondent has history of extreme violence

**Relationship Identifiers:** ☐ Current or former spouses ☐ Parents of child(ren) in common

☐ Lived together ☐ Current or past dating relationship ☐ Other Relative (Explain)

## This Order is Effective Until:

*Pursuant to Federal law, this Order shall be enforced by law enforcement officers in all states, territories, districts and tribal lands regardless of whether this Order of Protection is registered locally.*

## Respondent Identifiers

Sex	Race	DOB mm/dd/yyyy	Ht	Wt
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>

Eyes	Hair	SS#
<input type="text"/>	<input type="text"/>	<input type="text"/>
Phone #	DL # or other ID#	
<input type="text"/>	<input type="text"/>	

Distinguishing Characteristics: 


## THE COURT HEREBY FINDS AND ORDERS:

That there is jurisdiction over the parties and subject matter, and the Respondent has been provided with proper notice and the opportunity to be heard. That the victim(s) is (are) in immediate and present danger of domestic abuse and therefore an Order of Protection is hereby granted pursuant to the terms herein.

np



A hearing on this matter was held on the \_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.

☐ The Petitioner appeared pro se.

☐ The Petitioner was represented by counsel \_\_\_\_\_.

☐ The Respondent appeared pro se.

☐ The Respondent was represented by counsel \_\_\_\_\_.

☐ The Respondent failed to appear despite proper notice.

---

X The Respondent is restrained from committing any criminal act against the victim(s) including, but not limited to: acts of violence or Domestic Abuse, A.C.A. §9-15-103 (3); Harassment A.C.A. §5-71-208; Harassing Communications A.C.A. §5-71-209; Stalking A.C.A. §5-71-229; or Terroristic Threatening A.C.A. §5-13-301.

☐ The Respondent is prohibited from initiating any contact with the victim(s) including but not limited to physical presence, telephonic, electronic, oral, written, visual, or video. Respondent also shall not use a third party to contact the victim(s) except by legal counsel or as authorized by law or court order.

☐ The Respondent is excluded from the Petitioner's residence and the immediate vicinity thereof.

**Petitioner's Address:** \_\_\_\_\_

(or) ☐ The Petitioner's address is excluded from notice to the Respondent.

☐ The Respondent is prohibited from the following places:

**Petitioner's Workplace:** \_\_\_\_\_

**School:** \_\_\_\_\_

**Other (Identify):** \_\_\_\_\_

---

☐ \_\_\_\_\_ is awarded temporary custody of the minor child(ren) for the duration of this order or until future orders shall be issued from a Court with jurisdiction over the parties:

(Children's Names) \_\_\_\_\_

☐ Visitation with regard to the minor child(ren) is established as follows: \_\_\_\_\_

☐ \_\_\_\_\_ is ordered to pay child support to \_\_\_\_\_ through the Circuit Clerk's Office in the amount of \$ \_\_\_\_\_ per \_\_\_\_\_, plus any Clerk fees as they come due with said payments to begin on \_\_\_\_\_. This amount is according to the Child Support Chart based upon the payor's income of \_\_\_\_\_ per \_\_\_\_\_.

This amount does/does not (circle one) deviate from the Child Support Chart.

*(If the amount deviates from the Chart, the justification is included below in the "Other Order's section")*

☐ \_\_\_\_\_ is ordered to pay spousal support in the amount of \$ \_\_\_\_\_ per \_\_\_\_\_, beginning on \_\_\_\_\_. The spousal support shall be paid until \_\_\_\_\_. Method of payment shall be: \_\_\_\_\_

**Note: As there is an expiration date on all Orders of Protection, future matters regarding Child Support, Alimony and Visitation should be handled through another Domestic Relations case (i.e. divorce, paternity, or through the Office of Child Support Enforcement).**

☐ A law enforcement officer with jurisdiction is ordered to assist the Petitioner in gaining possession of the dwelling, and/or to otherwise assist in execution or service of the Order of Protection.

☐ A law enforcement officer with jurisdiction is ordered to assist the Respondent in obtaining their personal effects from the dwelling upon proper and timely request of the Respondent.



☐ Other Orders: \_\_\_\_\_

*If the parties (or other persons named herein) are subject to the jurisdiction of another court (i.e. through a divorce or paternity action), upon proper notice and the opportunity to be heard, said court may amend the terms of this Order as appropriate.*

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, IT IS SO ORDERED.

CIRCUIT JUDGE

### **WARNINGS TO RESPONDENT**

--Pursuant to A.C.A. § 9-15-207, a violation of an Order of Protection is a Class A misdemeanor carrying a maximum penalty of one year imprisonment in the county jail or a fine of up to \$2,500, or both. A violation of an order of protection under this section within five (5) years of a previous conviction for violation of an order of protection is a Class D felony punishable by up to six years in prison or up to a \$10,000 fine or both.

--It is a federal offense for an individual who is subject to an Order of Protection or convicted of a misdemeanor of domestic violence to ship, transport, or possess a firearm or ammunition pursuant to 18 U.S.C. § 922(g)(8) and (9).

--Crossing state, territorial, or tribal boundaries to violate this Order may result in federal imprisonment pursuant to 18 U.S.C. §2262.

### **NOTICE TO LAW ENFORCEMENT**

--In the event that any Law enforcement officer has probable cause to believe that the Respondent named in the above Order has violated this Order and has verification of this Order the officer, may, without a warrant, arrest the violator whether the violation was in or outside the officer's presence. See A.C.A. §9-15-207(f).

--A law enforcement officer SHALL NOT arrest a Petitioner for the violation of an Order of Protection issued against a Respondent. See A.C.A. §9-15-207(e).

--This Order of Protection is enforceable in every county of this state by any court or law enforcement officer. See A.C.A. §9-15-207(g).

--This Order is entitled to full faith and credit in any jurisdiction of the United States. See 18 U.S.C. §2265.

(Adopted January 26, 1999; amended November 11, 2010, effective January 1, 2011.)

### **ADMINISTRATIVE ORDER NUMBER 13 — JUDICIAL EXEMPTION FROM JURY SERVICE**

During their term of office, Supreme Court Justices, Court of Appeals Judges, and judges of general jurisdiction trial courts shall not serve as grand or petit jurors in the courts of this State. (Adopted March 25, 1999.)



## ADMINISTRATIVE ORDER NUMBER 14 — ADMINISTRATION OF CIRCUIT COURTS

### 1. *Divisions.*

a. The circuit judges of a judicial circuit shall establish the following subject-matter divisions in each county of the judicial circuit: criminal, civil, juvenile, probate, and domestic relations. The designation of divisions is for the purpose of judicial administration and caseload management and is not for the purpose of subject-matter jurisdiction. The creation of divisions shall in no way limit the powers and duties of the judges to hear all matters within the jurisdiction of the circuit court.

b. For purposes of this order, "probate" means cases relating to decedent estate administration, trust administration, adoption, guardianship, conservatorship, commitment, and adult protective custody. "Domestic Relations" means cases relating to divorce, annulment, maintenance, custody, visitation, support, paternity, and domestic abuse. Provided, however, the definitions of "probate" and "domestic relations" are not intended to restrict the juvenile division of circuit court from hearing adoption, guardianship, support, custody, paternity, or commitment issues which may arise in juvenile proceedings.

2. *Administrative Judges.* In each judicial circuit in which there are two or more circuit judges, there shall be an administrative judge.

a. *Means of Selection.* On or before the first day of February of each year following the year in which the general election is held, the circuit judges of a judicial circuit shall select one of their number by secret ballot to serve as the administrative judge for the judicial circuit. In circuits with fewer than ten judges the selection must be unanimous among the judges in the judicial circuit. In circuits with 10 or more judges the selection shall require the approval of at least 75% of the judges. The name of the administrative judge shall be submitted in writing to the Supreme Court. If the judges are unable to agree on a selection, they shall notify the Chief Justice of the Supreme Court in writing and furnish information detailing their efforts to select an administrative judge and the results of their balloting. The Supreme Court shall then select the administrative judge. An administrative judge shall be selected on the basis of his or her administrative skills.

b. *Term of Office.* The administrative judge shall serve a term of two years and may serve successive terms. The administrative judge shall be subject to removal for cause by the Supreme Court. If a vacancy occurs in the office of the administrative judge prior to the end of a term, then within twenty days of such vacancy, the circuit judges in office at the time of such vacancy shall select an administrative judge to serve the unexpired term, and failing to do so, the Supreme Court shall select a replacement.

c. *Duties.* In addition to his or her regular judicial duties, an administrative judge shall exercise general administrative supervision over the circuit court and judges within his or her judicial circuit under the administrative plan submitted pursuant to Section 3 of this Administrative Order. The administrative judge will be the liaison for that judicial circuit with the Chief Justice of the Supreme Court in matters relating to administration. In addition, the duties of the administrative judge shall include the following:

(1) *Administrative Plan.* The administrative judge shall insure that the administrative plan and its implementation are consistent with the requirements of the orders of the Supreme Court.

(2) *Case Assignment.* Cases shall be assigned under the supervision of the administrative judge in accordance with the circuit's administrative plan. The administrative judge shall assure that the business of the court is apportioned among the circuit judges as equally as possible, and cases may be reassigned by the administrative judge as necessity requires. A circuit judge to whom a case is assigned shall accept that case unless he or she is disqualified or the interests of justice require that the case not be heard by that judge.

(3) *Information Compilation.* The administrative judge shall have responsibility for the computation, development, and coordination of case statistics and other management data respecting the judicial circuit.

(4) *Improvements in the Functioning of the Court.* The administrative judge shall periodically evaluate the effectiveness of the court in administering justice and recommend changes to the Supreme Court.

3. *Administrative Plan.* The circuit judges of each judicial circuit by majority vote shall adopt a plan for circuit court administration. The administrative judge of each judicial circuit shall submit the administrative plan to the Supreme Court. The purpose of the administrative plan is to facilitate the best use of the available judicial and support resources within each circuit so that cases will be resolved in an efficient and prompt manner. The plan shall include the following:

a. *Case Assignment and Allocation.*

(1) The plan shall describe the process for the assignment of cases and shall control the assignment and allocation of cases in the judicial circuit. In the absence of good cause to the contrary, the plan of assignment of cases shall assume (i) random selection of unrelated cases; (ii) a substantially equal apportionment of cases among the circuit judges of a judicial circuit; and (iii) all matters connected with a pending or supplemental proceeding will be heard by the judge to whom the matter was originally assigned. For purposes of subsection 3(a)(1)(i), "random selection" means that cases assigned to a particular subject-matter division shall be randomly distributed among the judges assigned to hear those types of cases. For purposes of subsection 3(a)(1)(ii), "a substantially equal apportionment of cases" does not require that the judges among whom the cases of a division are assigned must hear the same percentage of such cases so long as the judges' overall caseloads are substantially equal.

(2) Cases in a subject-matter division may be exclusively assigned to particular judges, but such assignment shall not preclude judges from hearing cases of any other subject-matter division.

b. *Caseload Estimate.* The plan shall provide a process which will apportion the business of the circuit court among each of the judges within the judicial circuit on as equal a basis as possible. The plan shall include an estimate of the projected caseload of each of the judges based upon previous case filings. If, at any time, it is determined that a workload imbalance exists which is affecting the judicial circuit or a judge adversely, the plan shall be amended subject to the provisions of Section 4 of this Administrative Order.

c. *Other Provisions.* The plan shall provide the process for handling recusals, the reassignment of a case, and requests for the assignment of a judge by the Supreme Court. This process shall be consistent with the requirements of Administrative Order Nos. 1 and 16 and may address the use of state district court judges.



#### 4. *Supreme Court.*

a. The administrative plan for the judicial circuit shall be submitted by the administrative judge to the Supreme Court by July 1 of each year following the year in which the general election of circuit judges is held. The effective date of the plan will be the following January 1. Until a subsequent plan is submitted to and published by the Supreme Court, any plan currently in effect shall remain in full force. Judges who are appointed or elected to fill a vacancy shall assume the caseload assigned to the judge they are replacing until such time a new administrative plan is required or the original plan is amended. Upon approval, the Supreme Court shall publish the administrative plan and a copy shall be filed with the clerk of the circuit court in each county within the judicial circuit and the Clerk of the Supreme Court. The process for the amendment of a plan shall be the same as that of the plan's initial adoption.

b. In the event the administrative judge is unable to submit a plan consistent with the provisions of this Administrative Order, the Supreme Court shall formulate a plan for the equitable distribution of cases and caseloads within the judicial circuit. The Supreme Court shall set out the plan in an order which shall be filed with the clerk of each court in the judicial circuit and the Clerk of the Supreme Court. The clerk shall thereafter assign cases in accordance with the plan.

c. In the event an approved plan is not being followed, a judge may bring the matter to the attention of the Chief Justice of the Arkansas Supreme Court by setting out in writing the nature of the problem. Upon receipt of a complaint, the Supreme Court may cause an investigation to be undertaken by appropriate personnel and will take other action as may be necessary to insure the efficient operation of the courts and the expeditious dispatch of litigation in the judicial circuit. (Adopted April 6, 2001; amended November 1, 2001; amended July 11, 2002; amended January 30, 2003; amended January 22, 2004; amended May 27, 2010; amended April 21, 2011.)

**Publisher's Notes.** The July 3, 2003, *Per Curiam* read: "In our *per curiam* order dated January 30, 2003, *In re: Administrative Order Number 14 — Administration of Circuit Courts*, we directed that administrative plans be submitted by the various judicial circuits<sup>1</sup> by July 1, 2003. The plans have been submitted, and the Court has reviewed them. We announce the following actions with respect to the plans.

"(1) The administrative plans submitted by the following judicial circuits are approved: 1st, 4th, 8th-N, 8th-S, 11th-W, 14th, 15th, 16th, 17th, 18th-E, 19th-W, 20th, 22nd, and 23rd.

"(2) The plan adopted by the majority of the circuit judges and submitted by the administrative judge in the 10th judicial circuit is approved.

"(3) The administrative plans submitted by the 7th, 9th-W, 13th, and 21st judicial circuits

are approved conditioned upon these plans being modified to provide for the computerized random assignment of cases. (See Administrative Order Number 14 (3)(a)(3)).

"(4) Administrative Order Number 14 (3)(a)(2) provides that 'except for the exclusive assignment of criminal and juvenile division cases, cases in other subject-matter divisions should not be exclusively assigned to particular judges absent extraordinary reasons which must be set out in the circuit's administrative plan.' The plans submitted by the 2nd, 5th, 6th, and 12th judicial circuits provide for particular judges to exclusively hear domestic relations and probate cases, but the plans fail to set out the extraordinary reasons for such assignments. Accordingly, these plans are remanded, and the above listed circuits are directed to furnish the Court with the required explanation or to submit a modified plan.

1. It is not necessary for the one-judge judicial circuits, 9th-E, 11th-E, 18th-W, and 19th-E, to submit plans.

"(5) The plan submitted by the 3rd judicial circuit provides that one judge 'will primarily hear equity cases.' We have made clear that cases cannot be assigned based upon a law/equity dichotomy; consequently, this plan is remanded with directions to correct this flaw.

"The plans submitted by the 1st judicial circuit and the 6th judicial circuit as it relates to case assignments in Perry County have a troubling feature. Each provides for the open assignment of certain cases as opposed to the assignment of each case to a particular judge. We understand the reasons for this practice, but these judicial circuits should work toward assigning each case to a judge. In the future, plans may not be approved with this open assignment feature.

"Finally, we announce that it is the Court's belief that rotation of judges in those instances where judges are exclusively assigned to criminal or juvenile cases may be desirable. The possibility of 'burn-out,' as well as a desire to diversify, are factors worthy of consideration. Administrative judges and all circuit judges should be cognizant of this consideration as plans are prepared in the future. Hopefully, the wishes of colleagues will be addressed, but the Court will consider the possible need for rotation in specific instances, as well as any necessary amendment to Administrative Order Number 14.

"Pursuant to Administrative Order Number 14, approved plans shall be effective January 1, 2004."

#### CASE NOTES

**Cited:** *Smith v. McCracken*, 96 Ark. App. 270, 240 S.W.3d 621 (2006); *Foster v. Hill*, 371 Ark. 666, 269 S.W.3d 791 (2007).

### **ADMINISTRATIVE ORDER NUMBER 15 — ATTORNEYS**

#### **ADMINISTRATIVE ORDER NUMBER 15.1 — QUALIFICATIONS AND STANDARDS FOR ATTORNEYS APPOINTED TO REPRESENT CHILDREN AND PARENTS**

**Section 1. Qualifications for attorneys appointed by the court to represent children and indigent parents in dependency-neglect cases.**

a. An attorney shall be licensed and in good standing with the Arkansas Supreme Court.

b.(1) Prior to appointment, an attorney shall have initial education to include approved legal education of not less than 10 hours in the two years prior to the date an attorney qualifies as a court-appointed attorney for children or indigent parents in dependency-neglect cases. Initial training must include:

- Child development;
- Dynamics of abuse and neglect;
- Attorney roles & responsibilities, including ethical considerations;
- Relevant state law, federal law, case law, and rules;
- Family dynamics, which may include but is not limited to, the following topics: substance abuse, domestic violence and mental health issues; and Division of Children and Family Services (DCFS) policies and procedures. Additional initial legal education may include, but is not limited to:
- Grief and attachment;
- Custody and visitation;
- Resources and services; and
- Trial and appellate advocacy.



(2) The Administrative Office of the Courts (AOC) shall design and conduct programs for the initial 10 hours of legal education, either alone or in collaboration with other agencies or entities.

(3) Following completion of the initial 10 hours of legal education, continuing legal education (CLE) shall include at least 4 hours per year related to representation in dependency-neglect cases which may include, but is not limited to, the subject categories listed in (b)(1). The 4 hours of CLE may be in any one of the specified categories in (b)(1) or in any combination thereof.

(4) Both the initial 10 hours of education and the 4 hours of CLE shall be certified in accordance with the rules and regulations promulgated by the Continuing Legal Education Board. All educational hours shall be calculated with reference to the CLE reporting period of July 1 through June 30, as utilized for general CLE credit by the Continuing Legal Education Board. The CLE hours for attorneys may not be carried over from one CLE year to the next.

(5) An attorney who is qualified for court appointment in dependency-neglect cases but who fails to acquire 4 hours of CLE required by June 30 of any year shall be subject to the pertinent compliance dates of Rule 5.(D) of the Arkansas Rules and Regulations for Minimum Continuing Legal Education. In accordance with Rule 5.(D), attorneys who sign an acknowledgment deficiency by August 31, and obtain their 4 hours by December 1 shall remain qualified. However, such attorneys shall not be subject to the provisions of Section 5 of the Regulations for Minimum Continuing Legal Education.

(6) When an attorney is seeking to complete the 4-hour CLE requirement between June 30 and December 1 for the previous CLE year, he or she may remain as attorney on any pending cases for which appointment was made when the attorney was in compliance with the educational requirements. However, that attorney shall not accept appointment to any new cases until he or she is in full compliance with the CLE requirements.

(7) An attorney who fails to complete 4 hours of CLE by December 1 is no longer qualified for court appointment in dependency-neglect cases. His or her name shall be removed from the list of qualified attorneys that is maintained and distributed to the trial courts by the AOC. Such attorney can become qualified again only by completing 10 hours of CLE in the categories required for initial qualification.

(8) Attorneys in compliance with the educational qualifications as an attorney ad litem for dependency-neglect cases as of July 1, 2001 shall be deemed to have met the initial educational qualifications to represent parents in dependency-neglect cases.

*c. Clinical prerequisite for new appointments in dependency-neglect cases.*

(1) *Attorneys ad litem:* Assistance in representation of a child with an experienced attorney in the following hearings:

Emergency;

Adjudication/Disposition;

Review;

Permanency Planning; and

Termination of Parental Rights.

(2) *Parent counsel:* Assistance in representation of a parent with an experienced attorney in the following hearings:

Emergency;

Adjudication/Disposition;  
Review;  
Permanency Planning; and  
Termination of Parental Rights.

**Section 2. Standards of practice for attorneys ad litem in dependency-neglect cases.**

a. An attorney ad litem shall conduct personally or in conjunction with a trained Court Appointed Special Advocate (CASA) volunteer an independent investigation consisting of review of all relevant documents and records including but not limited to: police reports, DCFS records, medical records, school records, and court records. The ad litem shall interview the child, and in conjunction with a trained CASA volunteer, when one has been appointed, shall interview the parents, foster parents, caseworker, service providers, school personnel and others having relevant knowledge to assist in representation. Continuing investigation and regular contact with the child are mandatory.

b. An attorney ad litem shall determine the best interest of a child by considering such factors as the child's age and sense of time, level of maturity, culture and ethnicity, degree of attachment to family members including siblings; as well as continuity, consistency, and the child's sense of belonging and identity.

c. An attorney shall make earnest efforts to attend all case staffings and court-ordered mediation conferences and to meet with his or her client prior to every hearing. An attorney ad litem shall appear at all hearings to represent the best interest of the child. All relevant facts should be presented to the court and if the child's wishes differ from the ad litem's determination of the child's best interest, the ad litem shall communicate the child's wishes to the court.

d. An attorney ad litem shall explain the court proceedings and the role of the ad litem in terms that the child can understand.

e. An attorney ad litem shall advocate for specific and appropriate services for the child and the child's family.

f. An attorney ad litem shall monitor implementation of case plans and court orders.

g. An attorney ad litem shall file appropriate pleadings on behalf of the child.

h. An attorney ad litem shall review the progress of the child's case and shall advocate for timely hearings.

i. An attorney ad litem shall request orders that are clear, specific, and, where appropriate, include a time line for assessment, services, placement, treatment and evaluation of the child and the child's family.

j. Attorney-client or any other privilege shall not prevent the ad litem from sharing all information relevant to the best interest of the child with the court.

k. An attorney ad litem, functioning as an arm of the court, is afforded immunity against ordinary negligence for actions taken in furtherance of his or her appointment.

l. An attorney ad litem shall participate in 10 hours of initial legal education prior to appointment and shall participate in 4 hours of CLE each year thereafter.



m. An attorney ad litem shall identify any potential or actual conflict of interest that would impair his or her ability to represent a client. The attorney shall notify the court as soon as practical of such conflict to allow the court to appoint another attorney for the client or for the client to retain counsel prior to the next hearing.

n. A full-time attorney shall not have more than 75 dependency-neglect cases, and a part-time attorney shall not have more than 25 dependency-neglect cases. Any deviations from this standard must be approved by the Administrative Office of the Courts which shall consider the following, including but not limited to: the number of counties and geographic area in a judicial district, the experience and expertise of the attorney ad litem, area resources, the availability of CASA volunteers, the attorney's legal practice commitments and the proportion of the attorney's practice dedicated to representing children in dependency-neglect cases, the availability of qualified attorneys in the geographic area, and the availability of funding. An attorney who is within 5 cases of reaching the maximum caseload shall notify the Administrative Office of the Courts and the Juvenile Division Judge.

o. An attorney shall not accept appointment of any case for which he or she cannot devote the requisite amount of time to comply with the above Standards of Practice and the Model Rules of Professional Conduct.

### **Section 3. Standards of practice for attorneys appointed by the court to represent parents in dependency-neglect cases.**

a. An attorney shall conduct a review of all relevant documents and records including but not limited to: police reports, DCFS records, medical records, and court records. An attorney shall interview all people having relevant knowledge to assist in representation, including but not limited to the investigator, OCC attorney or DCFS case worker, and service providers.

b. An attorney shall make earnest efforts to attend all case staffings and court-ordered mediation conferences and to meet with his or her client prior to every hearing. An attorney shall attend all dependency-neglect court hearings until the case is closed or his or her client's parental rights have been terminated.

c. An attorney shall diligently and zealously protect and advance the client's interests, rights and goals at all case staffings and in all court proceedings.

d. An attorney shall advise and explain to the client each stage of the court proceedings and the likelihood of achieving the client's goals. An attorney, where appropriate, shall identify alternatives for the client to consider, including the client's rights regarding any possible appeal, and explain the risks, if any, inherent in the client's position.

e. An attorney shall appear at all hearings and present all evidence and develop all issues to zealously advocate for his or her client and to further the client's goals.

f. An attorney shall advocate for specific and appropriate services for the parent to further the client's goals.

g. An attorney shall monitor implementation of case plans and court orders to further the client's goals.

h. An attorney shall file appropriate pleadings to further the client's goals.

i. An attorney shall review the progress of the client's case and shall advocate for timely hearings when necessary to further the client's goals.

j. An attorney shall request orders that are clear, specific, and, where appropriate, include a time line for assessment, services, placement, and treatment.

k. An attorney shall participate in 10 hours of initial legal education prior to appointment and shall participate in 4 hours of CLE each year thereafter.

l. An attorney shall identify any potential or actual conflict of interest that would impair his or her ability to represent a client. The attorney shall notify the court as soon as practical of such conflict to allow the court to appoint another attorney for the client or for the client to retain counsel prior to the next hearing.

m. An attorney shall not accept appointment of any case for which he or she cannot devote the requisite amount of time to comply with the above Standards of Practice and the Model Rules of Professional Conduct.

#### **Section 4. Qualifications for attorneys appointed by the court to represent children in domestic relations cases and guardianship cases when custody is an issue.**

a. An attorney shall be licensed and in good standing with the Arkansas Supreme Court.

(1) Prior to appointment, an attorney shall have initial education to include approved legal education of not less than 10 hours in the two years prior to the date the attorney qualifies for appointment. Initial education shall include but is not limited to:

Child development;

Ad litem roles and responsibilities, including ethical considerations;

Relevant substantive state, federal and case law;

Custody and visitation; and

Family dynamics, including substance abuse, domestic abuse, and mental health issues.

(2) The Administrative Office of the Courts shall design and conduct programs for the initial 10 hours of legal education, either alone or in collaboration with other agencies or entities.

(3) Continuing education required to maintain qualification as an attorney ad litem shall include 4 hours of annual education in any of the five subject-matter areas set out in (b)(1) above for initial training, or in other areas affecting the child and family. The 4 hours of CLE may be in any one of the specified categories or in any combination thereof.

(4) Both the initial 10 hours of education and the 4 hours of CLE shall be certified as CLE in accordance with the rules and regulations promulgated by the Continuing Legal Education Board. All educational hours shall be calculated with reference to the CLE reporting period of July 1 through June 30, as utilized for general CLE credit by the Continuing Legal Education Board. The CLE hours for attorneys ad litem may not be carried over from one CLE year to the next.

(5) An attorney who is qualified as an attorney ad litem but who fails to acquire 4 hours of CLE by June 30 of any year shall be subject to the pertinent compliance dates of Rule 5.(D) of the Arkansas Rules and Regulations for Minimum Continuing Legal Education. In accordance with Rule 5.(D), attorneys who sign an acknowledgment of deficiency and obtain their four hours by December 1 shall remain qualified as attorneys ad litem.



However, such attorneys shall not be subject to the provisions of Section 5 of the Regulations for Minimum Continuing Legal Education.

(6) When an attorney ad litem is seeking to complete the 4-hour continuing education requirement between June 30 and December 1 for the previous CLE year, he or she may remain as attorney ad litem on any pending cases for which appointment was made when the attorney was in compliance with educational requirements. However, that attorney shall not accept appointment to any new cases until he or she is in full compliance with the CLE requirements.

(7) An attorney who fails to complete 4 hours of CLE by December 1 is no longer qualified as an attorney ad litem. His or her name shall be removed from the list of qualified attorneys that is maintained and distributed to the trial courts by the AOC. Such attorney can become qualified again only by completing 10 hours in the categories required for initial qualification.

### **Section 5. Standards of practice for attorneys ad litem in domestic relations cases and guardianship cases when custody is an issue.**

a. An attorney ad litem shall conduct an independent investigation consisting of review of all relevant documents and records. The ad litem shall interview the child, parents, and others having relevant knowledge to assist in representation. Continuing investigation and regular contact with the child during the pendency of the action are mandatory. Upon entry of a final order, the attorney ad litem's obligation to represent the minor child shall end, unless directed otherwise by the court.

b. An attorney ad litem shall determine the best interest of a child by considering such custody criteria as:

(1) Moral fitness factors: integrity, character, compassion, sobriety, religious training and practice, a newly acquired partner regarding the preceding elements;

(2) Stability factors: emotional stability, work stability, financial stability, residence and school stability, health, partner stability;

(3) Love and affection factors: attention given, discipline, attitude toward education, social attitude, attitude toward access of the other party to the child, and attitude toward cooperation with the other party regarding the child's needs;

(4) Other relevant information regarding the child such as stated preference, age, sex, health, testing and evaluation, child care arrangements; and regarding the home such as its location, size, and family composition.

c. An attorney ad litem shall appear at all hearings to represent the best interest of the child. All relevant facts should be presented to the court and if the child's wishes differ from the ad litem's determination of the child's best interest, the ad litem shall communicate the child's wishes to the court, as well as the recommendations of the ad litem.

d. An attorney ad litem shall file appropriate pleadings on behalf of the child, call witnesses, participate fully in examination of witnesses, present relevant evidence, and advocate for timely hearings.

e. An attorney ad litem shall explain to the child the court proceedings and the role of the ad litem in terms that the child can understand.

f. An attorney ad litem shall make recommendations to the court for specific and appropriate services for the child and the child's family. All recommendations shall likewise be communicated to the attorneys for the parties, or if a party is pro se, then to the party.

g. An attorney ad litem shall not be prevented by any privilege, including the lawyer-client privilege, from sharing with the court all information relevant to the best interest of the child.

h. An attorney shall not accept appointment to any case for which he or she cannot devote the requisite amount of time to comply with these standards of practice and the Model Rules of Professional Conduct. (Adopted September 21, 2001.)

**Publisher's Notes.** Acts 1999, No. 708, established a statewide system of contracts for attorneys ad litem and provided that the Arkansas Supreme Court adopt standards of practice and qualifications for service for all attorneys who seek to receive contracts to provide legal representation to children in dependency-neglect proceedings. The act also established a program for the appointment and payment of attorneys in domestic relations and guardianship cases where custody is an issue and provided that the Arkansas Supreme Court, with the advice of judges, adopt standards of practice and qualifications for service for all attorneys seeking appointment to provide legal representation for children in these cases. The qualifications and standards of practice for attorneys ad litem in dependency-neglect proceedings were ad-

opted in a per curiam order dated June 24, 1999, effective January 1, 2000. The qualifications and standards of practice for attorney ad litem appointments in chancery and guardianship cases were adopted in a per curiam order dated December 9, 1999, effective April 1, 2000. These orders were amended on March 30, 2000, to clarify issues with regard to the educational qualifications for attorneys ad litem in these cases. This Administrative Order Number 15 supersedes the per curiam orders of June 24, 1999, December 9, 1999, and March 20, 2000.

As enacted, Section 1 of this Administrative Order has subsections a. and c. but no subsection b. Section 4 has a subsection a. but no b.

**Cross References.** Appointment and payment of attorneys to represent indigent parents in dependency-neglect cases, § 9-27-401.

## ADMINISTRATIVE ORDER NUMBER 15.2 — PRO BONO LEGAL SERVICES BY NON-ADMITTED LICENSED ATTORNEYS

(a) *Authorization to Provide Pro Bono Services.* Notwithstanding the limitations on practice for attorneys who are not licensed by the State of Arkansas, non-admitted attorneys are authorized to provide pro bono legal services in this state as set out in this order. This order constitutes legal authorization for purposes of Ark. R. Prof. Conduct 5.5 (d)(2).

(1) The attorney must be licensed in another state or the District of Columbia and be in good standing in that jurisdiction.

(2) The attorney shall provide his or her services without charge or an expectation of a fee to persons of limited means who have been referred to the attorney by an authorized sponsoring entity as set out in subsection (b) and only through such referrals.

(3) The volunteer attorney shall complete any appropriate training required by the sponsoring entity and shall additionally comply with the Continuing Legal Education requirements of any state in which the attorney holds a current license to practice law.

(4) If the volunteer attorney's services for a client require a court appearance, the attorney shall comply with the appearance requirements of Rule XIV of the Rules Governing Admission to the Bar and/or the procedure of the applicable forum, even if the attorney resides inside the State of Arkansas.

(5) The volunteer attorney agrees to be bound and subject to all applicable Arkansas Rules of Professional Conduct.



(b) *Sponsoring Entity*. When providing pro bono services pursuant to this provision, attorney's representation shall be under the auspices of a sponsoring entity. The sponsoring entity shall be a legal aid services provider that represents Arkansas clients, namely Legal Aid of Arkansas, Inc., Center for Arkansas Legal Services, Inc., Lone Star Legal Aid, Inc., or such other entity as may be approved by the Arkansas Supreme Court, and shall:

(1) make the volunteer attorney aware of the sponsoring entity's resources that may be of assistance to the attorney;

(2) maintain a log on an annual basis of all volunteer attorneys providing legal services through that sponsoring entity; and

(3) provide professional malpractice insurance covering the volunteer attorney's services if the volunteer attorney is not otherwise covered by professional malpractice insurance. (Added March 31, 2011.)

## **ADMINISTRATIVE ORDER NUMBER 16 — PROCEDURES REGARDING THE ASSIGNMENT OF JUDGES**

### **Section I. Authority and scope.**

Pursuant to Ark. Const. Amend. 80, §§ 4, 12, and 13; Ark. Code Ann. §§ 16-10-101 (Repl. 1999), 16-13-214 (Repl. 1999), and this Court's inherent rule-making authority, the Court adopts and publishes Administrative Order No. 16: Procedures Regarding the Assignment of Circuit, District, and Retired Judges and Justices.

This Order authorizes the Chief Justice to assign (A) sitting circuit court judges, (B) retired circuit, chancery, circuit/chancery, and appellate court judges and justices, and (C) sitting state district court judges, with their consent, to serve temporarily in circuit court. Sitting circuit judges are authorized to sit in a judicial circuit other than the one in which they are currently elected or appointed. Retired judges or retired justices are those who, at the time of assignment, are receiving or have met the statutory requirements to receive judicial retirement benefits.

This Order also authorizes the Chief Justice to assign sitting district court judges and sitting state district court judges, with their consent, to serve temporarily in a district court. Sitting district court judges and sitting state district court judges are authorized to sit on assignment in a city, county or district other than the one to which they are currently elected or appointed. Sitting circuit judges and retired circuit, chancery, circuit/chancery, and appellate judges are also authorized, with their consent, to sit temporarily in district courts, upon appointment by the Chief Justice.

By adoption of this Order, the Court does not prohibit the use of Exchange Agreements by circuit judges or district judges pursuant to Ark. Const. amend. 80, §§ 6(C) and 7(E); § 16-17-102 (Repl. 1999), and the use of "special judges" as provided by Ark. Const. amend. 80, § 13(C); Ark. Code Ann. § 16-17-210 (Repl. 1999); and Administrative Order No. 1. The duties of the Chief Justice under this Order may be discharged by his or her designee.

## Section II. Bases for assignment.

- A. Disqualification pursuant to Arkansas Code of Judicial Conduct;<sup>1</sup> or
- B. Temporary inability to serve; or
- C. Other need as determined by the Chief Justice.<sup>2</sup>

## Section III. Request for assignment.

*Circuit Courts:* A trial judge requesting that a judge be assigned shall write a letter to the Chief Justice asking that an assignment be made pursuant to one or more of the bases set forth in Section II. In cases of disqualification in judicial circuits with more than one judge, the process in the circuit's administrative plan should be followed. All judges in the circuit must disqualify before an assignment will be made. One judge in the circuit is responsible for writing the letter of request, sufficient in detail to inform the Chief Justice of the following:

- A. that all the judges in the circuit have recused;
- B. the type of case involved;
- C. the facts or law in dispute;
- D. whether a temporary hearing is scheduled or necessary;
- E. the estimated time to hear the matter;
- F. the names of the attorneys representing the parties; and
- G. other pertinent information to assist the Chief Justice in making an assignment.

*District Courts:* A district court judge requesting that a judge be assigned shall follow the same procedure as set out for circuit courts above, including the requirement pertaining to the disqualification of all judges in multiple-judge districts. A request shall include the same information pertinent to a case as set out above for circuit court cases.

*Circuit or District Courts:* A judge or judges recusing because of disqualification shall take no further action in a case after assignment, except that the judge requesting an assignment shall direct his or her staff to notify the attorneys or pro se litigants of the assignment and to accommodate, to the extent possible, an assigned judge regarding facilities and staff, when necessary, to carry out the assignment.

## Section IV. Considerations in making assignments.

Issues which will be considered in selecting a judge to be assigned include, but are not limited to:

- A. the type and complexity of the case;
- B. the amount of time estimated for the assignment;
- C. the geographic location of the case and the proximity of the assigned judge; and
- D. the consent of the sitting judge or retired judge or justice selected.

Under no circumstances shall a judge, a lawyer, or a party seek to influence the decision of the Chief Justice in making an assignment.

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<sup>1</sup> Am. 80, Sec. 12; Canon 2 and Rule 2.11 of the Arkansas Code of Judicial Conduct.

<sup>2</sup> Am. 80, Sec. 13.



**Section V. Assigned judges' power to sign documents.**

A judge assigned to a cause or matter may render or sign orders, judgments, documents, or other papers in that cause or matter in a geographic location other than the judicial circuit or district in which the cause or matter is pending. Such order, judgment, document, or other paper shall have the same effect, for all intents and purposes, as if signed in the judicial circuit or district in which the matter or cause is pending.

**Section VI. Terminations and reassignments.**

An assignment, once made, will be terminated only for good cause at the request of the assigned judge or at the discretion of the Chief Justice.

*Circuit Courts:* After termination of an assignment and notification to the clerk in the county in which the case is filed, the clerk shall reassign the case within the circuit to the appropriate judge. If the cause necessitating the assignment still exists, the process for assignment by the Chief Justice may begin anew with a letter from a judge in the circuit to the Chief Justice. Assignment shall be made in the same manner as set out herein.

*District Courts:* After termination of an assignment and notification to the clerk of the district court in which the case is filed, the district clerk shall notify the district court of the termination of assignment. If the cause necessitating the assignment still exists, the process for assignment by the Chief Justice may begin anew with a letter from the district judge to the Chief Justice. Assignment shall be made in the same manner as set out herein.

**Section VII. Reports.**

All judges assigned to circuit court cases are subject to Administrative Order No. 3, which requires the reporting of cases that have been under advisement for more than ninety (90) days after final submission. For reporting such cases, a judge shall follow the process set out in Administrative Order No. 3(2)(A). A judge who has no cases that have been under submission for more than ninety (90) days is not required to file a report. (Adopted on February 6, 2003; amended May 27, 2010.)

**ADMINISTRATIVE ORDER NUMBER 17 —  
PROFESSIONAL PRACTICUM RULE**

Each person admitted to the Bar of Arkansas (Bar), by examination, shall complete a professional practicum. The course shall be completed within two years after the date an attorney is certified for admission to the Clerk of the Arkansas Supreme Court.

The goal of the professional practicum is to enhance the quality of legal services provided to the public. The professional practicum shall consist of not less than one day's instruction, focusing on lawyers' roles as an officer of the Court and as a member of the Bar, and lawyers' relation to community, clients, and courts, and may include topics regarding the professional and ethical implications of private and non-private practice. The course is not designed to address the topic of law office economics. The practicum shall also focus on the practical aspects of practicing law in Arkansas and common areas of disciplinary concerns. The course will not be an overview of traditional law school courses.

The practicum will be organized, prepared, and presented under the direction of the Professional Practicum Committee (Committee) of the Supreme Court of Arkansas. The Committee may present the program itself or through contract with a third-party provider, which may be the Arkansas Bar Association.

Upon good cause shown, an attorney may be entitled to an extension of time in which to meet this requirement. Such relief shall extend to the immediately succeeding professional practicum only. "Good cause," for purposes of this rule, includes but is not limited to military service or a family or medical emergency during or immediately before a scheduled professional practicum. In exceptional cases the Committee may grant further extension or allow the attorney to achieve compliance in some manner other than attendance at the practicum.

An attorney who fails to meet this requirement shall have his or her license suspended. Such suspension shall be lifted only upon completion of the professional practicum.

The Office of Professional Programs (Office) shall be the repository for all records pertaining to administration of this rule. The Office shall be responsible for providing notice to all persons seeking admission to the Bar of this requirement, course dates and locations. Further, the Office shall maintain all records pertaining to compliance and provide all notices required for enforcement of the provisions of this rule. (Adopted July 1, 2004, effective January 1, 2005; amended April 10, 2008.)

**Publisher's Notes.** The Per Curiam order dated July 1, 2004, also provided for a Professional Practicum Committee as follows: "PROFESSIONAL PRACTICUM COMMITTEE. There is hereby established a Professional Practicum Committee (Committee) composed of five members, one from each Congressional District (as now or hereafter constituted) and one from the State at large. The Court shall appoint the Chair of the Committee.

"The Committee shall organize, prepare, and present, the professional practicum as established by order of this Court.

"Each appointee shall serve a term of six (6) years, unless otherwise designated by this Court. Vacancies occurring from causes other than expiration of term of office will be filled

by the Court as they occur, and the person so appointed shall serve the remainder of the term of his or her predecessor. Members shall continue to serve beyond their designated term until such time as their successor is qualified and appointed by the Court.

"A fee, as established by the Court, shall be set for applications to take the professional practicum. Remittances for such fee shall be made by money order or cashier's check payable to the Clerk of the Supreme Court. Fees thus provided shall be used by the Committee to defray the expenses of the professional practicum. Members of the Committee may be entitled to receive per diem, and reasonable reimbursement for expenses of meals, lodging, and transportation as may be set from time to time by order of this Court."

## **ADMINISTRATIVE ORDER NUMBER 18 — ADMINISTRATION OF DISTRICT COURTS**

This administrative order is promulgated pursuant to Ark. Const. Amend. 80, § 7; Ark. Code Ann. § 16-17-704; and the Supreme Court's inherent rule-making authority. Procedural rules applicable to district courts are set out in the District Court Rules.

### **1. Divisions.**

(a) The district court judges shall establish the following subject-matter divisions in each district court: criminal, civil, traffic, and small claims. For



purposes of this administrative order, the term “traffic division” means cases relating to a violation of a law regulating the operation of a vehicle upon a roadway.

(b) The designation of divisions is for the purpose of judicial administration and caseload management and is not for the purpose of subject-matter jurisdiction. The creation of divisions shall in no way limit the powers and duties of the judges to hear all matters within the jurisdiction of the district court.

## 2. *Departments.*

(a) Each department of a district court shall maintain its own docket, and the docket shall be heard at times and places as may be determined by the judge(s) of the district court. Except as authorized in subsection (2)(b) or as approved by the Supreme Court, each department of a district court shall hear cases in all of the subject matter divisions. “Department” is defined in Ark. Code Ann. § 16-17- 901.

(b) If a district court’s territorial jurisdiction is only city-wide and the district court has more than one department, the judges of the district court by unanimous written agreement may designate that cases of one or more of the subject matter divisions (criminal, civil, traffic, and small claims) be assigned to one or more of the departments.

3. *Civil Jurisdiction.* The district court shall have original jurisdiction within its territorial jurisdiction over the following civil matters:

(a) Exclusive of the circuit court in all matters of contract where the amount in controversy does not exceed the sum of one hundred dollars (\$100), excluding interest, costs, and attorney’s fees;

(b) Concurrent with the circuit court in matters of contract where the amount in controversy does not exceed the sum of five thousand dollars (\$5,000), excluding interest, costs, and attorneys’ fees;

(c) Concurrent with the circuit court in actions for the recovery of personal property where the value of the property does not exceed the sum of five thousand dollars (\$5,000); and

(d) Concurrent with the circuit court in matters of damage to personal property where the amount in controversy does not exceed the sum of five thousand dollars (\$5,000), excluding interest and costs.

4. *Small Claims Division.* The small claims division shall have the same jurisdiction over amounts in controversy as provided in subsection 3 of this administrative order. Special procedural rules governing actions filed in the small claims division are set out in Rule 10 of the District Court Rules. The following restrictions apply to litigation in the small claims division:

(a) *Restriction on participation by attorneys.* No attorney-at-law or person other than the plaintiff and defendant shall take part in the filing, prosecution, or defense of litigation in the small claims division. When any case is pending in the small claims division of any district court and the judge of the court determines that an attorney is representing any party in the case, the case shall immediately be transferred to the civil docket. However, it is not the intention of this provision and this provision shall not be construed, to abridge in any way the rights of persons to be represented by legal counsel.

(b) *Entities restricted from bringing actions.* No action may be brought in the small claims division by any collection agency, collection agent, or assignee of a claim or by any person, firm, partnership, association, or corporation engaged, either primarily or secondarily, in the business of

lending money at interest. "Credit bureaus and collection agencies", by definition, shall include those businesses that either collect delinquencies for a fee or are otherwise engaged in credit history or business.

(c) *Actions by and against corporations.* (1) Corporations, other than those identified in subsection 4(b) of this administrative order, which are organized under the laws of this state and which have no more than three stockholders or in which eighty-five percent or more of the voting stock is held by persons related by blood or marriage within the third degree of consanguinity or any closely held corporations by unanimous vote of the shareholders may sue and be sued in the small claims division. (2) A corporation shall be represented in the proceedings by an officer of the corporation.

5. *Assignment of Judges.* See Administrative Order Number 16.

6. *Jurisdiction of State District Court Judgeships.* [This section (6) applies to State District Court Judgeships ("Pilot District Courts") upon their effective date.] In addition to the powers and duties of a district court under this administrative order, a state district court shall exercise additional power and authority as set out in this section.

(a) *Original Jurisdiction.* A state district court shall have original jurisdiction within its territorial jurisdiction over the following civil matters:

(1) Exclusive of the circuit court in all matters of contract where the amount in controversy does not exceed the sum of one hundred dollars (\$100), excluding interest, costs, and attorney's fees;

(2) Concurrent with the circuit court in matters of contract where the amount in controversy does not exceed the sum of twenty-five thousand dollars (\$25,000), excluding interest, costs, and attorney's fees;

(3) Concurrent with the circuit court in actions for the recovery of personal property where the value of the property does not exceed the sum of twenty-five thousand dollars (\$25,000);

(4) Concurrent with the circuit court in matters of damage to personal property where the amount in controversy does not exceed the sum of twenty-five thousand dollars (\$25,000), excluding interest and costs.

(b) *Reference.* A state district court judge may be referred matters pending in the circuit court. A state district court judge presiding over any referred matter shall be subject at all times to the superintending control of the administrative judge of the judicial circuit. The following matters pending in circuit court may be referred to a state district court judge:

(1) *Consent Jurisdiction.* Matters filed in the civil, domestic relations or probate division of circuit court upon the consent of all parties (see subsection (d) below);

(2) *Protective Orders.* Ark. Code Ann. §§ 9-15-201 — 217;

(3) *Forcible Entry and Detainers and Unlawful Detainer.* Ark. Code Ann. §§ 18-60-301 — 312;

(4) *Other Matters.* Matters of an emergency or uncontested nature pending in the civil, domestic relations, or probate division of circuit court (such as, *ex parte* emergency involuntary commitments pursuant to Ark. Code Ann. § 20-47-209 — 210, decedent estate administration, uncontested divorces, and defaults) under guidelines and procedures set out in the judicial circuit's administrative plan; and



(5) *Criminal Matters.* (A) Any of the following duties (the rules referenced below are the Arkansas Rules of Criminal Procedure) with respect to an investigation or prosecution of an offense lying within the exclusive jurisdiction of the circuit court:

- (i) Issue a search warrant pursuant to Rule 13.1.
- (ii) Issue an arrest warrant pursuant to Rule 7.1 or Ark. Code Ann. § 16-81-104, or issue a summons pursuant to Rule 6.1.
- (iii) Make a reasonable cause determination pursuant to Rule 4.1(e).
- (iv) Conduct a first appearance pursuant to Rule 8.1, at which the judge may appoint counsel pursuant to Rule 8.2; inform a defendant pursuant to Rule 8.3; accept a plea of “not guilty” or “not guilty by reason insanity”; conduct a pretrial release inquiry pursuant to Rules 8.4 and 8.5; or release a defendant from custody pursuant to Rules 9.1, 9.2, and 9.3.
- (v) Conduct a preliminary hearing as provided in Ark. Code Ann. § 16-93-307.

If a person is charged with the commission of an offense lying within the exclusive jurisdiction of the circuit court, a state district court judge may not accept or approve a plea of guilty or nolo contendere to the offense charged or to a lesser included felony offense but, may accept or approve a plea of guilty or nolo contendere to a misdemeanor.

(B) If authorized by an Act of the General Assembly, a state district court judge may preside over a drug court program, probation revocation proceedings, or parole revocation proceedings.

(c) *Reference Process.* Except for the exercise of consent jurisdiction which is governed by subsection (d), with the concurrence of a majority of the circuit judges of a judicial circuit, the administrative judge of a judicial circuit may refer matters pending in the circuit court to a state district court judge, with the judge’s consent, which shall not be unreasonably withheld. A final judgment although ordered by a state district court judge, is deemed a final judgment of the circuit court and will be entered by the circuit clerk under Rule 58 of the Arkansas Rules of Civil Procedure. Any appeal shall be taken to the Arkansas Supreme Court or Court of Appeals in the same manner as an appeal from any other judgment of the circuit court. An order that does not constitute a final appealable order may be modified or vacated by the circuit judge to whom the case has been assigned as permitted by Rule 60 of the Arkansas Rules of Civil Procedure.

(d) *Consent Process.*

1. *Notice.* The circuit clerk shall give the plaintiff notice of the consent jurisdiction of a state district court judge when a suit is filed in the civil, domestic relations, or probate division of circuit court. The circuit clerk shall also attach the same notice to the summons for service on the defendant. Any party may obtain a “Consent to Proceed before a State District Court Judge” form from the Circuit Clerk’s Office.

2. *Consent.* By agreeing to consent jurisdiction, the parties are waiving their right to a jury trial, and any appeal in the case shall be taken directly to the Arkansas Supreme Court or Court of Appeals.

3. *Transfer.* Once the completed forms have been returned to the circuit clerk, the circuit clerk shall then assign the case to a state district court judge and forward the consent forms for final approval to the circuit judge to whom the case was originally assigned. When the circuit judge has approved the transfer and returned the consent forms to the circuit clerk’s office for filing, the circuit clerk shall forward a copy of the consent forms to

the state district court judge to whom the case is reassigned. The circuit clerk shall also indicate on the file that the case has been reassigned to the state district court judge.

4. *Appeal.* The final judgment, although ordered by a state district court judge, is deemed a final judgment of the circuit court and will be entered by the circuit clerk under Rule 58 of the Arkansas Rules of Civil Procedure. Any appeal shall be taken to the Arkansas Supreme Court or Court of Appeals in the same manner as an appeal from any other judgment of the circuit court.

7. *Small Claims Magistrate.*

(a) At the request of the majority of the district judges of a district court, with the concurrence of a majority of the circuit court judges of a judicial circuit, the Administrative Judge of the judicial circuit may designate one or more licensed attorney(s) to serve as a Small Claims Magistrate to preside over the Small Claims Division of the district court. A Small Claims Magistrate shall be deemed the "judge" as that term is used in Rule 10 of the District Court Rules. A Small Claims Magistrate shall be subject to the superintending control of the district judges of the district court.

(b) A Small Claims Magistrate shall possess the same qualifications as a district court judge. The appointment shall be in writing and filed with the District Court Clerk.

8. *Special Judges.*

(a) When the judge of a district court shall fail to attend on any day scheduled for the holding of that court or when a judge is disqualified from presiding in a pending case, a special judge may be elected.

(b) When a special judge is to be elected, notice shall be given by the clerk of the court to the regular practicing attorneys in the district served by the court in the most practical manner under the circumstances, including giving notice by telephone or by posting the notice in a public and conspicuous place in the courtroom. Upon notice from the clerk of the court, the regular practicing attorneys attending the court may elect a special judge. The attorneys present in the courtroom shall elect one of their number as special judge. The election shall be conducted by the clerk of the court, who will accept nominations from the attorneys present. Only attorneys who are qualified to serve as special judge may vote in the election of a special judge. The election shall be by secret ballot. The attorney receiving a majority of the votes shall be declared elected as special judge. He or she shall immediately be sworn in by the clerk and shall immediately enter upon the duties of the office. He or she shall adjudicate those causes pending at the time of his or her election.

(c) No person who is not an attorney regularly engaged in the practice of law in the State of Arkansas and duly licensed and in good standing to do so, and who is not a resident possessed of the qualifications required of an elector of this state, whether registered to vote or not, shall be elected special judge. A law clerk is not eligible to be elected as a special judge.

(d) For purposes of this rule, each division of district court in a multi-judge district shall be considered to be a separate court.

(e) The clerk of the court shall make a record of the proceedings, which shall be a part of the record of the court. Forms for the clerk's use are appended to Administrative Order Number 1. (Adopted January 1, 2005; amended May 25, 2006; amended September 27, 2007; amended February 9, 2011, effective July 1, 2011; amended June 22, 2012.)



**Commentary:**

**Court Notes, 2004:** Authority for a small claims division in district courts was formerly found in Ark. Code Ann. §§ 16-17-601 *et seq.* Subsection 1(b) is derived from Amendment 80, § 7(D). The jurisdictional amount and the subject matter jurisdiction of civil cases in district courts are established by the Supreme Court pursuant to Amendment 80, § 7(B). It was previously set by the legislature. *See* Ark. Code Ann. § 16-17-704. Subsection 4(a) is derived from former Ark. Code Ann. § 16-17-612. Subsection 4(b) is derived from former Ark. Code Ann. § 16-17-604. Subsection 4(c) is derived from former Ark. Code Ann. § 16-17-605.

**Court Notes, 2006:** New section 6 on small claim magistrates and new section 7 on special judges have been added. A special district judge shall be appointed or elected in the same manner as a special circuit judge. Section 3 has been amended to clarify that the jurisdictional amounts in contract cases are exclusive of costs and attorney's fees, as well as interest. In cases involving personal property, the jurisdictional amount is exclusive of interest and costs only because an award of attorney's fees will not be available.

**CASE NOTES****Adopted Amendments.**

Supreme court adopted amendments to this Administrative Order which added a new section 6 and renumbered the remaining sections, and the new section 6 applied only to the pilot state district court judgeships created by 2007 Ark. Act 663 and was effective upon the effective date of such courts; the supreme court revised its proposal by increas-

ing the original jurisdiction monetary amount to \$25,000, making some provision for unlawful detainer cases, setting procedures for the reference jurisdiction and the consent jurisdiction, and limiting the reference jurisdiction to coincide with the pilot court's territorial jurisdiction. In re Admin. Order No. 18, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 698 (Sept. 27, 2007).

**FORMS**

IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, ARKANSAS

**NOTICE OF RIGHT TO CONSENT  
TO DISPOSITION OF CASE BY A STATE DISTRICT COURT JUDGE**

In accordance with Administrative Order Number 18, you are hereby notified that upon the consent of all the parties in a case, a State District Court Judge may be authorized to conduct all proceedings, including trial of the case and entry of a final judgment. Copies of appropriate consent forms are available from the Circuit Clerk.

You should be aware that your decision to consent or not to consent to the disposition of your case before a State District Court Judge is entirely voluntary, **and by consenting to the reference of this matter to a State District Court Judge, the parties waive their right to a jury trial**, and any appeal in the case shall be taken directly to the Arkansas Supreme Court or Court of Appeals as authorized by law.

You should communicate your consent by completing the Form -- **CONSENT TO PROCEED BEFORE A STATE DISTRICT COURT JUDGE** -- and return to the Circuit Clerk.

IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, ARKANSAS

\_\_\_\_\_  
DIVISION**CONSENT TO PROCEED BEFORE A  
STATE DISTRICT COURT JUDGE**\_\_\_\_\_  
(Plaintiff)

v.

CASE NO. \_\_\_\_\_

\_\_\_\_\_  
(Defendant)

The undersigned parties (or counsel, if so authorized) to this proceeding are fully aware of the right to proceed before a State District Court Judge and do hereby consent to the reference of the matter to a State District Court Judge in accordance with Administrative Order No. 18.

**By consenting to the reference of this matter to a State District Court Judge, the parties waive their rights to a jury trial**, and any appeal in the case shall be taken directly to the Arkansas Supreme Court or Court of Appeals as authorized by law. The State District Court Judge shall be empowered to conduct all further proceedings and to order the disposition of the matter and the entry of an appropriate judgment.

PLAINTIFFS

DATE

DEFENDANTS

DATE

_____	_____	_____	_____
_____	_____	_____	_____

**ORDER OF REFERENCE**

IT IS HEREBY ORDERED that this matter be referred to \_\_\_\_\_,  
State District Court Judge, for the conduct of further proceedings and the entry of judgment in  
accordance with the foregoing consent.

\_\_\_\_\_  
Date\_\_\_\_\_  
CIRCUIT JUDGE



## **ADMINISTRATIVE ORDER NUMBER 19 — ACCESS TO COURT RECORDS**

### **Section I. Authority, Scope, and Purpose.**

A. Pursuant to Ark. Const. Amend. 80 §§ 1, 3, 4; Ark. Code Ann. §§ 16-10-101 (Repl. 1999), 25-19-105(b)(8) (Supp. 2003), and this Court's inherent rule-making authority, the Court adopts and publishes Administrative Order Number 19: Access to Court Records. This order governs access to, and confidentiality of, court records. Except as otherwise provided by this order, access to court records shall be governed by the Arkansas Freedom of Information Act (Ark. Code Ann. §§ 25-19-101, et seq.).

B. The purposes of this order are to:

- (1) promote accessibility to court records;
- (2) support the role of the judiciary;
- (3) promote governmental accountability;
- (4) contribute to public safety;
- (5) reduce the risk of injury to individuals;
- (6) protect individual privacy rights and interests;
- (7) protect proprietary business information;
- (8) minimize reluctance to use the court system;
- (9) encourage the most effective use of court and clerk of court staff;
- (10) provide excellent customer service; and
- (11) avoid unduly burdening the ongoing business of the judiciary.

C. This order applies only to court records as defined in this order and does not authorize or prohibit access to information gathered, maintained, or stored by a non-judicial governmental agency or other entity.

D. Disputes arising under this order shall be determined in accordance with this order and, to the extent not inconsistent with this order, by all other rules and orders adopted by this Court.

E. This order applies to all court records; however clerks and courts may, but are not required to, redact or restrict information that was otherwise public in case records and administrative records created before January 1, 2009.

### **Section II. Who Has Access Under This Order.**

A. All persons have access to court records as provided in this order, except as provided in section II(B) of this order.

B. The following persons, in accordance with their functions within the judicial system, may have greater access to court records:

- (1) employees of the court, court agency, or clerk of court;
- (2) private or governmental persons or entities who assist a court in providing court services;
- (3) public agencies whose access to court records is defined by other statutes, rules, orders or policies; and
- (4) the parties to a case or their lawyers with respect to their own case.

### **Section III. Definitions.**

A. For purpose of this order:

- (1) "Court Record" means both case records and administrative records, but does not include information gathered, maintained or stored by a

non-court agency or other entity even though the court may have access to the information, unless it is adopted by the court as part of the court record.

(2) "Case Record" means any document, information, data, or other item created, collected, received, or maintained by a court, court agency or clerk of court in connection with a judicial proceeding.

(3) "Administrative Record" means any document, information, data, or other item created, collected, received, or maintained by a court, court agency, or clerk of court pertaining to the administration of the judicial branch of government.

(4) "Court" means the Arkansas Supreme Court, Arkansas Court of Appeals, and all Circuit, District, or City Courts.

(5) "Clerk of Court" means the Clerk of the Arkansas Supreme Court, the Arkansas Court of Appeals, and the Clerk of a Circuit, District, or City Court including staff. "Clerk of Court" also means the County Clerk, when acting as the Ex-Officio Circuit Clerk for the Probate Division of Circuit Court.

(6) "Public access" means that any person may inspect and obtain a copy of the information.

(7) "Remote access" means the ability to electronically search, inspect, or copy information in a court record without the need to physically visit the court facility where the court record is maintained.

(8) "In electronic form" means information that exists as electronic representations of text or graphic documents; an electronic image, including a video image of a document, exhibit or other thing; data in the fields or files of an electronic database; or an audio or video recording (analog or digital) of an event or notes in an electronic file from which a transcript of an event can be prepared.

(9) "Bulk Distribution" means the distribution of all, or a significant subset of, the information in court records, as is, and without modification or compilation.

(10) "Compiled Information" means information that is derived from the selection, aggregation or reformulation of information from more than one court record.

(11) "Confidential" means that the contents of a court record may not be disclosed unless otherwise permitted by this order, or by law. When and to the extent provided by this order or by law, "confidential" shall mean also that the existence of a court record may not be disclosed.

(12) "Sealed" means that the contents of a court record may not be disclosed unless otherwise permitted by this order, or by law. When and to the extent provided by this order or by law, "sealed" shall mean also that the existence of a court record may not be disclosed.

(13) "Protective order" means that as defined by the Arkansas Rules of Civil Procedure.

(14) "Expunged" means that the record or records in question shall be sequestered, sealed, and treated as confidential, and neither the contents, nor the existence of, the court record may be disclosed unless otherwise permitted by this order, or by law. Unless otherwise provided by this order or by law, "expunged" shall not mean the physical destruction of any records.

(15) "Court Agency" means the Administrative Office of the Courts, the Office of Professional Programs, the Office of the Arkansas Supreme Court Committee on Professional Conduct, the Judicial Discipline and Disability



Commission, and any other office or agency now in existence or hereinafter created, which is under the authority and control of the Arkansas Supreme Court.

(16) "Custodian" with respect to any court record, means the person having administrative control of that record and does not mean a person who holds court records solely for the purposes of storage, safekeeping, or data processing for others.

#### **Section IV. General Access Rule.**

A. Public access shall be granted to court records subject to the limitations of sections V through X of this order.

B. This order applies to all court records, regardless of the manner of creation, method of collection, form of storage, or the form in which the records are maintained.

C. If a court record, or part thereof, is rendered confidential by protective order, by this order, or otherwise by law, the confidential content shall be redacted, but there shall be a publicly accessible indication of the fact of redaction. This subsection (C) does not apply to court records that are rendered confidential by expungement or other legal authority that expressly prohibits disclosure of the existence of a record.

#### **Section V. Remote Access.**

A. Courts should endeavor to make at least the following information, when available in electronic form, remotely accessible to the public, unless public access is restricted pursuant to section VII:

- (1) litigant/party/attorney indexes to cases filed with the court;
- (2) listings of case filings, including the names of the parties;
- (3) the register of actions or docket sheets;
- (4) calendars or dockets of court proceedings, including case numbers and captions, date and time of hearings, and location of hearings;
- (5) judgments, orders, or decrees.

B. Remote access to information beyond this list is left to the discretion of the court.

#### **Section VI. Bulk Distribution and Compiled Information.**

A. Requests for bulk distribution or compiled information stored on computers maintained by the Administrative Office of the Courts (AOC) shall be made in writing on the form provided to the Director of the AOC or other designee of the Arkansas Supreme Court. Requests for bulk distribution or compiled information that is not stored on computers maintained by the AOC shall be made in writing on the form provided to the court or court agency having jurisdiction over the records. The AOC shall maintain on the Arkansas Judiciary website a current description of the records available on AOC computers. Requests will be acted upon or responded to within a reasonable period of time.

B. Compiled information shall be provided according to the terms of this section (VI)(B).

(1) Requests for compiled records shall identify the requested information and the desired format of the compilation.

(2) The grant of a request under this section (VI)(B) may be made contingent upon the requester paying the actual costs of reproduction, including personnel time, the costs of the of the medium reproduction, supplies, equipment, and maintenance, and including the actual costs of mailing or transmitting the records by facsimile or other electronic means.

(a) The requester may be charged for personnel time exceeding one (1) hour associated with the tasks, in addition to the actual costs of reproduction.

(b) If the estimated costs exceed twenty-five dollars (\$25.00), an estimate will be required and the requester may be required to pay that fee in advance.

(c) Information may be furnished without charge or at a reduced charge if it is determined that a waiver or reduction of the fee is in the public interest.

(d) The requester is entitled to an itemized breakdown of charges under this section (VI)(B)(2).

(e) Costs for compiled records requested from a court or court agency having jurisdiction over the records shall be as otherwise permitted by state law or county or city ordinance.

(3) When the request includes cases or information excluded from public access under section (VII), or the identification of specific individuals is not essential to the purpose of the inquiry, then the requested records may be provided; however, names, addresses (except zip code), month and day of birth shall be redacted from the information.

(4) When the request includes release of social security numbers, driver's license or equivalent state identification card numbers, the information provided shall include only the last four digits of social security numbers, only the last four digits of driver's license or equivalent state identification card numbers. Account numbers and personal identification numbers (PINs) of specific assets, liabilities, accounts, and credit cards may not be released.

(5) When the identification of specific individuals is essential to the purpose of the request, then the request must include an executed copy of the Compiled Records License Agreement and the requester must declare under penalty of perjury that the request is made for a scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose, and that the identification of specific individuals is essential to the purpose of the inquiry. This license agreement requirement may be waived for information furnished to an agency of the State of Arkansas. Denial of all or part of a compiled records request shall be reviewable by the Supreme Court Committee on Automation by the requestor filing a written request for review within 20 days of the denial. At its next regularly scheduled meeting the Committee shall review the request and make a determination whether the request should be granted. The determination shall be made by a majority of those members of the Committee present and voting. The Chair of the Committee shall communicate its decision to the Director of the Administrative Office of the courts or the court or court agency having jurisdiction over the records. The Committee's decision shall be final.

C. Bulk distribution shall be provided according to the terms of this section (VI)(C).

(1) The Administrative Office of the Courts is authorized to develop a license agreement for bulk records consistent with this rule.



(a) The license agreement shall provide the terms and conditions for receipt and update of the bulk data.

(b) The license agreement shall provide for a startup fee not to exceed \$1,000 and a monthly subscription fee not to exceed \$200 for access to the bulk data.

(c) The license agreement shall provide that recipients of the bulk data shall purge from their databases any records that become confidential or sealed within 24 hours of notice of the records being expunged or sealed.

(d) The license agreement shall provide that recipients of the bulk data shall replace their data within 24 hours of the availability of a monthly extract or transactional update of the databases.

(e) Costs for bulk records requested from a court or court agency having jurisdiction over the records shall be as otherwise permitted by state law or county or city ordinance.

(f) The license agreement requirement may be waived for information provided to an agency of the State of Arkansas. However, agencies of the State of Arkansas shall not be required to post a surety bond.

(2) The Administrative Office of the Courts shall establish a secure server from which the databases of case information may be downloaded by licensed users.

(a) The secure server shall include a monthly extract of all public case data.

(b) The secure server shall include transactional updates that will be periodically extracted from the case management databases no less frequently than once every 24 hours.

(3) The request for bulk distribution must:

(a) include an executed copy of the Bulk Records License Agreement or a request for waiver of the Bulk Records License Agreement if the requester is an agency of the State of Arkansas;

(b) Include a cashier's check or money order as indicated in the license agreement to set up a bulk distribution account.

(4) The monthly extract and transactional updates shall include only the last four digits of social security numbers, only the last four digits of driver's license or equivalent state identification card numbers. Account numbers and personal identification numbers (PINs) of specific assets, liabilities, accounts, and credit cards may not be released.

(5) The bulk data will not include cases or records excluded from public access under section (VII). (Amended May 24, 2012.)

## **Section VII. Court Records Excluded From Public Access.**

A. *Case records.* The following information in case records is excluded from public access and is confidential absent a court order to the contrary; however, if the information is disclosed in open court and is part of a verbatim transcript of court proceedings or included in trial transcript source materials, the information is not excluded from public access:

(1) information that is excluded from public access pursuant to federal law;

(2) information that is excluded from public access pursuant to the Arkansas Code Annotated;

(3) information that is excluded from public access by order or rule of court;

(4) Social Security numbers;

(5) account numbers of specific assets, liabilities, accounts, credit cards, and personal identification numbers (PINs);

(6) information about cases expunged or sealed pursuant to Ark. Code Ann. §§ 16-90-901 et seq.;

(7) notes, communications, and deliberative materials regarding decisions of judges, jurors, court staff, and judicial agencies;

(8) all home and business addresses of petitioners who request anonymity when seeking a domestic order of protection.

**B. *Administrative Records.*** The following information in administrative records is excluded from public access and is confidential absent a court order to the contrary:

(1) information that is excluded from public access pursuant to Arkansas Code Annotated or other court rule;

(2) information protected from disclosure by order or rule of court;

(3) security and emergency preparedness plans. Security and emergency preparedness plans shall not be open to the public under this order or the Arkansas Freedom of Information Act, Ark. Code Ann. §§ 25-19-101 et seq., to the extent they contain information that if disclosed might jeopardize or compromise efforts to secure and protect individuals, the courthouse, or court facility. This exclusion from public access shall include: (A) Risk and vulnerability assessments; (B) Plans and proposals for preventing and mitigating security risks; (C) Emergency response and recovery records; (D) Security plans and procedures; and (E) Any other records containing information that if disclosed might jeopardize or compromise efforts to secure and protect individuals, the courthouse, or court facility. (Amended October 23, 2008, effective January 1, 2009; amended May 24, 2012.)

**Explanatory Note:** Before the amendment, this part of the Administrative Order made the address and phone number of all litigants confidential. That rule would have been both too broad and unworkable. Litigants' addresses are needed for, among other

things, summonses and judgments. The revised provision is limited to the situation where current substantive law makes a litigant's addresses confidential for an obvious and compelling reason. Ark. Code Ann. § 9-15-203 (Repl. 2008).

## **Section VIII. Obtaining Access to Information Excluded from Public Access.**

**A.** Any requestor may make a verified written request to obtain access to information in a case or administrative record to which public access is prohibited under this order to the court having jurisdiction over the record. The request shall demonstrate that:

(1) reasonable circumstances exist that require deviation from the general provisions of this order;

(2) the public interest in disclosure outweighs the harm in disclosure; or

(3) the information should not be excluded from public access under section (VII) of this order.

The person seeking access has the burden of providing notice to the parties and such other persons as the court may direct, providing proof of notice to the court or the reason why notice could not or should not be given, demonstrating to the court the requestor's reasons for prohibiting access to the information.

**B.** The court shall hold a hearing on the request, unless waived, within a reasonable time, not to exceed thirty (30) days of receipt of the request. The court shall grant a request to allow access following a hearing if the



requestor demonstrates by a preponderance of the evidence that any one or more of the requirements of (VIII)(A)(1) through (VIII)(A)(3) have been satisfied.

C. A court shall consider the public access and the privacy interests served by this order and the grounds demonstrated by the requestor. In its order, the court shall state its reasons for granting or denying the request. When a request is made for access to information excluded from public access, the information will remain confidential while the court rules on the request.

D. A court may place restrictions on the use or dissemination of the information to preserve confidentiality. (Amended May 24, 2012.)

### **Section IX. When Court Records May Be Accessed.**

A. Court records that are publicly accessible will be available for public access in the courthouse during regular business hours established by the court; however, public access to trial exhibits and trial transcript source materials shall be granted at the discretion of the court. Court records in electronic form to which the court allows remote access under this policy will be available for access during hours established by the court, subject to unexpected technical failures or normal system maintenance announced in advance.

B. Upon receiving a request pursuant to sections (VI) or (VIII) of this order, a court will respond within a reasonable period of time. (Amended May 24, 2012.)

### **Section X. Contracts With Vendors Providing Information Technology Services Regarding Court Records.**

A. If a court, court agency, or other private or governmental entity contracts with a vendor to provide information technology support to gather, store, or make accessible court records, the contract will require the vendor to comply with the intent and provisions of this access policy. For purposes of this section, the term 'vendor' also includes a non-judicial branch state, county or local governmental agency that provides information technology services to a court.

B. Each contract shall require the vendor to assist the court in its role of educating litigants and the public about this order. The vendor shall also be responsible for training its employees and subcontractors about the provisions of this order.

C. Each contract shall prohibit vendors from disseminating bulk or compiled information, without first obtaining approval as required by this order.

D. Each contract shall require the vendor to acknowledge that court records remain the property of the court and are subject to the directions and orders of the court with respect to the handling and access to the court records, as well as the provisions of this order.

E. These requirements are in addition to those otherwise imposed by law.

### **Section XI. Violation of Order Not Basis for Liability.**

Violation of this order by the disclosure of confidential or erroneous court records by a court, court agency, or clerk of court employee, official, or an

employee or officer of a contractor or subcontractor of a court, court agency, or clerk of court shall not be the basis for establishing civil or criminal liability for violation of this order. This does not preclude a court from using its inherent contempt powers to enforce this order.

## **APPENDIX I. COMMENTARY**

### **Section I. Commentary**

The objective of this order is to promote public accessibility to court records, taking into account public policy interests that are not always fully compatible with unrestricted access. The public policy interests listed above are in no particular order. This order attempts to balance competing interests and recognizes that unrestricted access to certain information in court records could result in an unwarranted invasion of personal privacy or unduly increase the risk of injury to individuals and businesses. This order recognizes there are strong societal reasons for allowing public access to court records, and denial of access could compromise the judiciary's role in society, inhibit accountability, and endanger public safety. Open access allows the public to monitor the performance of the judiciary, furthers the goal of providing public education about the results in cases, and, if properly implemented, reduces court staff time needed to provide public access.

This order starts from the presumption of open public access to court records. In some circumstances; however, there may be sound reasons for restricting access to these records. This order recognizes that there are times when access to information may lead to, or increase the risk of, harm to individuals. However, given the societal interests in access to court records, this order also reflects the view that any restriction to access must be implemented in a manner tailored to serve the interests in open access. It is also important to remember that, generally, at least some of the parties in a court case are not in court voluntarily, but rather have been brought into court by plaintiffs or by the government. A person who is not a party to the action may also be mentioned in the court record. Care should be taken that the privacy rights and interests of such involuntary parties or "third" persons are not unduly compromised.

Subsection (C) is intended to assure that public access provided under this order does not apply to information gathered, maintained, or stored by other agencies or entities that is not necessary to, or is not part of the basis of, a court's decision or the judicial process. Access to this information is governed by the law and the access policy of the agency collecting and maintaining such information. The ability of a computer in a court or clerk's office to access the information, because the computer uses shared software and databases, does not, by itself, make the information subject to this order.

Existing laws, rules and policies regarding court records have been carefully reviewed during the development of this access policy.

The Administrative Office of the Courts may provide advisory information to individuals or entities about the provisions, restrictions, and limitations of this order.

### **Section II. Commentary**

Section II(A) provides the general rule that all persons, including members of the general public, the media, and commercial and noncommercial entities, are entitled to the same basic level of access to court records. Generally, access to court records is not determined by who is seeking access or the purpose for seeking access; however, some users, such as court



employees or the parties to a particular case, may have greater access to those particular records than is afforded the general public.

Section II(B) provides the exception to the general rule and specifies the entities and persons for whom courts may provide greater access. This greater level of access is a result of the need for effective management of the judicial system and the protection of the right to a fair trial.

Sections II(B)(1) through (4) identify groups whose authority to access court records is different from that of the public.

Subsection (1): Employees of the court, court agency, and clerk of court need greater access than the public in order to do their work and therefore work under different access rules.

Subsection (2): Employees and subcontractors of entities who provide services to the court or clerk of court or court agency, that is, court services that have been "outsourced," may also need greater access to information to do their jobs and therefore operate under a different access policy. Section X provides the requirements under this order for contracts with vendors concerning court records.

Subsection (3): This subsection is intended to cover personnel in other governmental agencies who have a need for information in court records in order to do their work. An example of this would be an integrated justice system operated on behalf of several justice system agencies where access is governed by internal policies or statutes or rules applicable to all users of the integrated system.

Subsection (4): This subsection continues nearly unrestricted access by litigants and their lawyers to information in their own cases but no higher level of access to information in other cases. As to cases in which they are not the attorney of record, attorneys would have the same access as any other member of the public.

### **Section III. Commentary**

Sections III(A)(1)-(3) explain which records in a court are covered by this order.

Section III(A)(1) excludes from the definition of "court record" information gathered, maintained, or stored by other agencies or entities that is not necessary to, or is not part of the basis of a court's decision or the judicial process. Access to this information is governed by the laws and access policy of the agency collecting and maintaining such information. The ability of a computer in a court or clerk's office to access the information, because the computer uses shared software and databases, does not, by itself, make the court records access policy applicable to the information. An example of this is information stored in an integrated criminal justice information system where all data is shared by law enforcement, the prosecutor, the court, defense counsel, and probation and corrections departments. The use of a shared system can blur the distinctions between agency records and court records. Under this section, if the information is provided to the court as part of a case or judicial proceeding, the court's access rules then apply, regardless of where the information came from or the access rules of that agency. Conversely, if the information is not made part of the court record, the access policy applicable to the agency collecting the data still applies even if the information is stored in a shared database.

Section III(A)(2), "Case Record," is meant to be all inclusive of information that is provided to, or made available to, the court that relates to a judicial proceeding. The term "judicial proceeding" is used because there may not be

a court case in every situation. The definition is not limited to information “filed” with the court or “made part of the court record” because some types of information the court needs to make a fully informed decision might not be “filed” or technically part of the court record. The language is, therefore, written to include information delivered to, or “lodged” with, the court, even if it is not “filed.” An example is a complaint accompanying a motion to waive the filing fee based on indigence. The definition is also intended to include exhibits offered in hearings or trials, even if not admitted into evidence.

The definition includes all information used by a court to make its decision, even if an appellate court subsequently rules that the information should not have been considered or was not relevant to the judicial decision made.

The language is intended to include within its scope materials that are submitted to the court, but upon which a court did not act because the matter was withdrawn or the case was resolved. Once relevant material has been submitted to the court, it does not become inaccessible because the court did not, in the end, act on the information in the materials because the parties resolved the issue without a court decision.

The definition is written to cover any information that relates to a judicial proceeding generated by the court itself, whether through the court administrator’s personnel or the clerk’s office personnel. This definition applies to proceedings conducted by temporary judges or referees hearing cases in an official capacity. This includes two categories of information. One category includes documents, such as notices, minutes, orders, and judgments, which become part of the court record. The second category includes information that is gathered, generated, or kept for the purpose of managing the court’s cases. This information might never be in a document; it might only exist as information in a field of a database such as a case management system, an automated register of actions, or an index of cases or parties.

Another set of items included within the definition is the official record of the proceedings, whether it is notes and transcripts generated by a court reporter of what transpired at a hearing, or an audio or video recording (analog or digital) of the proceeding. Public Access to these materials shall be granted at the court’s discretion under Section IX(A), and information that would otherwise be confidential, but is included within these materials because it was disclosed in open court, is not required to be redacted under Section VII. Pursuant to Ark. Code Ann. §§ 16-13-501 et seq., court reporters are required to create transcripts only at the request of either party or the judge. The fees for creation of the transcript are set out in Ark. Code Ann. § 16-13-506. This order attempts to retain the common-law framework for access to court reporters’ materials, but recognizes that technological changes such as automated electronic transcription and audio and video streaming over the Internet may result in increased availability of these materials without unduly burdening the ongoing business of the judiciary. Administrative Order Number 6 governs broadcasting, recording or photographing in the courtroom.

Section III(A)(3) defines “Administrative Record.” The definition of “court record” includes some information and records maintained by the court and clerk of court that is related to the management and administration of the court or the clerk’s office. Examples of this category of information include:



internal court policies, memoranda and correspondence, court budget and fiscal records, and other routinely produced administrative records, memos and reports, and meeting minutes.

This subsection makes it clear that the order applies only to information related to the judicial branch. Some information maintained by clerks of court is not a court record, nor is the court responsible for its collection, maintenance, or accessibility. Land records and voter records are examples of information that do not pertain to the administration of the judicial branch of government.

An administrative record might or might not be related to a particular case. That is to say, an administrative record may relate to a particular case and therefore be a case record also. For example, the application of a judicial official for reimbursement for expenses incurred in the course of administering justice in a particular case is both an administrative record and a case record. A record with such dual character may be subject to public disclosure in either capacity; inversely, the record is excluded from public access only if it qualifies for exclusion in both capacities. For this reason, a judicial official who creates administrative records should take care to avoid including the sort of information that may be excluded from public access to case records and that is not essential to the administrative purpose of the record.

Section III(A)(6) defines "public access" very broadly. The language implies that access is not conditioned on the reason access is requested or on prior permission being granted by the court. Access is defined to include the ability to obtain a copy of the information, not just inspect it. The section does not address the form of the copy, as there are numerous forms the copy could take, and more will probably become possible as technology continues to evolve.

A minimum inspection of the court record can be done at the courthouse where the record is maintained. It can also be done in any other manner determined by the court that serves the principles and interests specified in section I of this order. The inspection can be of the physical record or an electronic version of the court record. Access may be over the counter, by fax, by regular mail, by e-mail or by courier. The section does not preclude the court from making inspection possible via electronic means at other sites, or remotely. It also permits a court to satisfy the request to inspect by providing a printed report, computer disk, tape or other storage medium containing the information requested from the court record.

The section implies an equality of the ability to "inspect and obtain a copy" across the public. Implementing this equality will require the court to address several sources of inequality of access. Some people have physical impairments that prevent them from using the form of access available to most of the public. Another problem has to do with the existence of a "digital divide" regarding access to information in electronic form. The court should provide equivalent access to those who do not have the necessary electronic equipment to obtain access. Finally, there is the issue of the format of electronic information and whether it is equally accessible to all computer platforms and operating systems. The court should make electronic information equally available, regardless of the computer used to access the information (in other words, in a manner that is hardware and software independent).

Another aspect of access is the need to redact restricted information in documents before allowing access to the balance of the document. In some circumstances this may be a quite costly. Lack of, or insufficient, resources may present the court with an awkward choice of deciding between funding normal operations and funding activities related to access to court records. As technology improves it is becoming easier to develop software that allows redaction of pieces of information in documents in electronic form based on "tags" (such as XML tags) accompanying the information. When software to include such tags in documents becomes available, and court systems acquire the capability to use the tags, redaction will become more feasible, allowing the balance of a document to be accessible with little effort on the part of the court.

The objective of section III(A)(7) defining "remote access" is to describe a means of access that is technology neutral that is used to distinguish means of access for different types of information. The term is used in section V regarding information that should be remotely accessible. The key elements are that: 1) the access is electronic, 2) the electronic form of the access allows searching of records, as well as viewing and making an electronic copy of the information, 3) a person is not required to visit the courthouse to access the record, and 4) no assistance of court or clerk of court staff is needed to gain access (other than staff maintaining the information technology systems).

This definition is independent of any particular technology or means of access. Remote access may be accomplished electronically by any one or more of a number of existing technologies, including dedicated terminal, kiosk, dial-in service, or Internet site. Attaching electronic copies of information to e-mails, and mailing or faxing copies of documents in response to a letter or phone request for information would not constitute remote access under this definition.

In section III(A)(8), the breadth of the definition of "in electronic form" makes clear that this order applies to information that is available in any type of electronic form. The point of this section is to define what "in electronic form" means, not to define whether electronic information can be accessed or how it is accessed. This subsection refers to electronic versions of textual documents (for example documents produced on a word processor, or stored in some other text format such as PDF format), and pictures, charts, or other graphical representations of information (for example, graphics files, spreadsheet files, etc.).

A document might be electronically available as an image of a paper document produced by scanning, or another imaging technique (but not filming or microfilming). This document can be viewed on a screen and it appears as a readable document, but it is not searchable without the aid of OCR (optical character recognition) applications that translate the image into a searchable text format.

An electronic image may also be one produced of a document or other object through the use of a digital camera, for example in a courtroom as part of an evidence presentation system.

Courts are increasingly using case management systems, data warehouses or similar tools to maintain data about cases and court activities. This order applies equally to this information even though it is not produced or available in paper format unless a report containing the information is generated. This section also covers files created for, and transmitted through, an electronic filing system for court documents.



Evidence can be in the form of audio or videotapes of testimony or events. In addition audio and video recording (ER - electronic recording) and computer-aided transcription systems (CAT) using court reporters are increasingly being used to capture the verbatim record of court hearings and trials. In the future real-time video streaming of trials or other proceedings is a possibility. Because this information is in electronic form, it would fall within this definition.

Section III(A)(10) recognizes that compiled information is different from case-by-case access because it involves information from more than one case. Compiled information is different from bulk access in that it involves only some of the information from some cases and the information has been reformulated or aggregated; it is not just a copy of all the information in the court's records. Compiled information involves the creation of a new court record. In order to provide compiled information, a court generally must write a computer program to select the specific cases or information sought in the request, or otherwise use court resources to identify, gather, and copy the information.

Generating compiled data may require court resources and generating the compiled information may compete with the normal operations of the court for resources, which may be a reason for the court not to compile the information. It may be less costly for the court and less of an impact on the court to, instead, provide bulk distribution of the requested information, and let the requestor, rather than the court, compile the information.

The interchangeable definitions of "confidential" and "sealed" in section III(A)(11)-(14) recognize that in some circumstances the court is prohibited from disclosing the contents of a court record, and in some circumstances the court is prohibited from disclosing the very existence of a court record. For purposes of this order, the definition of "protective order" has the same meaning as found in the Arkansas Rules of Civil Procedure, i.e., the usual means by which a court designates a court record or parts of a record as confidential or sealed, for example, to protect a trade secret that includes information necessary to adjudication, but which would be harmful to the litigant if disclosed to the public. Also, this order itself provides that certain information in court records is "confidential," such as a litigant's personal bank account number, section VII(A)(5). The definitions of "confidential" and "sealed" recognize, however, that this order and other laws may provide limited access to confidential information. For example, consistently with section II, attorneys typically may access un-redacted records in cases on which they are attorneys of record.

Redactions from a publicly disclosed court record to protect sealed content are ordinarily indicated in the disclosure. However, the definitions of "confidential" and "sealed" recognize that in some instances, as provided by court order or by law, the court is prohibited from disclosing even the existence of a court record. For example, when a court record is "expunged," as defined in section III(A)(14) and pursuant to Ark. Code Ann. §§ 16-90-901, et seq. neither the existence of nor the contents of the records may be disclosed. In some cases, expunge also means the physical destruction of court records in juvenile cases pursuant to Ark. Code Ann. § 9-27-309. In such cases, because physical destruction of the records in electronic form would be impractical, such records should be redacted to eliminate the ability to identify the juvenile while preserving sufficient information regarding the court's actions for statistical and historic purposes.

The Court recognizes that for public policy reasons, such as to assist first-time offenders to remain productive members of society, it is sometimes necessary to conceal not only the contents of court records, but also the very existence of them from the general public. Expungement is not the only means by which a record may be sealed and made confidential as against disclosure of its very existence; for example, such confidentiality is afforded to adoption records by Ark. Code Ann. §§ 9-9-201, et seq. However, this order should not be construed to authorize the suppression of court records absent authorization by duly promulgated judicial rule or by duly enacted legislation. Cf. section IV(C).

The definition of “custodian” in section III(A)(16) recognizes that technology decreases the relevance of the physical location of records in electronic form. Court records might be stored remotely from the court in order to increase access, to provide greater security, to prevent loss in case of disaster, or to share resources with other agencies. However, that the records in electronic form are not physically located within a structure housing the court neither reduces the responsibility of the court and clerk for the content of the records, nor gives to the person holding the records for the purposes of storage, safekeeping, or data processing for the court the authority to disseminate the records.

#### **Section IV. Commentary**

The objective of this section is to make clear that this order applies to information in the court record regardless of the manner in which the information was created, collected or submitted to the court. Application of this order is not affected by the means of storage, manner of presentation or the form in which information is maintained. To support the general principle of open access, the application of the rule is independent of the technology or the format of the information.

Subsection (A) states the general premise that information in the court record will be publicly accessible unless access is specifically prohibited. The provision does not require any particular level of access, nor does it require a court to provide access in any particular form, for example, publishing court records in electronic form on a web site or dial-in database.

Subsection (C) provides a way for the public to know that information exists even though public access to the information itself is prohibited. This allows a member of the public to request access to the restricted record under section IX, which they would not know to do if the existence of the restricted information was not known.

However, the Court recognizes that for public policy reasons, such as to assist first-time offenders to remain productive members of society, it is sometimes necessary to conceal not only the contents of court records, but also the very existence of them from the general public. For example, Ark. Code Ann. § 16-90-903 limits the disclosure of the existence of certain expunged records. Section IV(C) accommodates this necessity, but should not be construed to authorize the suppression of court records absent authorization by duly promulgated judicial rule or by duly enacted legislation.

#### **Section V. Commentary**

This order does not impose an affirmative obligation to preserve information or data, or to transform information or data received into a format or medium that is not otherwise routinely maintained by the court. While this section encourages courts to make the designated information available to



the public through remote access, this is not required, even if the information already exists in an electronic format.

Several types of information in court records have traditionally been given wider public distribution than merely making them publicly accessible at the courthouse. Typical examples are listed in this section. Often this information is regularly published in newspapers, particularly legal papers. Many of the first automated case management systems included a capability to make this information available electronically, at least on computer terminals in the courthouse, or through dial-up connections. Similarly, courts have long prepared registers of actions that indicate for each case what documents or other materials have been filed in the case. Again, early case management systems often automated this function. The summary or general nature of the information is such that there is little risk of harm to an individual through unwarranted invasion of privacy or proprietary business interests. This section acknowledges and encourages this public distribution practice by making these records presumptively accessible remotely, particularly if they are in electronic form. When a court begins to make information available remotely, they are encouraged to start with the categories of information identified in this list.

While not every court, or every automated system, is capable of providing this type of access, courts are encouraged to develop the capability to do so. The listing of information that should be made remotely available in no way is intended to imply that other information should not be made remotely available. Some court automated systems may also make more information available remotely to litigants and their lawyers than is available to the public.

Making certain types of information remotely accessible allows the court to make cost effective use of public resources provided for its operation. If the information is not available, someone requesting the information will have to call the court or come down to the courthouse and request the information. Public resources will be consumed with court staff locating case files containing the record or information, providing it to the requestor, and returning the case file to the shelf. If the requestor can obtain the information remotely, without involvement of court staff, there will be less use of court resources.

In implementing this section a court should be mindful about what specific pieces of information are appropriately remotely accessible. Care should be taken that the release of information is consistent with all provisions of the access policy, especially regarding personal identification information. For example, the information remotely accessible should not include information presumptively excluded from public access pursuant to section VII, or prohibited from public access by court order. An example of calendar information that may not be accessible by law is that relating to juvenile cases, adoptions, and mental health cases.

Subsection (5): One role of the judiciary, in resolving disputes, is to state the respective rights, obligations and interests of the parties to the dispute. This declaration of rights, obligations and interests usually is in the form of a judgment or other type of final order. Judgments or final orders have often had greater public accessibility by court rule or statutory requirement that they be recorded in a "judgment book." One reason this is done is to simplify public access by placing all such information in one place, rather than making someone step through numerous individual case files to find them.

Recognizing such practices, this order specifically encourages this information to be remotely accessible if in electronic form.

There are circumstances where information about charges and convictions in criminal cases can change over time, which could mean copies of such listings derived from court records can become inaccurate unless updated. For example, a defendant may be charged with a felony, but the charge may be dismissed, or modified or reduced to a misdemeanor when the case is concluded. In other circumstances a felony conviction may be reduced to a misdemeanor conviction if the defendant successfully completes probation. These types of circumstances suggest that there be a disclaimer associated with such information, and that education about these possibilities be provided to litigants and the public.

#### **Section VI. Commentary**

In the past, court information other than that required to be reported to the Administrative Office of the Courts, was available only directly from the courts. In 2001, the Arkansas Court Automation Project began, with its long-term goal to provide a centralized case management system for all courts in the State of Arkansas. This project is the foundation to provide statewide electronic filing and document imaging for the courts. As courts go online with the new system, the public will have a more convenient central location from which to request court records.

Subsection (A) of this rule requires that requests for bulk distribution or compiled information stored on AOC computers be submitted to the Director of the Administrative Office of the Courts or other designee of the Court. Otherwise requests should be submitted to the court or court agency having jurisdiction over the records. The AOC is required to maintain a description of court records in order to assist requesters in determining where to send their requests.

Prior to the 2012 amendment, section (VI) provided a two-track system for requesting bulk and compiled records. The system proved to be unworkable in practice, so the 2012 amendment separated and simplified the process for requesting bulk and compiled data.

Section (VI)(B) provides the process for filling compiled records requests. The process recognizes the increased likelihood that requested data is stored on computers, and that to fulfill the requests it is more likely that a computer programmer is required to isolate, analyze and compile the requested information into a desired format. Although section (VI)(B)(2)(a) permits charging a fee for personnel time exceeding one hour, and section (VI)(B)(2)(b) may require paying the fee in advance, section (VI)(B)(2)(c) permits waiver of fees for personnel time if it is in the public interest to provide the compilation at no cost.

Section (VI)(B)(3) recognizes that requesters may require information about cases that are confidential but do not require the confidential information in the cases. For example, researchers considering the efficacy of the juvenile justice system may be interested in age, race, geographic area, and gender of participants in the system relative to the outcomes in those cases. Fulfilling these requests can be completed without disclosing the identification of the individuals.

Section (VI)(B)(4) provides that account numbers, and credit card numbers, full social security numbers and driver license numbers will never be provided in compiled records requests; however, the last four digits of SSN and driver license numbers may be provided in compilations.



Section (VI)(B)(5) provides the limited circumstances under which compiled records will be provided where the request includes information about specific individuals. Names, addresses, and dates of birth will only be provided in compiled form when the requester declares under penalty of perjury that identification of individuals is essential to the inquiry and that the request is for a scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose. Because of the sensitive nature of such compilations, a license agreement governing acceptable use of the records must be provided with the request. Nevertheless the license agreement may be waived when the information is provided to a state agency. Such exchanges of information, especially between criminal justice agencies, are typically managed by a separate interagency agreement and exchanges between state and local agencies are managed by intergovernmental agreement.

Section (VI)(C) contemplates that most bulk records requests will be filled by licensed subscription to bulk databases of otherwise public information. To protect the privacy of individuals while simultaneously promoting access to public information the license agreement will provide the terms for receipt and update of the bulk data. Recipients of bulk data are required to purge records that become confidential within 24 hours of receiving notice that the records have become confidential. By requiring that the recipients maintain the currency of the bulk data, the risk of downstream disclosure of information which became confidential subsequent to its initial disclosure is significantly reduced. The 2012 amendment to section (VI) eliminates the inquiry into the purpose of the request for bulk records and instead uses the licensing agreement and the cost of participation to balance the privacy and public access provisions of Administrative Order No. 19.

### **Section VII. Commentary**

Subsection (A)(1) Federal Law: There are several types of information that are commonly but possibly incorrectly, considered to be protected from public disclosure by federal law. Although there may be restrictions on federal agencies disclosing Social Security numbers, they may not apply to state or local agencies such as courts or clerks of courts. While federal law prohibits disclosure of tax returns by federal agencies or employees, this prohibition may not extend to disclosure by others. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) and regulations adopted pursuant to it limit disclosure of certain health related information. Whether the limitation extends to state court records is not clear. There are also federal restrictions regarding information in alcohol and drug abuse patient records and requiring confidentiality of information acquired by drug court programs. This order does not supersede any federal law or regulation requiring privacy or non-disclosure of information.

In addition to deliberative material excluded under this order, a court may exclude from public access materials generated or created by a court reporter with the exception of the official transcript.

This Court recognizes that “[a] trial court has the inherent authority to protect the integrity of the court in actions pending before it and may issue appropriate protective orders that would provide FOIA exemption under Section 25-19-105(b)(8).” See *City of Fayetteville v. Edmark*, 304 Ark. 179, 191 (1990). Rule 26(c) of the Arkansas Rules of Civil Procedure further recognizes that “the court in which the action is pending may make any

order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”

Subsection (A)(2) clarifies that this order does not supersede any Arkansas law requiring privacy or non-disclosure of information in court records. The following is a non-exhaustive list of Arkansas Code Annotated sections regarding confidentiality of records whose confidentiality may extend to the records even if they become court records:

(a) adoption records as provided in the Revised Uniform Adoption Act, as amended, Ark. Code Ann. §§ 9-9-201, et seq.;

(b) records relating to Human Immunodeficiency Virus or Acquired Immune Deficiency Syndrome, pursuant to Ark. Code Ann. §§ 16-82-101 et. seq.;

(c) records relating to child abuse not admitted into evidence as part of a public proceeding, pursuant to Ark. Code Ann. §§ 12-12-501, et seq.;

(d) records relating to drug tests conducted pursuant to Ark. Code Ann. § 11-14-101, et seq. except as provided by Ark. Code Ann. § 11-14-109;

(e) records of grand jury minutes, pursuant to Ark. Code Ann. § 25-19-105(b)(4);

(f) records of juvenile proceedings, pursuant to Ark. Code § 9-27-309;

(g) the master list of jurors' names and addresses, pursuant to Ark. Code Ann. § 16-32-103;

(h) addresses and phone numbers of prospective jurors, pursuant to Ark. Code Ann. § 16-33-101;

(i) indictment against any person not in actual confinement, pursuant to Ark. Code Ann. § 16-85-408;

(j) home or business address of petitioner for domestic order of protection if omitted by petitioner, pursuant to Ark. Code Ann. § 9-15-203;

(k) records or writings made at dispute resolution proceedings, pursuant to Ark. Code Ann. § 16-7-206;

(l) information related to defendant's attendance, attitude, participation, and results of drug screens when participating in a pre- or post-trial treatment program for drug abuse pursuant to Ark. Code Ann. § 16-98-201, even though defendant may have executed a consent for a limited release of confidential information regarding treatment permitting the judge, the prosecutor, and the defense attorney access to the information.

Subsection (B) presumes that administrative records will be governed by the Arkansas Freedom of Information Act, but recognizes that some public record exclusions are codified outside of the Act and that courts have inherent authority to restrict access to court records.

Freedom of Information Act exemptions are only exemptions to the enclosing act. The reference to the Arkansas Code Annotated should not be construed as applying FOIA exemptions to the courts. They may provide guidance upon a motion for a protective order, but should not be construed to be general exemptions beyond their context.

### **Section VIII. Commentary**

This section is intended to address those extraordinary circumstances in which confidential information or information which is otherwise excluded from public access is to be included in a release of information. In some circumstances, the nature of the information contained in a record and the restrictions placed on the accessibility of the information contained in that



record may be governed by federal or state law. This section is not intended to modify or overrule any federal or state law governing such records or the process for releasing information.

Information excluded from public access that is sought in a request for bulk or compiled records is governed by section VI of this order.

#### **Section IX. Commentary**

Subsection (A) is intended to retain the common-law framework with respect to public access to court records at the courthouse. The section recognizes that access to trial exhibits and trial transcript source materials not filed with the court clerk is subject to the discretion of the court. This section is not intended to enhance, extend, or diminish the discretion of the court with respect to access to exhibits and transcript source materials.

This section does not preclude or require “after hours” access to court records in electronic form. Courts are encouraged to provide access to records in electronic form beyond the hours access is available at the courthouse, however, it is not the intent of this order to compel such additional access.

#### **Section X. Commentary**

This section is intended to apply when information technology services are provided to a court by an agency outside the judicial branch, or by outsourcing of court information technology services to non-governmental entities. Implicit in this order is the concept that all court records are under the authority of the judiciary, and that the judiciary has the responsibility to ensure public access to court records and to restrict access where appropriate. This applies as well to court records maintained in systems operated by any non-judicial governmental department or agency.

#### **Section XI. Commentary**

The Supreme Court recognizes that it is not within its constitutional authority to either establish or provide immunity for civil or criminal liability based on violations of this order. The intent of this section is to make clear that absent a statutory or common-law basis for civil or criminal liability, violation of this order alone is insufficient to establish or deny liability for violating the order. Neither does this section preclude the possibility that violation of this order may be used as evidence of negligence or misconduct that resulted in a statutory or common law claim for civil or criminal liability. (Amended May 24, 2012.)

### **ADMINISTRATIVE ORDER NUMBER 19.1 — REDACTION IN ADMINISTRATIVE RECORDS**

Confidential information as defined and described in Sections III(A)(11) and VII(B) of Administrative Order 19 shall not be included as part of a court administrative record unless the confidential information is necessary to the administration of the judicial branch of government. Section III(A)(3) of the Order defines an administrative record as any document, information, data, or other item created, collected, received, or maintained by a court, court agency, or clerk of court pertaining to the administration of the judicial branch of government. If inclusion of confidential information in a court administrative record is necessary to the administration of the judicial branch of government:

A. The confidential information shall be redacted from the court administrative record to which public access is granted pursuant to Section IV(A)

of Administrative Order 19. The point in the court administrative record at which the redaction is made shall be indicated by striking through the redacted material with an opaque black mark or by inserting some explanatory notation in brackets, such as: [Information Redacted], [I.R.], [Confidential], or [Subject To Protective Order]. The requirement that the redaction be indicated in a court administrative record shall not apply to administrative records rendered confidential by expungement or other legal authority that expressly prohibits disclosure of the existence of a record; and

B. An un-redacted copy of the court administrative record with the confidential information included shall be filed with the court under seal. It is the responsibility of a court, court agency, or clerk of court creating a court administrative record to ensure that confidential information is omitted or redacted from administrative records. As noted in Section XI of Administrative Order 19, a court may use its inherent contempt powers to enforce this rule. (Added October 23, 2008, effective January 1, 2009.)

**Explanatory Note:** This new Administrative Order applies only to records related to court administration created by the judicial branch and agents and agencies of that

branch. It does not apply to records created by administrative agencies in the Executive Branch or independent administrative agencies.

## ADMINISTRATIVE ORDER NUMBER 20 — PRIVATE CIVIL PROCESS SERVERS APPOINTMENT — QUALIFICATIONS

(a) *Authority to Appoint Persons to Serve Process in Civil Cases.* The administrative judge of a judicial district, or any circuit judge(s) designated by the administrative judge, may issue an order appointing an individual to make service of process pursuant to Arkansas Rule of Civil Procedure 4(c)(2) in cases pending in each county of the district wherein approval has been granted. The appointment shall be effective for every division of circuit court, and for every district court, in the county.

(b) *Minimum Qualifications to Serve Process.* Each person appointed to serve process must have these minimum qualifications:

- (1) be not less than 18 years old and a citizen of the United States;
- (2) have a high school diploma or equivalent;
- (3) not have been convicted of a crime punishable by imprisonment for more than one year or a crime involving dishonesty or false statement, regardless of the punishment;
- (4) hold a valid driver's license from one of the United States; and
- (5) demonstrate familiarity with the various documents to be served.

Each judicial district may, with the concurrence of all the circuit judges in that district, prescribe additional qualifications.

(c) *Appointment Procedure.*

(1) A person seeking court appointment to serve process shall file an application with the circuit clerk. In a multi-county district, an applicant may file an application in one county seeking appointment in one or more counties of the district. The application shall be accompanied by an affidavit stating the applicant's name, address, occupation, and employer, and establishing the applicant's minimum qualifications pursuant to section (b) of this Administrative Order. Neither the application nor the affidavit shall



require disclosure of the applicant's social security number. The General Assembly will set any application fee charged by the circuit court.

(2) The circuit judge shall determine from the application and affidavit, and from whatever other inquiry is needed, whether the applicant meets the minimum qualifications prescribed by this Administrative Order and any additional qualifications prescribed in that district. If the judge determines that the applicant is qualified, then the judge shall issue an order of appointment. The circuit clerk shall file the order, and provide a certified copy of it to the process server and to the sheriff of the county in which the person will serve process. The circuit clerk of each county shall maintain and post a list of appointed civil process servers. In multi-county districts, if the applicant has sought appointment in more than one county, then the order shall specify the counties in which the process server is qualified. In this instance, the circuit clerk shall also provide a certified copy of the order to the sheriff and circuit clerk of each county in which the person will serve process.

(d) *Identification.* When serving process, each process server shall carry a certified copy of his or her order of appointment and a valid driver's license. He or she shall, upon request or inquiry, present this identification at the time service is made.

(e) *Duration, Renewal, and Revocation.* A judge shall appoint process servers for a fixed term not to exceed three years. Appointments shall be renewable for additional three-year terms. A process server seeking a renewal appointment shall file an application for renewal and supporting affidavit demonstrating that he or she meets the minimum qualifications prescribed by this Administrative Order and the judicial district. The General Assembly shall set any renewal fee charged by the circuit court. Upon notice to the administrative judge, any circuit judge may revoke an appointment to serve process for his or her division for any of the following reasons: (1) making a false return of service; (2) serious and purposeful improper service of process; (3) failing to meet the minimum qualifications for serving process; (4) misrepresentation of authority, position, or duty; or (5) other good cause.

(f) *Forms.* Forms for the application, affidavit, order of appointment, and renewal of appointment are available at the Administrative Office of the Courts section of the Arkansas Judiciary website, <http://courts.state.ar.us>. (Added January 10, 2008, effective March 1, 2008; amended December 11, 2008.)

**Explanatory Note:** This new Administrative Order imposes expanded minimum qualifications for private process servers in civil cases. Arkansas Rule of Civil Procedure 4(c)(2) formerly provided that the circuit court could appoint any person more than eighteen years old to serve process. Given the importance and effect of service of process, that qualification is insufficient. The expanded minimum qualifications imposed by this Administrative Order will help ensure the competence and character of private process servers. The Order establishes a floor, not a ceiling: the circuit judges in each judicial district may establish additional qualifications. Rule 4(c)(2) has been amended to incor-

porate this Order by reference. The Order also creates a uniform procedure for appointment and reappointment by the circuit court, as well as giving examples of the good cause which would justify revocation of the privilege of serving process. Finally, the Order requires process servers to carry a certified copy of their order of appointment, and their driver's license, to establish the server's legal authority.

**Explanatory Note, 2008 Amendment:** The Administrative Order has been clarified in various respects. The change in subsection (a) confirms that the Order and Rule 4(c)(2) must be read in harmony. Moreover, the circuit court's authority extends to appointing

process servers for the district courts within the judicial district. In subsection (b), the requirement of having Arkansas driver's license has been changed to having a valid driver's license from any state. In subsection (c), the procedure for appointment in multi-county districts has been spelled out: an applicant may seek a multi-county appointment by applying to any circuit court in a multi-county district. The circuit clerk in the county

where the petition is filed must provide certified copies of any appointment order to the circuit clerks and sheriffs in all counties covered by the appointment. As amended, the Order prohibits requiring an applicant to disclose his or her social security number during the application process. Finally, the Order clarifies that any fee related to an application for appointment or renewal shall be set by the General Assembly.

## ADMINISTRATIVE ORDER NUMBER 21 — ELECTRONIC FILING

### Section 1. Purpose, Scope, and Application.

(a) *Purpose.* This order establishes statewide policies and procedures governing the electronic filing process in all the courts in Arkansas.

(b) *Scope.* Electronic filing is a voluntary means of fulfilling the filing requirements of the courts of this state, but any court or clerk that elects to adopt electronic filing pursuant to this order must use the electronic filing system provided by the Administrative Office of the Courts ("AOC") or an electronic citation system approved by the AOC. Once an election is made to use the electronic filing system provided by the AOC, then electronic filing shall be the exclusive means of filing in all cases, except as may otherwise be provided in this order or by rule adopted by the Supreme Court.

(c) *Application.* This order shall be liberally construed to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice by the court. (Amended May 31, 2012.)

### Section 2. Definitions.

(a) *Case management system.* A "case management system" is an electronic database maintained by the court or clerk to track information used to manage the court's caseload, such as case numbers, party names, attorneys for parties, titles of all documents filed in a case, and all scheduled events in a case.

(b) *Case initiating document.* A "case initiating document" is the first filing in any matter, including but not limited to the complaint and summons, and any subpoena, and citation.

(c) *Citation.* "Citation" means a written order or electronic ticket issued by a law enforcement officer or employee of the department of public safety of a city or incorporated town who is authorized to make an arrest; and that requires a person accused of violating the law to appear in a designated court or governmental office at a specified date and time.

(d) *Clerk.* The "clerk" means the clerk of the Supreme Court and Court of Appeals, circuit court, or district court.

(e) *Conventional document.* A "conventional document" is a paper document that may be filed or submitted to the clerk for filing in paper form or a paper document that must be converted by a registered user or clerk to an electronic document.

(f) *Document management system.* A "document management system" is an electronic database containing documents stored in electronic form and



structured to allow access to those documents using index fields such as case number, filing date, or type of document.

(g) *Electronic case*. An “electronic case” is one in which the case documents are electronically maintained in a document management system.

(h) *Electronic document*. An “electronic document” is an electronic version of a conventional document or an electronic ticket and has the same legal effect.

(i) *Electronic filing*. “Electronic filing” is the electronic transmission to or from a clerk of an electronic document by uploading from the registered user’s (or his or her designated agent’s) or clerk’s computer to the electronic filing system. It does not include submission via e-mail, fax, floppy disks, or other electronic means.

(j) *Electronic filing system*. “Electronic filing system” refers to the system established pursuant to this order that receives and stores electronic documents.

(k) *Electronic service*. “Electronic service” is the electronic transmission of an electronic document, or of notice of its filing, to a party, attorney, or representative under these rules. Electronic service may not be used to accomplish service of process or a subpoena to gain jurisdiction over persons or property.

(l) *Electronic ticket*. “Electronic ticket” means an electronic citation or warning printed by a law enforcement officer and issued to a person accused of violating the law.

(m) *Public access terminal*. A “public access terminal” is a computer terminal provided by a clerk for viewing publicly accessible electronic documents. Public access terminals must be available during the clerk’s normal business hours and must include access to a printer.

(n) *Registered user*. A “registered user” is an individual who has been issued a user ID and password to access the electronic filing system. (Amended May 31, 2012.)

### Section 3. Implementation of Electronic Filing.

(a) *Establishment of electronic filing and electronic citation systems*. The AOC is authorized to develop or contract with a vendor for the development of electronic filing systems for the district, circuit, and appellate courts, and to approve the interface of electronic citation systems with the courts.

(1) In the district courts, the District Judge(s) shall decide whether to adopt the electronic filing system.

(2) In the circuit courts, the Administrative Judge of the Judicial Circuit, with input from the Clerk, and, if applicable, the Ex Officio Circuit Clerk for the Probate Division, of the counties within the Circuit, shall decide whether to adopt the electronic filing system.

(3) In the appellate courts, the Supreme Court shall decide whether to adopt the electronic filing system.

(4) Every court is encouraged to implement an electronic filing system as soon as practical.

(b) *Mandatory electronic filing processes*. Once implemented, use of the electronic filing system in all cases or a particular type of case is mandatory only if: (1) the court provides a mechanism for waiving electronic fees in appropriate circumstances; (2) the court allows for the exceptions needed to ensure access to justice for indigent, disabled, self-represented, and other litigants who have special needs; (3) the court provides adequate advance

notice of the mandatory participation requirement; (4) the court provides a one-year transition period during which any document may be filed conventionally or electronically, and the court provides notice during the transition period about electronic filing to all parties filing a document conventionally; and (5) the court provides training for filers in the use of the process.

(c) *Paper filing exceptions.*

(1) Documents may be filed conventionally during the one-year transition period required by section (3)(b)(4) herein, and the clerk must electronically file such documents not later than 48 hours after the conventional filing.

(2) Conventional paper filings shall be permitted, pursuant to the provisions of the policies and procedures manual promulgated by the AOC, by the clerk for specific documents or classes of documents, such as documents not available in electronic form, documents that are too lengthy to electronically image, and documents filed under seal.

(3) Conventional paper filings shall be permitted in the event of electronic filing system errors or other technical problems pursuant to Section 12.

(d) *Quality control procedures.* The clerk must institute a combination of automated and human quality control procedures sufficient to ensure the accuracy and reliability of their electronic records system.

(e) *Archiving electronic documents.* The clerk must maintain forward migration processes to guarantee future access to electronic documents.

(f) *Effect on Rules of Evidence.* This order does not affect any rule of evidence regarding the authentication of a document.

(g) *Fee for electronic filing system.*

(1)(A) The fee to be charged for use of the electronic filing system shall be as prescribed in this section.

(B) No portion of the electronic filing system fee shall be refunded.

(2) The electronic filing system fee is as follows:

(A) For all civil actions and misdemeanors electronically filed in either the Supreme Court or Court of Appeals ..... \$20.00;

(B) For initiating a cause of action through the electronic filing system in the civil, domestic relations, or probate division of circuit court, including appeals ..... \$20.00;

(C) For initiating a cause of action through the electronic filing system in the civil or small claims division of district court ..... \$20.00.

(3) The fee provided under subdivision (g) of this section shall be remitted by the Clerk of the Supreme Court on or before the fifteenth day of each month to the Administration of Justice Funds Section on a form provided by the Office of Administrative Services of the Department of Finance and Administration for deposit into the Judicial Fine Collection Enhancement Fund established by section 16-13-712.

(4) No fee shall be charged or collected when the court by order, under Rule 72 of the Arkansas Rules of Civil Procedure, allows an indigent person to prosecute a cause of action in forma pauperis.

(5) Prosecuting attorneys filing actions on behalf of the state, with the exception of child support cases, are exempt from paying fees under this section.

(6) Fees under this section shall not be charged or collected in cases brought in the circuit court under the Arkansas Juvenile Code of 1989, section 9-27-301 et seq., by a governmental entity or nonprofit corporation,



including without limitation, an attorney ad litem appointed in a dependency-neglect case or the Department of Human Services. (Amended June 23, 2011; amended May 31, 2012.)

#### **Section 4. Official Court Record.**

(a) *Legal effect of electronic documents.* An electronic document is the official court record and has the same force and effect as a document filed conventionally.

(b) *Form of record.* To the maximum extent feasible, the clerk must ensure that all documents filed in electronic cases are maintained in electronic form.

(c) *Scanning and disposition.* Case-initiating documents and other paper documents may be scanned by the clerk and made part of the electronic record. Once the conventional document has been scanned, the electronic document is the official court record. Once scanned, with the exception of conventional documents identified in Section 5, the conventional document may be destroyed.

(d) *Court documents.* The court may electronically file or issue any notice, order, judgment, or other document prepared by the court.

#### **Section 5. Preservation of Certain Conventional Documents.**

(a) *Destruction of original documents.* After conversion to an electronic document, a clerk may return or destroy conventional documents.

(b) *Statutory requirements.* This order does not alter a clerk's statutory obligation to retain conventional documents.

#### **Section 6. Time of Filing, Confirmation, Existing Practice, and File-Mark.**

(a) *Filed upon transmission.* An electronic document shall be considered filed with the clerk when the transmission to the electronic filing system is completed. Upon receipt of the electronic document, the electronic filing system shall automatically confirm to the registered user that the transmission of the electronic document was completed and the date and time of the document's receipt by the electronic filing system. Absent confirmation of receipt, there is no presumption that the electronic filing system received the electronic document. Absent confirmation, the electronic filer is responsible for verifying that the clerk received and filed the document transmitted.

(b) *Existing practice maintained.* Electronic filing of documents does not change the rules and practice for the acceptance or rejection of documents presented to a clerk for filing.

(c) *File mark.* The electronic filing system shall affix an electronic file mark that shall have the same force and effect as a manually affixed stamp of the clerk.

(d) *Time of filing.* Any electronic document received by the electronic filing system before midnight shall be deemed filed on that date.

#### **Section 7. Electronic Service.**

(a) *Consent to electronic service.* Registered users of the electronic filing system consent to electronic service of electronic documents as the only

means deemed to constitute service and such notice of filing is valid and effective service of the document on the registered users and shall have the same legal effect as service by conventional means.

(b) *Applicability.* Complaints, petitions, subpoenas, or other documents that must be served with a summons may not be served electronically.

(c) *Service on registered users.*

(1) The electronic filing system shall provide notice to all registered users associated with the case that an electronic document has been filed and is available on the document management system. The notice shall be sent electronically to the addresses furnished by the registered users associated with the case.

(2) When the clerk accepts a conventional document for filing pursuant to Section 3(c) and converts it to an electronic document that is stored in the document management system, the electronic filing system shall provide notice of this conventional filing to the registered users associated with the case.

(d) *Service on nonregistered recipients.* The registered user filing an electronic document shall serve nonregistered parties as otherwise provided by law or rule.

(e) *Time of service; time to respond.* Electronic service is complete at the time of transmission of the notice required by Section 7(c). For the purpose of computing time to respond to documents served via electronic service, any document served on a day or at a time when the court is not open for business shall be deemed served at the time of the next opening of the clerk for business.

## Section 8. Signatures.

(a) *Deemed signed.* Every electronic document shall be deemed to be signed by the registered user who files it. Each electronic document must bear the identifying information of the registered user as is required by rule or law. Where a statute or court rule requires a signature at a particular location on a form or pleading, the person's typewritten name shall be inserted. In the alternative, a facsimile, typographical, or digital signature may be used.

(b) *Documents under penalty of perjury or requiring signature of notary public.* Documents required by law to include a signature under penalty of perjury, or the signature of a notary public, may be submitted electronically, provided that the declarant or notary public has signed a conventional form of the document. The conventional document bearing the original signature(s) must be scanned and electronically submitted for filing in a format that accurately reproduces the original signatures and contents of the document.

(c) *Documents requiring signatures of opposing parties.*

(1) When a document to be filed electronically requires the signatures of opposing parties, such as a stipulation, the party filing the document must first obtain the signatures of all parties on a conventional document.

(2) The printed document bearing the original signatures must be scanned and electronically submitted for filing in a format that accurately reproduces the original signatures and contents of the document.

(d) *Signature of judicial officer or clerk.* Electronically filed court documents requiring a court official's signature may be signed electronically. A court using electronic signatures on court documents must adopt policies



and procedures to safeguard such signatures and comply with any AOC guidelines for electronic signatures that may be adopted.

### **Section 9. Format of documents.**

An electronic document shall be formatted in accordance with the applicable rules governing formatting of conventional documents, including page limits. Electronic documents shall be self-contained and shall not contain hyperlinks to external papers or websites. Hyperlinks to other electronic documents filed in the case are permitted.

### **Section 10. Registration requirements.**

(a) *Registration mandatory.* All persons wanting access to the electronic filing system or document management system must become a registered user in order to access the system. The following persons shall be permitted to become registered users: (1) licensed Arkansas attorneys; (2) non-Arkansas attorneys permitted to practice pro hac vice in Arkansas; (3) litigants appearing pro se in a particular case in which the court has mandated electronic filing; and (4) clerk and court personnel. A clerk shall permit persons who are not registered users and who are not authorized to access the document management system to access electronically filed documents via a public access terminal located in the courthouse, subject to the restriction on disclosure of confidential documents provided in section (11) of this order.

(b) *Registration requirements.* The AOC shall establish registration requirements for all authorized users and must limit the registration of users to individuals, not law firms, agencies, corporations, or other groups. The AOC must assign to the registered user a confidential, secure log-in sequence. The log-in sequence must be used only by the registered user to whom it is assigned and by agents and employees as the registered user may authorize. No registered user shall knowingly permit his or her log-in sequence to be used by anyone other than his or her authorized agents and employees. The AOC may require users to undergo training prior to authorizing access to the electronic filing system. The AOC is permitted to collect a fee not to exceed \$100 for training and registration to be deposited in the Bar Account of Arkansas. Attorneys who complete this training shall be entitled to receive one hour of general Continuing Legal Education credit.

(c) *Electronic mail address required.* Registered users shall furnish at least one electronic mail address that the electronic filing system will use for electronic service and other notices. It is the registered user's responsibility to ensure that the electronic filing system has the correct electronic mail address.

(d) *Misuse of electronic systems.* Any registered user who attempts to harm the electronic filing system or document management system in any manner, attempts to alter electronic documents or information stored on the systems, or attempts any unauthorized use of the systems, has committed misuse of the system. Misuse of the electronic filing system or document management system may result in loss of a user's registration and subject the registered user to any other penalty provided by law or rule.

(e) *Electronic citation systems registration and access.* Registration requirements for, and access to, electronic citation systems shall be as determined through appropriate interdepartmental, interagency, or inter-

governmental agreements. The agreements shall clearly state the terms of access to the systems and permitted uses of the systems by registered users. (Amended June 23, 2011; amended May 31, 2012.)

### **Section 11. Access to Electronic Documents; Confidential Information.**

(a) *Confidential information not to be filed.* All confidential information identified in Administrative Order Number 19 (Section VII — A) shall be redacted from an electronic document before it is filed using the electronic filing system.

(b) *Exceptions; filing under seal.* Where a registered user reasonably believes that confidential information is necessary and relevant to the case and must be included in an electronic document, then the registered user shall file the unredacted document under seal and shall also file a redacted version of the document pursuant to Administrative Order 19 and related implementing rules. An electronic document or conventional document containing confidential information shall not be a public document.

(c) *System requirements.* The electronic filing system and the document management system shall segregate unredacted documents containing confidential information and filed pursuant to Section 11(b). Unredacted versions of documents shall be available only to court personnel and registered users associated on the electronic filing system with the case in which such documents are filed. The electronic filing system shall give notice to registered users associated with a case that an unredacted document containing confidential information has been filed in the case.

### **Section 12. Technical Failures.**

(a) *Electronic filing system errors.* The electronic filing system is deemed subject to a technical failure on a given day if the site is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour after 8:00 a.m. that day. Anticipated system outages must be communicated to registered users by electronic mail within a reasonable time prior to the outage and must be posted on the web site, if possible. A technical failure of the electronic filing system shall excuse an untimely filing.

(b) *Other technical problems.* Other technical problems in the nature of an unavoidable casualty, such as problems with the user's Internet Service Provider (ISP) that prevent a registered user from transmitting an electronic filing, may constitute a technical failure under these procedures excusing an untimely filing.

(c) *Conventional filing allowed.* In the event of a technical failure of the electronic filing system or other technical problems that prevent a registered user from submitting an electronic filing, documents should be submitted to the Clerk's office conventionally.

(d) *Relief after technical failure.* A party whose filing is made untimely as the result of a technical failure of the electronic filing system or other technical problems may seek appropriate relief from the court. Sample language is attached to this order as Form A. Technical failures of the electronic filing system under subdivision (a) of this Section 12 are excused.



For technical problems that are considered to be user-related under subdivision (b) of this section, the court for good cause shown may excuse an untimely filing.

**Section 13. Creation of Policies and Procedures Manual.**

The AOC is authorized to promulgate a policies and procedures manuals for the implementation of this order and for the use and operation of the electronic filing and electronic citation systems and the document management system, and shall update policies and procedures and the manuals as needed from time to time. (Amended May 31, 2012.)

**Section 14. Working Group.**

The Supreme Court Committee on Automation is authorized to appoint working groups, such as an electronic citation working group, which groups shall advise the Committee on matters of policy and procedure in the management of electronic filing systems. (Adopted May 31, 2012.)

**FORMS**

**Form A**

IN THE \_\_\_\_\_ COURT OF \_\_\_\_\_  
COUNTY, ARKANSAS

\_\_\_\_\_  
v. \_\_\_\_\_ Plaintiff(s)  
Case No. \_\_\_\_\_

\_\_\_\_\_  
Defendant(s)

**DECLARATION THAT PARTY WAS UNABLE TO FILE IN A TIMELY MANNER**

[NAME OF REGISTERED USER AND PARTY REPRESENTED] was unable to file [NAME OF DOCUMENT] in a timely manner due to technical difficulties. The deadline for filing the [NAME OF DOCUMENT] was [DATE]. The reason(s) that I was unable to file the [NAME OF DOCUMENT] in a timely manner, and the good faith efforts that I made before the filing deadline to both file in a timely manner and to inform the court and the other parties that I could not do so, are as follows:

[Statement of reasons and good faith efforts to file and to inform]

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,  
/s/ \_\_\_\_\_

Name of Registered User  
Address  
City, State, Zip Code  
Phone:  
Email:





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